

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

FILED
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L.M. RINGGOLD
CLERK, APPELLATE COURTS
STATE OF HAWAII

ORDER APPROVING PUBLICATION AND DISTRIBUTION
OF HAWAII PATTERN JURY INSTRUCTIONS - CRIMINAL
(By: Moon, C.J., for the court¹)

Upon consideration the Standing Committee on Pattern Criminal Jury Instructions request to publish and distribute (1) revisions to Criminal Instructions 1.01, 1.02A, 1.02B, 3.01, 5.01, 17.01, and 17.02 and (2) the addition of Criminal Jury Instructions 6.07, 7.16, 7.17, and 12.00A to the Hawai'i Pattern Jury Instructions - Criminal,

IT IS HEREBY ORDERED that the attached criminal jury instructions 1.01, 1.02A, 1.02B, 3.01, 5.01, 6.07, 7.16, 7.17, 12.00A, 17.01, and 17.02 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

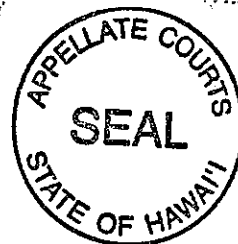
¹ Considered by: Moon, C.J., Nakayama, Acoba, and Duffy, JJ., and Intermediate Court of Appeals Chief Judge Recktenwald, assigned by reason of vacancy.

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

DATED: Honolulu, Hawai'i, May 4, 2009.

FOR THE COURT:


Chief Justice



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 are 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. 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.

1.01

PRELIMINARY INSTRUCTIONS TO THE JURY
(To be given after clerk administers oath to 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. 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.~~

~~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. 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.

~~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.~~ 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 in this case, and that includes the credibility of the witnesses. You will decide what facts have been proven by the evidence. By "credibility" I mean not only~~ A very important part of your job will be deciding whether or not a witness is telling the truth but also the truthful, whether the witness' testimony is accurate, and how much weight or importance to be given to his or her give to the 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.

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. 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 the trial you may hear the lawyers make ~~objections made by the lawyers.~~ It is ~~their~~ a lawyer's duty to ~~make objection~~ when ~~they think it should be done~~ he or she believes it is appropriate or necessary. ~~It is a~~ Objections help to the court to keep out matters that are not relevant to the issues in this trial 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.~~

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.

~~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.~~

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 will be excused from the courtroom so that ~~to enable the attorneys to~~ lawyers can discuss legal issues matters with me ~~out of your hearing.~~ Under the law, ~~various~~ some 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.~~ 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.

~~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.~~

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.

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").~~

(To be given prior to evidence being presented)

You have been given notebooks and pens. Some jurors prefer to take notes as evidence is presented. Other jurors prefer not to do so. It is up to you to decide whether or not you wish to take notes. Notes are not evidence, and may be used only as a memory aid for yourself and not as a substitute for your recollection of the evidence.

If you take notes, do not let note-taking interfere with your duty to listen carefully to all the testimony and observe the witnesses as they testify. Your observations of a witness may be considered in determining whether a witness is truthful and the weight to be given to the testimony.

Each time you leave the courtroom, leave your notebook face down on your chair. Note-taking is not permitted during recesses. At the end of the day, your notes will be kept by my clerk until the next court session and will not be read by anyone. When you begin your deliberations, you may take your notes with you into the jury room.

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.~~

You have been given notebooks and pens. Some jurors prefer to take notes as evidence is presented. Other jurors prefer not to do so. It is up to you to decide whether or not you wish to take notes. Notes are not evidence, and may be used only as a memory aid for yourself and not as a substitute for your recollection of the evidence.

If you take notes, do not let note-taking interfere with your duty to listen carefully to all the testimony and observe the witnesses as they testify. Your observations of a witness may be considered in determining whether a witness is truthful and the weight to be given to the testimony.

Each time you leave the courtroom, leave your notebook face down on your chair. Note-taking is not permitted during recesses. At the end of the day, your notes will be kept by my clerk until the next court session and will not be read by anyone. When you begin your deliberations, you may take your notes with you into the jury room.

JUROR NOTETAKING
(To be given prior to deliberations)

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

1. Notes may be used only by you to assist in refreshing your memory of the evidence. Notes are not a substitute for your own independent memory of the evidence.

2. Keep your notes to yourself and do not show or read them to any other juror.

3. You must not give certain evidence more weight simply because it appears in your notes. Do not assume that your notes are accurate or complete.

4. Some of you may not have taken notes. If you have not taken notes, you should rely on your 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 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 bailiff will collect your notes and return them to you at the start of the next day. Your notes will not be read by anyone.

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

JUROR NOTETAKING
(To be given prior to deliberations)

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

1. Notes ~~are for your own personal reference~~ may be used only by you to assist ~~you~~ in refreshing your memory of the evidence. ~~Keep your n~~Notes to yourself and do not show or read them to any other juror are not a substitute for your own independent memory of the evidence.

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.~~ Keep your notes to yourself and do not show or read them to any other juror.

3. You must not give certain evidence ~~emphasis~~ more weight simply because it appears in your notes. Do not assume that ~~because something appears in your notes that it necessarily took place in court~~ are accurate or complete.

4. Some of you may 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~~ your notes and return them to you at the start of the next day. Your notes will not be read by anyone.

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

I will now instruct you on the law that you must follow in reaching your verdict.

You are the judges of the facts of this case. You will decide what facts were proved by the evidence. However, you must follow these instructions even if you disagree with them.

You must consider all the instructions as a whole and consider each instruction in the light of all the others. Do not single out any word, phrase, sentence or instruction and ignore the others. No word, phrase, sentence or instruction is more important just because it is repeated in these instructions.

Commentary

HRE 1102 provides, 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."

~~The court will instruct you now concerning the law which you must follow in arriving at~~ I will now instruct you on the law that you must follow in reaching your verdict.

You are the ~~exclusive~~ judges of the facts of this case. You will decide what facts were proved by the evidence. However, you must follow these instructions even though ~~if you may have opinions to the contrary~~ disagree with them.

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~~ No word, phrase, sentence or instruction is more important simply just because it is repeated in these instructions.

Commentary

HRE 1102 provides, 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."

5.01

GENERIC ELEMENTS INSTRUCTION

[In Count (count number) of the
Indictment/Complaint/Information, the] [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.

5.01

GENERIC ELEMENTS INSTRUCTION

[In Count (count number) of the
Indictment/Complaint/Information, the] [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.

A person is not guilty of an offense unless the State proves beyond a reasonable doubt that the person acted with the required state(s) of mind, as these instructions specify, with respect to each element of the offense. The instruction for [the] [each] offense charged specifies the state(s) of mind required to be proved.

Notes

See H.R.S. §§ 702-204, 702-205.

Modification of this instruction is required for those "relatively few instances" when absolute or strict liability applies to an element of an offense. See Commentary on H.R.S. § 702-204.

6.07

STATE OF MIND REQUIRED

A person is not guilty of an offense unless the State proves beyond a reasonable doubt that the person acted with the required state(s) of mind, as these instructions specify, with respect to each element of the offense. The instruction for [the] [each] offense charged specifies the state(s) of mind required to be proved.

Notes

See H.R.S. §§ 702-204, 702-205.

Modification of this instruction is required for those "relatively few instances" when absolute or strict liability applies to an element of an offense. See Commentary on H.R.S. § 702-204.

In any prosecution* it is a defense that the conduct alleged in the charged offense does not include a voluntary act [or the voluntary omission to perform an act of which the Defendant is physically capable]. A "voluntary act" means a bodily movement performed consciously or habitually as the result of effort or determination of the Defendant.

The burden is upon the prosecution to prove beyond a reasonable doubt that the Defendant's conduct as to the (specify offense) charge included a voluntary act [or the voluntary omission to perform an act of which the Defendant is physically capable]. If the prosecution fails to meet its burden, then you must find the Defendant not guilty of the charge.

Notes

H.R.S. §§ 702-200, 702-201

* H.R.S. § 702-202 provides that possession is a voluntary act if the possessor knowingly procured or received the thing possessed or was aware of control of it for a sufficient period to have been able to terminate possession. Therefore, the voluntary act defense does not apply to a charged offense that involves proving possession as an element of the offense.

H.R.S. § 702-200(2) provides that where the voluntary act or voluntary omission defense is based on a physical or mental disease, disorder, or defect which precludes or impairs a voluntary act or a voluntary omission, the defense shall be

treated exclusively according to Chapter 704, except that a defense based on intoxication which is pathological or not self-induced which precludes or impairs a voluntary act or a voluntary omission shall be treated exclusively according to Chapter 702.

Commentary

"The effect of [HRS § 702-200] is to require, as a minimum basis for the imposition of penal liability, conduct which includes a voluntary act or voluntary omission. In most penal cases the issue of whether the defendant's conduct includes a voluntary act or a voluntary omission will not be separately litigated. The voluntariness of relevant acts or omissions will be evident. The Code, by making the issue of involuntariness a defense, accordingly puts the ultimate burden on the defendant to inject that issue into the case. The burden, of course can be met by the prosecutor if he [or she] raises the issue. Once the question of voluntariness has been raised, the prosecution has the burden of proving that issue beyond a reasonable doubt." Commentary on H.R.S. § 702-200.

The Penal Code's formulation of voluntary act "is intended to exclude from the category of voluntary action such bodily movements as (a) reflex or convulsions, (b) bodily movements during unconsciousness and sleep, (c) conduct during hypnosis or resulting from hypnotic suggestion, and (d) any other bodily movement that is not a product of the effort and determination of the defendant, either conscious or habitual." Commentary on H.R.S. § 702-201.

Additionally, the formulation of H.R.S. § 702-200 "is intended to permit liability in those cases where liability is not predicated on a voluntary act or omission but on a course of conduct initiated by a voluntary act. Thus, an automobile driver who suddenly loses consciousness and kills a pedestrian would not have performed a voluntary act giving rise to liability. However, if the driver had disregarded a known risk that consciousness might be lost and had commenced or continued driving, that included a voluntary act might be sufficient to impose penal liability." Commentary on H.R.S. § 702-200.

In any prosecution* it is a defense that the conduct alleged in the charged offense does not include a voluntary act [or the voluntary omission to perform an act of which the Defendant is physically capable]. A "voluntary act" means a bodily movement performed consciously or habitually as the result of effort or determination of the Defendant.

The burden is upon the prosecution to prove beyond a reasonable doubt that the Defendant's conduct as to the (specify offense) charge included a voluntary act [or the voluntary omission to perform an act of which the Defendant is physically capable]. If the prosecution fails to meet its burden, then you must find the Defendant not guilty of the charge.

Notes

H.R.S. §§ 702-200, 702-201

* H.R.S. § 702-202 provides that possession is a voluntary act if the possessor knowingly procured or received the thing possessed or was aware of control of it for a sufficient period to have been able to terminate possession. Therefore, the voluntary act defense does not apply to a charged offense that involves proving possession as an element of the offense.

H.R.S. § 702-200(2) provides that where the voluntary act or voluntary omission defense is based on a physical or mental disease, disorder, or defect which precludes or impairs a voluntary act or a voluntary omission, the defense shall be

treated exclusively according to Chapter 704, except that a defense based on intoxication which is pathological or not self-induced which precludes or impairs a voluntary act or a voluntary omission shall be treated exclusively according to Chapter 702.

Commentary

"The effect of [HRS § 702-200] is to require, as a minimum basis for the imposition of penal liability, conduct which includes a voluntary act or voluntary omission. In most penal cases the issue of whether the defendant's conduct includes a voluntary act or a voluntary omission will not be separately litigated. The voluntariness of relevant acts or omissions will be evident. The Code, by making the issue of involuntariness a defense, accordingly puts the ultimate burden on the defendant to inject that issue into the case. The burden, of course can be met by the prosecutor if he [or she] raises the issue. Once the question of voluntariness has been raised, the prosecution has the burden of proving that issue beyond a reasonable doubt."
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The Penal Code's formulation of voluntary act "is intended to exclude from the category of voluntary action such bodily movements as (a) reflex or convulsions, (b) bodily movements during unconsciousness and sleep, (c) conduct during hypnosis or resulting from hypnotic suggestion, and (d) any other bodily movement that is not a product of the effort and determination of the defendant, either conscious or habitual." Commentary on H.R.S. § 702-201.

Additionally, the formulation of H.R.S. § 702-200 "is intended to permit liability in those cases where liability is not predicated on a voluntary act or omission but on a course of conduct initiated by a voluntary act. Thus, an automobile driver who suddenly loses consciousness and kills a pedestrian would not have performed a voluntary act giving rise to liability. However, if the driver had disregarded a known risk that consciousness might be lost and had commenced or continued driving, that included a voluntary act might be sufficient to impose penal liability." Commentary on H.R.S. § 702-200.

It is a defense to the charge of (specify distribution or trafficking offense) that the Defendant acted as the procuring agent for the buyer. A procuring agent for the buyer is a person who acts only on behalf of the buyer and not as, or on behalf of, the seller.

A person who is a procuring agent for the buyer cannot be found guilty of distributing the unlawful drug because the act of "buying" falls outside the definition of "to distribute."

The burden is on the prosecution to prove beyond a reasonable doubt that the Defendant was not acting only as the procuring agent for the buyer. If the prosecution does not meet its burden, then you must find the Defendant not guilty of the offense of (specify distribution or trafficking offense).

Notes

H.R.S. § 712-1240.

Commentary

Under the procuring agent defense, " 'one who acts merely as a procuring agent for the buyer is a principal in the purchase, not the sale, and, therefore, can be held liable only to the extent that the purchaser is held liable.' " *State v. Davalos*,

113 Hawai'i 385, 387, 153 P.3d 456, 458 (2007) (quoting *State v. Balanza*, 93 Hawai'i 279, 284, 1 P.3d 281, 286 (2000) (*State v. Reed*, 77 Hawai'i 72, 79, 881 P.2d 1218, 1225 (1994))). A buyer or the agent of the buyer cannot be convicted of distributing a dangerous drug, HRS § 712-1242(1)(c), since " 'to buy' [or to offer to buy] clearly falls outside the meaning of 'to distribute' as that term is defined in HRS § 712-1240." *State v. Aluli*, 78 Hawai'i 317, 323, 893 P.2d 168, 174 (1995)

The question of whether a defendant was acting on the seller's behalf or on the purchaser's behalf rests on the specific facts of the case. *Davalos*, 113 Hawai'i at 392, 153 P.3d at 463. Generally these are questions of fact for the fact finder. *Id.*

The procuring agent defense is not an affirmative defense. *Id.* at 387 n. 6, 153 P.3d at 458 n.6. "Hence, like all non-affirmative defenses, the prosecution must disprove the defense beyond a reasonable doubt." *Id.*

It is a defense to the charge of (specify distribution or trafficking offense) that the Defendant acted as the procuring agent for the buyer. A procuring agent for the buyer is a person who acts only on behalf of the buyer and not as, or on behalf of, the seller.

A person who is a procuring agent for the buyer cannot be found guilty of distributing the unlawful drug because the act of "buying" falls outside the definition of "to distribute."

The burden is on the prosecution to prove beyond a reasonable doubt that the Defendant was not acting only as the procuring agent for the buyer. If the prosecution does not meet its burden, then you must find the Defendant not guilty of the offense of (specify distribution or trafficking offense).

Notes

H.R.S. § 712-1240.

Commentary

Under the procuring agent defense, "one who acts merely as a procuring agent for the buyer is a principal in the purchase, not the sale, and, therefore, can be held liable only to the extent that the purchaser is held liable." State v. Davalos, 113 Hawai'i 385, 387, 153 P.3d 456, 458 (2007) (quoting State v.

Balanza, 93 Hawai'i 279, 284, 1 P.3d 281, 286 (2000) (State v. Reed, 77 Hawai'i 72, 79, 881 P.2d 1218, 1225 (1994)). A buyer or the agent of the buyer cannot be convicted of distributing a dangerous drug, HRS § 712-1242(1)(c), since " 'to buy' [or to offer to buy] clearly falls outside the meaning of 'to distribute' as that term is defined in HRS § 712-1240." State v. Aluli, 78 Hawai'i 317, 323, 893 P.2d 168, 174 (1995)

The question of whether a defendant was acting on the seller's behalf or on the purchaser's behalf rests on the specific facts of the case. Davalos, 113 Hawai'i at 392, 153 P.3d at 463. Generally these are questions of fact for the fact finder. Id.

The procuring agent defense is not an affirmative defense. Id. at 387 n. 6, 153 P.3d at 458 n.6. "Hence, like all non-affirmative defenses, the prosecution must disprove the defense beyond a reasonable doubt." Id.

12.00A INTERFERENCE WITH REPORTING AN EMERGENCY OR CRIME
H.R.S. § 710-1010.5

[In Count (count number) of the
[Indictment/Complaint/Information], the] [The] Defendant,
(defendant's name), is charged with the offense of Interference
with Reporting an Emergency or Crime.

A person commits the offense of Interference with Reporting
an Emergency or Crime if he/she intentionally or knowingly
prevents a victim or witness to a criminal act from calling a
911-emergency telephone system, obtaining medical assistance, or
making a report to a law enforcement officer.

There are three material elements of the offense of
Interference with Reporting an Emergency or 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 intentionally or knowingly
prevented another person from [calling a 9-11 emergency telephone
system] [obtaining medical assistance] [making a report to a law
enforcement officer]; and

2. That the Defendant was aware or believed or hoped that
the other person was a [victim of a criminal act] [witness to a

criminal act]; and

3. That the Defendant was aware, or believed or hoped that the other person [was calling a 911-emergency telephone system] [was obtaining medical assistance] [was making a report to a law enforcement officer].

Notes

H.R.S. §§ 710-1010.5, 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 710, see instruction:

12.00 - "law enforcement officer"

See State v. Pond, 118 Hawai'i 452, 193 P.3d 368 (2008).

12.00A **INTERFERENCE WITH REPORTING AN EMERGENCY OR CRIME**
H.R.S. § 710-1010.5

[In Count (count number) of the
[Indictment/Complaint/Information], the] [The] Defendant,
(defendant's name), is charged with the offense of Interference
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A person commits the offense of Interference with Reporting
an Emergency or Crime if he/she intentionally or knowingly
prevents a victim or witness to a criminal act from calling a
911-emergency telephone system, obtaining medical assistance, or
making a report to a law enforcement officer.

There are three material elements of the offense of
Interference with Reporting an Emergency or 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 intentionally or knowingly
prevented another person from [calling a 9-11 emergency telephone
system] [obtaining medical assistance] [making a report to a law
enforcement officer]; and

2. That the Defendant was aware or believed or hoped that
the other person was a [victim of a criminal act] [witness to a

criminal act]; and

3. That the Defendant was aware, or believed or hoped that the other person [was calling a 911-emergency telephone system] [was obtaining medical assistance] [was making a report to a law enforcement officer].

Notes

H.R.S. §§ 710-1010.5, 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 710, see instruction:

12.00 - "law enforcement officer"

See State v. Pond, 118 Hawai'i 452, 193 P.3d 368 (2008).

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 a 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 a 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.

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~~ a 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~~ a 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.

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 a 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 a 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 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.

17.02

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~~ a 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~~ a 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 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.