

CRIMINAL LAW, FALL, 2009 - HANDOUT # 8

AFFIRMATIVE DEFENSES

§ 703-300 **Definitions relating to justification.** In this chapter, unless a different meaning is plainly required:

"**Believes**" means reasonably believes.

"**Deadly force**" means force which the actor uses with the intent of causing or which he knows to create a substantial risk of causing death or serious bodily harm. Intentionally firing a firearm in the direction of another person or in the direction [in] which another 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 will use deadly force if necessary, does not constitute deadly force.

"**Dwelling**" means any building or structure, though movable or temporary, or a portion thereof, which is for the time being a home or place of lodging.

"**Force**" means any bodily impact, restraint, or confinement, or the threat thereof.

"**Unlawful force**" means force which is employed without the consent of the person against whom it is directed and the employment of which constitutes an offense or would constitute an offense except for a defense not amounting to a justification to use the force. Assent constitutes consent, within the meaning of this section, whether or not it otherwise is legally effective, except assent to the infliction of death or serious or substantial bodily injury.

§ 703-303 **Execution of public duty.**

(1) Except as provided in subsection (2), conduct is justifiable when it is required or authorized by:

- (a) The law defining the duties or functions of a public officer or the assistance to be rendered to a public officer in the performance of his duties; or
- (b) The law governing the execution of legal process; or
- (c) The judgment or order of a competent court or tribunal;
- (d) The law governing the armed services or the lawful conduct of war; or
- (e) Any other provision of law imposing a public duty.

(2) The other §§ of this chapter apply to:

- (a) The use of force upon or toward the person of another for any of the purposes dealt with in those sections; and
- (b) The use of deadly force for any purpose, unless the use of deadly force is otherwise expressly authorized by law or occurs in the lawful conduct of war.

(3) The justification afforded by subsection (1) applies:

- (a) When the actor believes his conduct to be required or authorized by the judgment or direction of a competent court or tribunal or in the lawful execution of legal process, notwith-

standing lack of jurisdiction of the court or defect in the legal process; and

(b) When the actor believes his conduct to be required or authorized to assist a public officer in the performance of his duties, notwithstanding that the officer exceeded his legal authority.

§ 703-304 Use of force in self-protection.

(1) Subject to the provisions of this section and of section 703-308, the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by the other person on the present occasion.

(2) The use of deadly force is justifiable under this section if the actor believes that deadly force is necessary to protect himself against death, serious bodily injury, kidnapping, rape, or forcible sodomy.

(3) Except as otherwise provided in subsections (4) and (5) of this section, a person employing protective force may estimate the necessity thereof under the circumstances as he believes them to be when the force is used without retreating, surrendering possession, doing any other act which he has no legal duty to do, or abstaining from any lawful action.

(4) The use of force is not justifiable under this section:

(a) To resist an arrest which the actor knows is being made by a peace officer, although the arrest is unlawful; or

(b) To resist force used by the occupier or possessor of property or by another person on his behalf, where the actor knows that the person using the force is doing so under a claim of right to protect the property, except that this limitation shall not apply if:

(i) The actor is a public officer acting in the performance of his duties or a person lawfully assisting him therein or a person making or assisting in a lawful arrest; or

(ii) The actor believes that such force is necessary to protect himself against death or serious bodily injury.

(5) The use of deadly force is not justifiable under this section if:

(a) The actor, with the intent of causing death or serious bodily injury, provoked the use of force against himself in the same encounter; or

(b) The actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action which he has no duty to take, except that:

(i) The actor is not obliged to retreat from his dwelling or place of work, unless he was the initial aggressor or is assailed in his place of work by another person whose place of work the actor knows it to be; and

(ii) A public officer justified in using force in the performance of his duties, or a

person justified in using force in his assistance or a person justified in using force in making an arrest or preventing an escape, is not obliged to desist from efforts to perform his duty, effect the arrest, or prevent the escape because of resistance or threatened resistance by or on behalf of the person against whom the action is directed.

(6) The justification afforded by this section extends to the use of confinement as protective force only if the actor takes all reasonable measures to terminate the confinement as soon as he knows that he safely can, unless the person confined has been arrested on a charge of crime.

§ 703-305 Use of force for the protection of other persons.

(1) Subject to the provisions of this section and of § 703-310, the use of force upon or toward the person of another is justifiable to protect a third person when:

- (a) Under the circumstances as the actor believes them to be, the person whom he seeks to protect would be justified in using such protective force; and
- (b) The actor believes that his intervention is necessary for the protection of the other person.

(2) Notwithstanding subsection (1)

- (a) When the actor would be obliged under § 703-304 to retreat, to surrender the possession of a thing, or to comply with a demand before using force in self-protection, he is not obliged to do so before using force for the protection of another person, unless he knows that he can thereby secure the complete safety of such other person; and
- (b) When the person whom the actor seeks to protect would be obliged under § 703-304 to retreat, to surrender the possession of a thing or to comply with a demand if he knew that he could obtain complete safety by so doing, the actor is obliged to try to cause him to do so before using force in his protection if the actor knows that he can obtain the other's complete safety in that way; and
- (c) the actor nor the person whom he seeks to protect is obliged to retreat when in the other's dwelling or place of work to any greater extent than in his own.

§ 703-306 Use of force for the protection of property.

(1) The use of force upon or toward the person of another is justifiable when the actor believes that such force is immediately necessary:

- (a) To prevent the commission of criminal trespass or burglary in a building or upon real property in his possession or in the possession of another person for whose protection he acts; or
- (b) To prevent unlawful entry upon real property in his possession or in the possession of another person for whose protection he acts; or
- (c) To prevent theft, criminal mischief, or any trespassory taking of tangible, movable property in his possession or in the possession of another person for whose protection he acts.

(2) The actor may in the circumstances specified in subsection (1) use such force as he

believes is necessary to protect the threatened property, provided that he first requests the person against whom force is used to desist from his interference with the property, unless the actor believes that:

- (a) Such a request would be useless; or
- (b) It would be dangerous to himself or another person to make the request; or
- (c) Substantial harm would be done to the physical condition of the property which is sought to be protected before the request could effectively be made.

(3) The use of deadly force for the protection of property is justifiable only if:

(a) The person against whom the force is used is attempting to dispossess the actor of his dwelling otherwise than under a claim of right to its possession; or

(b) The person against whom the deadly force is used is attempting to commit felonious property damage, burglary, robbery, or felonious theft and either:

- (i) Has employed or threatened deadly force against or in the presence of the actor; or
- (ii) The use of force other than deadly force to prevent the commission of the crime would expose the actor or another person in his presence to substantial danger of serious bodily injury.

(4) The justification afforded by this section extends to the use of a device for the purpose of protecting property only if:

(a) The device is not designed to cause or known to create a substantial risk of causing death or serious bodily injury; and

(b) The use of the particular device to protect the property from entry or trespass is reasonable under the circumstances, as the defendant believes them to be; and

(c) The device is one customarily used for such a purpose or reasonable care is taken to make known to probable intruders the fact that it is used.

(5) The justification afforded by this section extends to the use of confinement as protective force only if the actor takes all reasonable measures to terminate the confinement as soon as he knows that he can do so with safety to the property, unless the person confined has been arrested on a charge of crime.

§ 703-307 Use of force in law enforcement.

(1) Subject to the provisions of this § and of § 703-310, the use of force upon or toward the person of another is justifiable when the actor is making or assisting in making an arrest and the actor believes that such force is immediately necessary to effect a lawful arrest.

(2) The use of force is not justifiable under this § unless:

(a) The actor makes known the purpose of the arrest or believes that it is otherwise known by or cannot reasonably be made known to the person to be arrested; and

(b) When the arrest is made under a warrant, the warrant is valid or believed by the actor to be valid.

(3) The use of deadly force is not justifiable under this section unless:

(a) The arrest is for a felony; and

(b) The person effecting the arrest is authorized to act as a peace officer or is assisting a person whom he believes to be authorized to act as a peace officer; and

(c) The actor believes that the force employed creates no substantial risk of injury to innocent persons; and

(d) The actor believes that:

(i) The crimes for which the arrest is made involved conduct including the use or threatened use of deadly force; or

(ii) There is a substantial risk that the person to be arrested will cause death or serious bodily injury if his apprehension is delayed.

(4) The use of force to prevent the escape of an arrested person from custody is justifiable when the force could justifiably have been employed to effect the arrest under which the person is in custody, except that a guard or other person authorized to act as a peace officer is justified in using force which he believes to be immediately necessary to prevent the escape from a detention facility.

(5) A private person who is summoned by a peace officer to assist in effecting an unlawful arrest is justified in using any force which he would be justified in using if the arrest were lawful, provided that he does not believe the arrest is unlawful. A private person who assists another private person in effecting an unlawful arrest, or who, not being summoned, assists a peace officer in effecting an unlawful arrest, is justified in using any force which he would be justified in using if the arrest were lawful, provided that he believes the arrest is lawful, and the arrest would be lawful if the facts were as he believes them to be.

§ 703-309 Use of force by persons with special responsibility for care, discipline, or safety of others.

The use of force upon or toward the person of another is justifiable under the following circumstances:

(1) The actor is the parent or guardian or other person similarly responsible for the general care and supervision of a minor, or a person acting at the request of the parent, guardian, or other responsible person, and:

(a) The force is employed with due regard for the age and size of the minor and is reasonably related to the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of the minor's misconduct; and

(b) The force used is not designed to cause or known to create a risk of causing substantial bodily injury, disfigurement, extreme pain or mental distress, or neurological damage.

(2) The actor is a teacher or a person otherwise entrusted with the care or supervision for a special purpose of a minor, and:

(a) The actor believes that the force used is necessary to further that special purpose,

including maintenance of reasonable discipline in a school, class, or other group, and that the use of force is consistent with the welfare of the minor; and

(b) The degree of force, if it had been used by the parent or guardian of the minor, would not be unjustifiable under paragraph (1)(b).

(3) The actor is the guardian or other person similarly responsible for the general care and supervision of an incompetent person, and:

(a) The force is employed with due regard for the age and size of the incompetent person and is reasonably related to the purpose of safeguarding or promoting the welfare of the incompetent person, including the prevention of the incompetent person's misconduct, or, when such incompetent person is in a hospital or other institution for the incompetent person's care and custody, for the maintenance of reasonable discipline in the institution; and

(b) The force used is not designed to cause or known to create a risk of causing substantial bodily injury, disfigurement, extreme pain or mental distress, or neurological damage.

(4) The actor is a doctor or other therapist or a person assisting the doctor or therapist at the doctor's or therapist's direction, and:

(a) The force is used for the purpose of administering a recognized form of treatment which the actor believes to be adapted to promoting the physical or mental health of the patient; and

(b) The treatment is administered with the consent of the patient, or, if the patient is a minor or an incompetent person, with the consent of the minor's or incompetent person's parent or guardian or other person legally competent to consent in the minor's or incompetent person's behalf, or the treatment is administered in an emergency when the actor believes that no one competent to consent can be consulted and that a reasonable person, wishing to safeguard the welfare of the patient, would consent.

(5) The actor is a warden or other authorized official of a correctional institution, and:

(a) The actor believes that the force used is necessary for the purpose of enforcing the lawful rules or procedures of the institution; and

(b) The nature or degree of force used is not forbidden by other provisions of the law governing the conduct of correctional institutions; and

(c) If deadly force is used, its use is otherwise justifiable under this chapter.

(6) The actor is a person responsible for the safety of a vessel or an aircraft or a person acting at the direction of the person responsible for the safety of a vessel or an aircraft, and:

(a) The actor believes that the force used is necessary to prevent interference with the operation of the vessel or aircraft or obstruction of the execution of a lawful order, unless the actor's belief in the lawfulness of the order is erroneous and the actor's error is due to ignorance or mistake as to the law defining authority; and

(b) If deadly force is used, its use is otherwise justifiable under this chapter.

(7) The actor is a person who is authorized or required by law to maintain order or decorum

in a vehicle, train, or other carrier, or in a place where others are assembled, and:

- (a) The actor believes that the force used is necessary for that purpose; and
- (b) The force used is not designed to cause or known to create a substantial risk of causing death, bodily injury or extreme mental distress.

§ 703-310 Provisions generally applicable to justification.

(1) When the actor believes that the use of force upon or toward the person of another is necessary for any of the purposes for which such belief would establish a justification under §§ 703-303 to 703-309 but the actor is reckless or negligent in having such belief or in acquiring or failing to acquire any knowledge or belief which is material to the justifiability of his use of force, the justification afforded by those sections is unavailable in a prosecution for an offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

(2) When the actor is justified under §§ 703-303 to 703-309 in using force upon or toward the person of another but he recklessly or negligently injures or creates a risk of injury to innocent persons, the justification afforded by those sections is unavailable in a prosecution for such recklessness or negligence toward innocent persons.

§ 703-308 Use of force to prevent suicide or the commission of a crime.

(1) The use of force upon or toward the person of another is justifiable when the actor believes that such force is immediately necessary to prevent the other person from committing suicide, inflicting serious bodily harm upon himself, committing or consummating the commission of a crime involving or threatening bodily injury, damage to or loss of property, or breach of the peace, except that:

- (a) Any limitations imposed by the other provisions of this chapter on the justifiable use of force in self-protection, for the protection of others, the protection of property, the effectuation of an arrest, or the prevention of an escape from custody shall apply notwithstanding the criminality of the conduct against which such force is used; and
- (b) The use of deadly force is not in any event justifiable under this section unless:
 - (i) The actor believes that there is a substantial risk that the person whom he seeks to prevent from committing a crime will cause death or serious bodily injury to another unless the commission or the consummation of the crime is prevented and that the use of such force presents no substantial risk of injury to innocent persons; or
 - (ii) The actor believes that the use of such force is necessary to suppress a riot after the rioters have been ordered to disperse and warned, in any particular manner that the law may require, that deadly force will be used if they do not obey.

(2) The justification afforded by this section extends to the use of confinement as preventive force only if the actor takes all reasonable measures to terminate the confinement as soon as he knows that he safely can, unless the person confined has been arrested on a charge of crime.

§ 702-237 Entrapment.

(1) In any prosecution, it is an affirmative defense that the defendant engaged in the prohibited conduct or caused the prohibited result because he was induced or encouraged to do so by a law enforcement officer, or by a person acting in cooperation with a law enforcement officer, who, for the purpose of obtaining evidence of the commission of an offense, either:

- (a) Knowingly made false representations designed to induce the belief that such conduct or result was not prohibited; or
- (b) Employed methods of persuasion or inducement which created a substantial risk that the offense would be committed by persons other than those who are ready to commit it.

(2) The defense afforded by this section is unavailable when causing or threatening bodily injury is an element of the offense charged and the prosecution is based on conduct causing or threatening such injury to a person other than the person perpetrating the entrapment.

§ 702-231 Duress.

(1) It is a defense to a penal charge that the defendant engaged in the conduct or caused the result alleged because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist.

(2) The defense provided by this section is unavailable if the defendant recklessly placed himself in a situation in which it was probable that he would be subjected to duress. The defense is also unavailable if he was negligent in placing himself in such a situation, whenever negligence suffices to establish the requisite state of mind for the offense charged.

(3) It is not a defense that a person acted on the command of his or her spouse, unless he or she acted under such coercion as would establish a defense under this section.

(4) When the conduct of the defendant would otherwise be justifiable under § 703-302, this section does not preclude the defense of justification.

(5) In prosecutions for any offense described in this Code, the defense asserted under this section shall constitute an affirmative defense. The defendant shall have the burden of going forward with the evidence to prove the facts constituting such defense, unless such facts are supplied by the testimony of the prosecuting witness or circumstance in such testimony, and of proving such facts by a preponderance of the evidence pursuant to § 701-115.

§ 703-302 Choice of evils.

(1) Conduct which the actor believes to be necessary to avoid an imminent harm or evil to himself or to another is justifiable provided that:

- (a) The harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
- (b) Neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
- (c) A legislative purpose to exclude the justification claimed does not otherwise plainly

appear.

(2) When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

(3) In a prosecution for escape under § 710-1020 or 710-1021, the defense available under this section is limited to an affirmative defense consisting of the following elements:

- (a) The actor receives a threat, express or implied, of death, substantial bodily injury, or forcible sexual attack;
- (b) Complaint to the proper prison authorities is either impossible under the circumstances or there exists a history of futile complaints;
- (c) Under the circumstances there is no time or opportunity to resort to the courts;
- (d) No force or violence is used against prison personnel or other innocent persons; and
- (e) The actor promptly reports to the proper authorities when the actor has attained a position of safety from the immediate threat.

§ 702-230 Intoxication.

(1) Self-induced intoxication is prohibited as a defense to any offense, except as specifically provided in this section.

(2) Evidence of the nonself-induced or pathological intoxication of the defendant shall be admissible to prove or negative the conduct alleged or the state of mind sufficient to establish an element of the offense. Evidence of self-induced intoxication of the defendant is admissible to prove or negative conduct or to prove state of mind sufficient to establish an element of an offense. Evidence of self-induced intoxication of the defendant is not admissible to negative the state of mind sufficient to establish an element of the offense.

(3) Intoxication does not, in itself, constitute a physical or mental disease, disorder, or defect within the meaning of § 704-400.

(4) Intoxication which (a) is not self-induced or (b) is pathological is a defense if by reason of such intoxication the defendant at the time of his conduct lacks substantial capacity either to appreciate its wrongfulness or to conform his conduct to the requirements of law.

(5) In this section:

- (a) "**Intoxication**" means a disturbance of mental or physical capacities resulting from the introduction of substances into the body;
- (b) "**Self-induced intoxication**" means intoxication caused by substances which the defendant knowingly introduces into his body, the tendency of which to cause intoxication he knows or ought to know, unless he introduces them pursuant to medical advice or under such circumstances as would afford a defense to a charge of a penal offense;
- (c) "**Pathological intoxication**" means intoxication grossly excessive in degree, given the

amount of the intoxicant, to which the defendant does not know he is susceptible and which results from a physical abnormality of the defendant.

§ 702-200 Requirement of voluntary act or voluntary omission

(1) In any prosecution, it is a defense that the conduct alleged does not include a voluntary act or the voluntary omission to perform an act of which the defendant is physically capable . . .

(2) Where the defense provided in subsection (1) 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 this chapter.

§ 704-400 Physical or mental disease, disorder, or defect excluding penal responsibility.

(1) A person is not responsible, under this Code, for conduct if at the time of the conduct as a result of physical or mental disease, disorder, or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

(2) As used in this chapter, the terms "physical or mental disease, disorder, or defect" do not include an abnormality manifested only by repeated penal or otherwise anti-social conduct.

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§ 704-401 Evidence of physical or mental disease, disorder, or defect admissible when relevant to state of mind.

Evidence that the defendant suffered from a physical or mental disease, disorder, or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind which is required to establish an element of the offense.

§ 704-408 Determination of irresponsibility.

If the report of the examiners filed pursuant to section 704-404, or the report of examiners of the defendant's choice under section 704-409, states that the defendant at the time of the conduct alleged suffered from a physical or mental disease, disorder, or defect which substantially impaired his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law, the court shall submit the defense of physical or mental disease, disorder, or defect to the jury or the trier of fact at the trial of the charge against the defendant.

Insanity acquittees. -- The state may, consistent with the Equal Protection Clause, place the burden on the insanity acquittee to prove, by a preponderance of the evidence, that he or she should be released. *State v. Miller*, 84 Haw. 269, 933 P.2d 606 (1997), reconsideration denied, 84 Haw. 496, 936 P.2d 191 (1997).