CHAPTER 710
OFFENSES AGAINST PUBLIC ADMINISTRATION

Part I. General Provisions Relating to Offenses Against Public Administration

Part II. Obstruction of Public Administration

Part III. Escape and Other Offenses Related to Custody

"PART I. GENERAL PROVISIONS RELATING TO OFFENSES AGAINST PUBLIC ADMINISTRATION

§710-1000 Definitions of terms in this chapter. In this chapter, unless a different meaning plainly is required:

"Administrative proceeding" means any proceeding the outcome of which is required to be based on a record or documentation prescribed by law, or in which law or regulation is particularized in application to individuals.

"Benefit" means gain or advantage, or anything regarded by the beneficiary as gain or advantage, including benefit to any other person or entity in whose welfare the beneficiary is interested.

"Custody" means restraint by a public servant pursuant to arrest, detention, or order of a court.

"Detention facility" means any place used for the confinement of a person:

(a) Arrested for, charged with, or convicted of a criminal offense;

(b) Confined pursuant to chapter 571;

(c) Held for extradition; or

(d) Otherwise confined pursuant to an order of a court.

"Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

"Falsely alter" means to change, without the authority of the ostensible maker or authorized custodian of the record, a statement, document, or record, whether complete or incomplete, by means of erasure, obliteration, deletion, insertion of new matter, transposition of matter, or in any other manner, so that the statement, document, or record so altered falsely appears or purports to be in all respects an authentic creation of its ostensible maker, or authorized by the maker or custodian of the record.

"Falsely complete" means to transform, by adding, inserting, or changing matter, an incomplete statement, document, or record into a complete one, without the authority of the ostensible maker or authorized custodian of the record, so that the complete statement, document, or record falsely appears or purports to be in all respects an authentic creation of its ostensible maker, or authorized by the maker or custodian of the record.

"Falsely make" means to create a statement, document, or record, which purports to be an authentic creation of its ostensible maker, but that is not because the ostensible maker is fictitious or because, if real, the ostensible maker did not authorize the creation thereof.

"Government" includes any branch, subdivision, or agency of the government of this State or any locality within it.

"Governmental function" includes any activity which a public servant is legally authorized to undertake on behalf of the government.

"Harm" means loss, disadvantage, or injury, or anything so regarded by the person affected, including loss, disadvantage, or injury to any other person or entity in whose welfare the person affected is interested.

"Information" includes data, text, images, sounds, codes, computer programs, software, or databases.

"Juror" means any person who is a member of any jury, including a grand jury, impaneled by any court of this State or by any public servant authorized by law to impanel a jury, and also includes any person who has been drawn or summoned to attend as a prospective juror.

"Law enforcement officer" means any public servant, whether employed by the State or subdivisions thereof or by the United States, vested by law with a duty to maintain public order or, to make arrests for offenses or to enforce the criminal laws, whether that duty extends to all offenses or is limited to a specific class of offenses.

"Materially false statement" means any false statement, regardless of its admissibility under the rules of evidence, which could have affected the course or outcome of the proceeding; whether a falsification is material in a given factual situation is a question of law.

"Oath" includes an affirmation and every other mode authorized by law of attesting to the truth of that which is stated, and, for the purposes of this chapter, written statements shall be treated as if made under oath if:

(a) The statement was made on or pursuant to a form bearing notice, authorized by law, to the effect that false statements made therein are punishable; or

(b) The statement recites that it was made under oath or affirmation, the declarant was aware of such recitation at the time the declarant made the statement and intended that the statement should be represented as a sworn statement, and the statement was in fact so represented by its delivery or utterance with the signed jurat of an officer authorized to administer oaths appended thereto.

"Oath required or authorized by law" means an oath the use of which is specifically provided for by statute or appropriate regulatory provision.

"Official proceeding" means a proceeding heard or which may be heard before any legislative, judicial, administrative, or

other governmental agency or official authorized to take evidence under oath, including any referee, hearing examiner, commissioner, notary, or other person taking testimony or deposition in connection with any such proceeding.

"Pecuniary benefit" is benefit in the form of money, property, commercial interests, or anything else the primary significance of which is economic gain.

"Public servant" means any officer or employee of any branch of government, whether elected, appointed, or otherwise employed, and any person participating as advisor, consultant, or otherwise, in performing a governmental function, but the term does not include jurors or witnesses.

"Record" means information that is written or printed, or that is stored in an electronic or other medium and is retrievable in a perceivable form.

"Statement" means any representation, but includes a representation of opinion, belief, or other state of mind only if the representation clearly relates to state of mind apart from or in addition to any facts which are the subject of the representation.

"Testimony" includes oral or written statements, documents, or any other material that may be offered by a witness in an official proceeding. [L 1972, c 9, pt of §1; am L 1987, c 130, §1; gen ch 1993; am L 2014, c 33, §2]

Revision Note

Numeric designations deleted and definitions rearranged pursuant to §23G-15.

COMMENTARY ON §710-1000

This section is definitional only and, of course, specifies no offense. A discussion of the definitions in this section, when needed or appropriate, is found in the commentary to the substantive offenses employing the terms defined.

SUPPLEMENTAL COMMENTARY ON §710-1000

Act 33, Session Laws 2014, amended this section by adding the following definitions: "electronic," "falsely alter," "falsely complete," "falsely make," "information," and "record." Senate Standing Committee Report No. 3330, House Standing Committee Report No. 260-14.

Case Notes

Plaintiffs failed to establish that defendant received pecuniary benefit from five million dollar gift to city and county of Honolulu. 906 F. Supp. 1377 (1995).

"Custody" construed. 59 H. 456, 583 P.2d 337 (1978).

The offense of terroristic threatening in the first degree does not require a nexus between the alleged threat and the threatened person's status as a public servant where the threatened person is a government officer or employee; thus, trial court did not err in failing to give a nexus instruction. 111 H. 327, 141 P.3d 974 (2006).

Under paragraph (15), any "officer or employee of any branch of government" qualifies as a public servant. 105 H. 261 (App.), 96 P.3d 590 (2004).

Under paragraph (15), a person qualifies as a public servant based on the type of work he or she performs, and not based on when that work is being performed. 105 H. 261 (App.), 96 P.3d 590 (2004).

There was no support for the government's argument that paragraph (3) [defining "custody"] sets forth "elements" that the prosecution must prove in order to sustain a conviction under §710-1021; none of the modes of custody set forth in paragraph (3) is an element of the crime of escape from custody. 782 F.3d 510 (2015).

" **§710-1001 Forfeiture of property used as benefit or pecuniary benefit in the commission of an offense defined in this chapter.** Any property offered, conferred, agreed to be conferred, or accepted as a benefit, pecuniary benefit, or compensation in the commission of an offense defined in this chapter is forfeited, subject to the requirements of chapter 712A, to the State. [L 1972, c 9, pt of §1; am L 1989, c 261, §21]

COMMENTARY ON §710-1001

This section is derived from the previous law on the forfeiture of bribery money.[1] Since this chapter deals with additional kindred offenses, e.g., compounding, giving and receiving unlawful compensation, giving and receiving improper gifts, unlawful assistance of a private interest, and obtaining unlawful assistance of a public servant, the forfeiture is expressed in general terms to cover all sections in which property is offered, conferred, agreed to be conferred, or accepted as a benefit, pecuniary benefit, or compensation in the commission of an offense defined in this chapter. The mere solicitation or agreement to accept property would not, of course, work a forfeiture.

The forfeiture is specifically made subject to the requirements of §701-119 which embodies a single procedure for the establishment of all forfeitures declared by the Penal Code. The procedure provides, as did the previous law,[2] for the protection of innocent owners of property which is involved in the commission of an offense.

§710-1001 Commentary:

1. H.R.S. §725-8.

2. See id. §§725-8 to 725-11.

"PART II. OBSTRUCTION OF PUBLIC ADMINISTRATION

§710-1010 Obstructing government operations. (1) A person commits the offense of obstructing government operations if, by using or threatening to use violence, force, or physical interference or obstacle, the person intentionally obstructs, impairs, or hinders:

(a) The performance of a governmental function by a public servant acting under color of the public servant's official authority;

(b) The enforcement of the penal law or the preservation of the peace by a law enforcement officer acting under color of the law enforcement officer's official authority; or

(c) The operation of a radio, telephone, television, or other telecommunication system owned or operated by the State or one of its political subdivisions.

(2) This section does not apply to:

(a) The obstruction, impairment, or hindrance of the making of an arrest;

(b) The obstruction, impairment, or hindrance of any governmental function, as provided by law, in connection with a labor dispute with the government; or

(c) A person who is making a video or audio recording or taking a photograph of a law enforcement officer while the officer is in the performance of the officer's duties in a public place or under circumstances in which the officer has no reasonable expectation of privacy; provided that the officer may take reasonable action to maintain safety and control, secure crime scenes and accident sites, protect the integrity and

confidentiality of investigations, and protect the public safety and order.

(3) Obstruction of government operations is a misdemeanor.

[L 1972, c 9, pt of §1; am L 1980, c 150, §1; am L 1991, c 223, §2; gen ch 1993; am L 2001, c 91, §3; am L 2016, c 164, §1]

COMMENTARY ON §710-1010

This section penalizes intentional interference with any level of government within the State. Subsection (1)(a) is addressed to governmental functions generally, subsection (1)(b) insures that peace officers acting under color of official authority are covered. Although subsection (1)(b) may not be needed, redundancy is to be preferred over ambiguity.

Two areas are specifically excepted from the operation of this section. The first excepted area, that of the making of an arrest, is covered under §710-1026 of this chapter. The second exception, that of labor disputes involving the government, is an area of conflicting policies.

> A labor dispute involving government employees ... presents special problems. Without the subsection [(2)(b)] exemption, activities which might constitute no more than tortious unfair labor practices in the context of normal industrial disputes would take on the added burden of criminal liability when the employer interfered with was the Government ... [W]hile such activity should not necessarily be protected, the appropriate sanctions should be determined by labor legislation, not the Criminal Code....[1]

This section requires that the obstruction be by means of violence, force, or physical interference. The Code takes the position that in many instances of nonfeasance by private individuals, e.g., by a failure to file a report required by law, the possibility of misdemeanor liability is too severe a sanction. In those cases where failure to do some act is attended by a substantial danger of disruption of governmental functions, special sections have been drafted to deal with the problems.[2]

Previous Hawaii law dealt with obstruction of governmental operations on an ad hoc basis; the previous coverage was somewhat spotty and the cases covered carried different penalties.[3] Under previous law, threats of violence against public officials were penalized as misdemeanors.[4] The Code seeks to extend the coverage of prior law to encompass protection of all governmental functions and to standardize the available penalties.

SUPPLEMENTAL COMMENTARY ON §710-1010

The Code as adopted by the legislature in 1972 differs from the Proposed Draft in that in subsection (2)(b), the words "as provided by law" were inserted after the word "function."

Act 150, Session Laws 1980, reduced the offense from a misdemeanor to a petty misdemeanor. In view of the relatively light sentences being imposed by the courts, the classification for the offense was changed to a petty misdemeanor in order to keep the cases in the district court, thus reducing the congestion in the circuit court and expediting the disposition of these cases. Senate Standing Committee Report No. 693-80, House Standing Committee Report No. 874-80.

Act 91, Session Laws 2001, clarified the offense of obstructing government operations by adding the operation of a radio, telephone, television, or other telecommunication system owned or operated by the State or a county. Electronic communications are utilized extensively by State and local governments, i.e., counties. Current law did not cover intentional obstruction, impairment, or hindering of radio, telephone, television, or other telecommunication systems owned or operated by the State or counties. Act 91 closed that gap.

Also, the term "peace officer," as used in the Penal Code, caused the intermediate court of appeals to question whether the term meant "law enforcement officer." Act 91 resolved the ambiguity by substituting that term for "peace officer" [throughout the Penal Code]. Conference Committee Report No. 23.

Act 164, Session Laws 2016, amended this section to establish an exception to the offense of obstructing government operations for a person making a video or audio recording or photograph of a law enforcement officer while the officer is in the performance of duties in a public place or under circumstances in which the officer has no reasonable expectation of privacy; provided that the officer may take reasonable action to maintain safety and control, secure crime scenes and accident sites, protect the integrity and confidentiality of investigations, and protect the public safety and order. The legislature found that with the popularity and widespread use of smart phones with video or audio recording and photographing capabilities, recordings and photos of law enforcement officers who are exercising their duties have been used as evidence in police conduct matters or widely disseminated via social media. However, such recordings and photographs may be seen as obstructing government operations. Act 164 established an exception under certain circumstances to enable a person to record or photograph a law enforcement officer exercising the

officer's duties without violating the law. Senate Standing Committee Report No. 2525, Conference Committee Report No. 129-16.

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§710-1010 Commentary:

1. Prop. Mich. Rev. Cr. Code, comments at 329.

2. E.g., §§710-1011, 1012.

3. E.g., H.R.S. §§65-50 (interfering with the Kauai fire department), 66-48 (interfering with the Maui fire department), 740-12 (interfering with fish and game wardens), 121-33 (interfering with the National Guard).

4. H.R.S. §725-6.

" **[§710-1010.5] Interference with reporting an emergency or crime.** (1) A person commits the offense of interference with reporting an emergency or crime if the person 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.

(2) Interference with the reporting of an emergency or crime is a petty misdemeanor. [L 2001, c 294, §1]

COMMENTARY ON §710-1010.5

Act 294, Session Laws 2001, established interference with the reporting of an emergency or crime as a petty misdemeanor. The legislature found that perpetrators of domestic violence should not prevent victims and witnesses from contacting authorities for assistance in preventing domestic violence. House Standing Committee Report No. 1222.

" **§710-1011 Refusing to aid a law enforcement officer.** (1) A person commits the offense of refusing to aid a law enforcement officer when, upon a reasonable command by a person known to him to be a law enforcement officer, he intentionally refuses or fails to aid such law enforcement officer, in:

(a) Effectuating or securing an arrest; or

(b) Preventing the commission by another of any offense.

(2) Refusing to aid a law enforcement officer is a petty misdemeanor.

(3) A person who complies with this section by aiding a law enforcement officer shall not be held liable to any person

for damages resulting therefrom, provided he acted reasonably under the circumstances known to him at the time. [L 1972, c 9, pt of §1; am L 2001, c 91, §4]

COMMENTARY ON §710-1011

This section is not designed to allow peace officers to foist their routine or dangerous duties upon innocent citizens. The reasonable context in which this aid is required precludes requests for routine and unnecessary, as well as dangerous and unconscionable, aid. The type of situation which the Code envisions is the request to a citizen, by a peace officer, to summon aid or render immediately vital information, where there is no question of danger, incrimination, or substantial inconvenience to the person of whom the aid is asked. Various forms of this law may be found in the proposed revisions of other states.[1]

Previous Hawaii law provided for a $50 fine for refusal to aid a peace officer, under roughly the same circumstances as those provided in the Code.[2] Instead, the Code imposes its lightest criminal penalty, petty misdemeanor, for this offense.

The waiver of civil liability in subsection (3) is both fair and necessary. The waiver is fair in that it is hardly equitable to order a person to perform a useful act, on one hand, then expose the person to the threat of civil liability, on the other. The waiver is necessary in that it would arguably be unreasonable to request such aid in many cases if all of the standards of civil liability were to apply. The person of whom aid is asked might, therefore, be able justifiably to refuse to give it.

Case Notes

Cited: 57 H. 390, 557 P.2d 1334 (1976).

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§710-1011 Commentary:

1. See N.Y.R.P.L. §195.10; Prop. Del. Cr. Code §§730, 731; Prop. Mich. Rev. Cr. Code §4250.

2. H.R.S. §740-10.

" **§710-1012 Refusing to assist in fire control.** (1) A person commits the offense of refusing to assist in fire control when:

(a) Upon a reasonable command by a person known to him to be a firefighter, he intentionally refuses to aid in extinguishing a fire or in protecting property at the scene of a fire; or

(b) Upon command by a person known to him to be a firefighter or law enforcement officer, he intentionally disobeys an order or regulation relating to the conduct of persons in the vicinity of a fire.

(2) "Firefighter" means any officer of a fire department or any other person vested by law with the duty to extinguish fires.

(3) Refusing to assist in fire control is a petty misdemeanor.

(4) A person who complies with this section by assisting in fire control shall not be held liable to any person for damages resulting therefrom, provided he acted reasonably under the circumstances known to him at the time. [L 1972, c 9, pt of §1; am L 1977, c 191, §2; am L 1983, c 124, §15; am L 2001, c 91, §4]

COMMENTARY ON §710-1012

Subsection (1)(a) of this section is intended to place obligations upon the citizen in aiding fire control similar to those which §710-1011 places upon the citizen with regard to law enforcement. Again, the request for aid need not be obeyed unless it is reasonable under the circumstances.

Subsection (1)(b) is related to the control of crowds and vehicles in the vicinity of a fire, under circumstances where disorderly conduct and riot-dispersal statutes would not apply.

The waiver of civil liability in subsection (4) is explained in the commentary to §710-1011.

Previous Hawaii law was substantially stricter than the Code in requiring all able-bodied men between 16 and 50 to aid in extinguishing a fire when properly so requested. The section also imposed liability upon one who refused to lend necessary materials to the control of a fire. The available penalty upon conviction was a fine of from $10 to $1,000.[1] The Code more precisely states when aid is expected and what type can be requested.

§710-1012 Commentary:

1. H.R.S. §185-8.

" **§710-1013 Compounding.** (1) A person commits the offense of compounding if the person intentionally accepts or agrees to accept any pecuniary benefit as consideration for:

(a) Refraining from seeking prosecution of an offense; or

(b) Refraining from reporting to law-enforcement authorities the commission or suspected commission of any offense or information relating to the offense.

(2) It is an affirmative defense to a prosecution under subsection (1) that the pecuniary benefit did not exceed an amount which the defendant believed to be due as restitution or indemnification for harm caused by the offense.

(3) Compounding is a misdemeanor. [L 1972, c 9, pt of §1; gen ch 1993]

COMMENTARY ON §710-1013

The harm in allowing the reporting or prosecution of any offense to be "bought off" need hardly be developed at length. The very functioning of any effective system for penalizing criminal behavior depends upon the unhampered reporting and prosecution of offenses. The traditional question is whether the offense of "compounding" shall apply to one who receives no pecuniary benefit, but nonetheless refrains from reporting an offense. When the offense was a felony, the common law recognized the crime of misprision of a felony, even if no pecuniary benefit was conferred. Most jurisdictions which have codified their penal law have rejected the crime of misprision,[1] as have most modern attempts at penal law revision.[2]

Subsection (2) excludes cases where the consideration accepted is believed to be due as restitution or indemnification, and it does not require judicial approval. The commentary to the Model Penal Code, from which this section is derived, states the reason for the exception as follows:

> Our society does not, in general, impose penal sanctions to compel persons to inform authorities of crime. A person who refrains from reporting a crime of which he was the victim, because his loss has been made good, is no more derelict in his social duty than one who, out of indifference or friendship to the offender, fails to report a known offense. The threat of prosecution for compounding is, in any event, ineffective to promote reporting of offenses by victims who are willing to "settle" with the offender, since compounding laws can easily be evaded by accepting restitution or indemnification without explicit "agreement" to drop prosecution. Finally, compounding laws impugn the widespread practice of prosecutors, who are

frequently content to drop prosecution when restitution has been made by the offender.[3]

Previous Hawaii law was in accord with the great majority of jurisdictions in rejecting the offense of misprision of a felony. The law penalized compounding of an offense carrying a life sentence with roughly the same dispositions as the Code makes available for any case of compounding.[4] When the compounding was of a lesser offense, the offense was a misdemeanor.[5] The Code authorizes a uniform and, therefore, in some cases, more severe penalty than that authorized by present law.

§710-1013 Commentary:

1. M.P.C., Tentative Draft No. 9, comments at 207 (1959).

2. M.P.C. §242.5; N.Y.R.P.L. §215.45; Prop. Del. Cr. Code §§736, 737; Prop. Mich. Rev. Cr. Code §4530; Prop. Pa. Cr. Code §2209.

3. M.P.C., Tentative Draft No. 9, comments at 203 (1959).

4. H.R.S. §725-5.

5. Id.

" **§710-1014 Rendering a false alarm.** (1) A person commits the offense of rendering a false alarm if the person knowingly causes a false alarm of fire or other emergency to be transmitted to or within an official or volunteer fire department, any other government agency, or any public utility that deals with emergencies involving danger to life or property.

(2) Rendering a false alarm is a misdemeanor. [L 1972, c 9, pt of §1; gen ch 1993]

COMMENTARY ON §710-1014

The rendering of a false fire alarm is almost universally made criminal. The Code generalizes the principle to cover all emergency alarms and all governmental emergency organizations (the police would be included while responding to an alarm of this character), public utilities that deal with emergencies, and, in the case of fire departments, volunteer organizations. The justification for the provision is the prevention of the "waste of government resources and the likelihood that the actor

will cause personnel or equipment to be unavailable to deal with real emergencies."[1]

§710-1014 Commentary:

1. M.P.C., Tentative Draft No. 6, comments at 144 (1957).

" **§710-1014.5 Misuse of 911 emergency telephone service.** (1) A person commits the offense of misuse of 911 emergency telephone service if the person accesses the telephone number 911 and:

(a) Knowingly causes a false alarm; or

(b) Makes a false complaint or a report of false information in reckless disregard of the risk that a public safety agency will respond by dispatching emergency services.

(2) Misuse of 911 emergency telephone service is a misdemeanor.

(3) For purposes of this section, "public safety agency" means any federal, state, or county police, fire, emergency medical service, or emergency management agency. [L 2005, c 17, §1; am L 2014, c 111, §22]

COMMENTARY ON §710-1014.5

Act 17, Session Laws 2005, established as a misdemeanor offense, the misuse of 911 emergency telephone service, when an individual accesses 911 and knowingly causes a false alarm or recklessly makes a false complaint or report. The legislature found that the Act would prevent public safety agencies from wasting their time on false alarms and ensure that legitimate emergency requests were not hampered by the abuse of the emergency system. Senate Standing Committee Report No. 1297, House Standing Committee Report No. 129.

Act 111, Session Laws 2014, which amended subsection (3), updated and recodified Hawaii's emergency management laws to conform with nationwide emergency management practices by, among other things, establishing a Hawaii emergency management agency in the state department of defense with the functions and authority currently held by the state civil defense agency; establishing the power and authority of the director of Hawaii emergency management, who will be the adjutant general, and providing the director with the functions and authority currently held by the director of civil defense; establishing county emergency management agencies, each to be under the respective county mayor's direction, with the functions and

authority currently held by the local organizations for civil defense; and repealing the chapters on disaster relief [chapter 127] and the civil defense [and] emergency act [chapter 128], which were determined to be obsolete with the creation of the Hawaii emergency management agency. Conference Committee Report No. 129-14.

" **§710-1015 False reporting to law-enforcement authorities.** (1) A person commits the offense of false reporting to law-enforcement authorities if the person intentionally makes a report or causes the transmission of a report to law-enforcement authorities relating to a crime or other incident within their concern when the person knows that the information contained in the report is false.

(2) False reporting to law-enforcement authorities is a misdemeanor. [L 1972, c 9, pt of §1; gen ch 1993]

COMMENTARY ON §710-1015

The rationale behind this section is much the same as that behind §710-1014: it is undesirable that public resources be wasted, and it is possible that harm may occur from the diversion of public resources from legitimate needs.

The Model Penal Code and most recent state revisions deal with this problem directly.[1] The Code avoids specific listings of what kinds of information may not be falsely related to law-enforcement authorities by penalizing all knowing transmission of false information relating to a crime or other incident within their concern. This proscription would include cases where the crime or incident did not occur and where the report pretends to furnish information which the actor does not have.

Previous Hawaii law made false reporting to a police officer concerning a crime a misdemeanor. The Code, while retaining the same penalty, broadens and clarifies the definition of the offense.

§710-1015 Commentary:

1. M.P.C. §241.5; N.Y.R.P.L. §240.50; Prop. Del. Cr. Code §735; Prop. Mich. Rev. Cr. Code §4540; Prop. Pa. Cr. Code §2106.

" **§710-1016 Impersonating a public servant.** (1) A person commits the offense of impersonating a public servant if the person pretends to be a public servant other than a law enforcement officer and engages in any conduct in that capacity with intent to deceive anyone.

(2) It is no defense to a prosecution under this section that the office the person pretended to hold did not in fact exist.

(3) Impersonating a public servant is a misdemeanor. [L 1972, c 9, pt of §1; am L 1984, c 139, §2; am L 2001, c 91, §4]

Cross References

Harassment by impersonation, see §711-1106.6.

COMMENTARY ON §710-1016

The object of this section is to prevent imposition on people by the false pretense of authority.

Previous Hawaii law recognized the offense of false personation of a government officer and imposed a possible maximum sentence of one year's imprisonment or a fine of $100.[1] The Code authorizes the same imprisonment, but a greater fine, for misdemeanors. Excluded from part II are offenses involving falsity which borders on perjury, e.g., false application or consent to marriage, false impersonation before a court.[2] These problems are dealt with directly in part VI of this chapter. Statutory protection for private fraternal organizations, by making unauthorized display of the badge or insignia of the organization a crime, is eliminated.[3] Also eliminated is the questionable distinction between the penalty which attaches to the unauthorized wearing of a police officer's uniform or badge and that which attaches to the unauthorized wearing of a uniform or badge which resembles a police officer's.[4] Both situations are covered equally under this section provided other requirements are met.

SUPPLEMENTAL COMMENTARY ON §710-1016

Act 139, Session Laws 1984, amended this section to exclude the offense of impersonating a peace officer, which offense was made a class C felony.

Case Notes

Trial court properly found defendant guilty of impersonating a public servant under this section where defendant wrote and signed a letter to defendant's attorney, in the name of defendant's supervisor, requesting the attorney to ask the presiding judge to drop contempt charges against defendant. 94 H. 440 (App.), 16 P.3d 845 (2000).

§710-1016 Commentary:

1. H.R.S. §742-2.

2. See H.R.S. §742-1.

3. Id. §742-5.

4. Compare id. §§742-3 with 742-4.

" **§710-1016.3 Obtaining a government-issued identification document under false pretenses in the first degree.** (1) A person commits the offense of obtaining a government-issued identification document under false pretenses in the first degree if that person, with intent to mislead a public servant and intent to facilitate a felony, obtains an identification document issued by the State or any political subdivision thereof by:

(a) Making any statement, oral or in written, printed, or electronic form, that the person does not believe to be true, in an application for any identification document issued by the State or any political subdivision thereof; or

(b) Submitting or inviting reliance on any statement, document, or record, in written, printed, or electronic form, that the person knows to be falsely made, completed, or altered.

(2) Obtaining a government-issued identification document under false pretenses in the first degree is a class C felony. [L 2002, c 224, pt of §2; am L 2014, c 33, §3]

Revision Note

Section was enacted as an addition to part V but was codified to this part pursuant to §23G-15.

" **§710-1016.4 Obtaining a government-issued identification document under false pretenses in the second degree.** (1) A person commits the offense of obtaining a government-issued identification document under false pretenses in the second degree if that person, with intent to mislead a public servant, obtains an identification document issued by the State or any political subdivision thereof by:

(a) Making any statement, oral or in written, printed, or electronic form, that the person does not believe to be true, in an application for any identification

document issued by the State or any political subdivision thereof; or

(b) Submitting or inviting reliance on any statement, document, or record, in written, printed, or electronic form, that the person knows to be falsely made, completed, or altered.

(2) Obtaining a government-issued identification document under false pretenses in the second degree is a misdemeanor. [L 2002, c 224, pt of §2; am L 2014, c 33, §4]

Revision Note

Section was enacted as an addition to part V but was codified to this part pursuant to §23G-15.

COMMENTARY ON §§710-1016.3 AND 710-1016.4

Act 224, Session Laws 2002, added these sections to provide criminal penalties for persons who obtain identity documents under false pretenses. The legislature found that misappropriation of personal identification information was on the rise. Act 224 addresses the criminal conduct associated with intentional identity theft. Conference Committee Report No. 25-02.

Act 33, Session Laws 2014, amended §§710-1016.3 and 710-1016.4 to apply to electronic statements, documents, or records. The legislature found that many government and business records are kept in electronic form. However, the current law prohibited only the alteration of records kept in written form. In 2000, Hawaii adopted the Uniform Electronic Transactions Act, chapter 489E, to recognize the need to establish the legal validity of electronic records, signatures, and contracts. Act 33 protected consumers by making relevant criminal offenses also applicable to electronic statements, documents, or records. Senate Standing Committee Report No. 3330, House Standing Committee Report No. 260-14.

" §**710-1016.5 REPEALED.** L 1987, c 130, §2.

" **[§710-1016.6] Impersonating a law enforcement officer in the first degree.** (1) A person commits the offense of impersonating a law enforcement officer in the first degree if, with intent to deceive, the person pretends to be a law enforcement officer and is armed with a firearm.

(2) Impersonating a law enforcement officer in the first degree is a class C felony. [L 1987, c 130, pt of §3]

" **[§710-1016.7] Impersonating a law enforcement officer in the second degree.** (1) A person commits the offense of impersonating a law enforcement officer in the second degree if, with intent to deceive, the person pretends to be a law enforcement officer.

(2) Impersonating a law enforcement officer in the second degree is a misdemeanor. [L 1987, c 130, pt of §3]

Case Notes

Police officers did not violate a civil process server's Fourth Amendment rights, because the officers had probable cause to arrest the process server for impersonating a law enforcement officer; since no constitutional violation occurred, the officers were entitled to qualified immunity. 348 F. Supp. 2d 1165 (2004).

" **[§710-1016.8] Presumptions.** Any person other than a law enforcement officer, who wears the uniform or displays the badge or identification card of a law enforcement officer, or who wears a uniform or displays a badge or identification card resembling the uniform, badge or identification card of a law enforcement officer, or a badge or identification card purported to be a law enforcement officer's badge or identification card, shall be presumed to be pretending to be a law enforcement officer. [L 1987, c 130, pt of §3]

" **[§710-1016.9] Defense.** (1) Employment by the State or a subdivision thereof or by the United States as a law enforcement officer at the time of the conduct charged is an affirmative defense to a prosecution for impersonating a law enforcement officer.

(2) It is no defense to a prosecution for impersonating a law enforcement officer that the office the person pretended to hold did not in fact exist. [L 1987, c 130, pt of §3]

COMMENTARY ON §§710-1016.6 TO 710-1016.9

Act 130, Session Laws 1987, was enacted by the legislature because it was concerned about the increase in the incidence of police impersonators. The legislature believed it was important to be able to prosecute people who intend to deceive others by impersonating law enforcement officers. Senate Conference Committee Report No. 85, House Conference Committee Report No. 60.

" **§710-1017 Tampering with a government record.** (1) A person commits the offense of tampering with a government record if:

(a) The person, acting knowingly, falsely makes a purported government record, or falsely completes or alters, or falsely makes an entry in, a government record or a true copy thereof;

(b) The person knowingly presents or uses a government record or a purported government record, or a true copy thereof, knowing that it has been falsely made, completed, or altered, or that a false entry has been made therein, with intent that it be taken as genuine;

(c) The person knowingly records, registers, or files, or offers for recordation, registration, or filing, in a governmental office or agency, a statement, document, or record, in written, printed, or electronic form, which has been falsely made, completed, or altered, or in which a false entry has been made, or which contains a false statement or false information; or

(d) Knowing the person lacks the authority to do so:

(i) The person intentionally destroys, mutilates, conceals, removes, or otherwise impairs the availability of any government records; or

(ii) The person refuses to deliver up a government record in the person's possession upon proper request of a public servant entitled to receive such record for examination or other purposes.

(2) For the purpose of this section, "government record" means all records created, issued, received, or kept by any governmental office or agency or required by law to be kept by others for the information of the government.

(3) Tampering with government records is a misdemeanor. [L 1972, c 9, pt of §1; am L 1991, c 145, §2; gen ch 1993; am L 2014, c 33, §5]

Revision Note

In subsection (1)(a) and (b), "or" deleted pursuant to §23G-15.

COMMENTARY ON §710-1017

This section is intended to penalize conduct which undermines confidence in the accuracy of public records. The accuracy of public records is essential to efficient public administration and, beyond the immediate context of public administration, the

government has an interest in protecting public confidence in its records.

This section does not require that the misuse of the public record be with intent to defraud another, i.e., to injure an interest which has value, as do the sections on forgery. Nor does this section require that the information made part of the public record, or offered for recordation, registration, or filing, be under oath or sworn to, as do the sections on perjury and related offenses. Those offenses, however, do complement the offense of tampering with public records, but they deal directly, and in a more precise context, with the aggravated circumstances presented.

This section is also addressed to the problem of access to public records. Obviously, acts of destruction and concealment impair the efficiency of public administration. Subsection (1)(d)(i) is intended primarily to cover acts of destruction, concealment, or impairment by individuals vis-a-vis the government, whereas subsection (1)(d)(ii) is intended primarily to cover the situation where a public servant refuses to surrender records to another public servant when the public servant has the duty to do so. Both clauses of this subsection are, however, worded broadly in order to cover acts of destruction, concealment, or retention outside their areas of immediate concern.

Subsection (2) is intended to be inclusive and to cover not only records traditionally considered "public" but also information kept for the benefit of the government, such as medical prescription records.

Previous Hawaii law on tampering with public records is similar to the code,[1] however the Code covers acts of tampering not covered under prior law, clarifies the acts that are covered, and dispenses with the former, archaic requirement of "malice" as it relates to this offense.

SUPPLEMENTAL COMMENTARY ON §710-1017

Act 33, Session Laws 2014, amended this section to apply to electronic statements, documents, or records. The legislature found that many government and business records are kept in electronic form. However, the current law prohibited only the alteration of records kept in written form. In 2000, Hawaii adopted the Uniform Electronic Transactions Act, chapter 489E, to recognize the need to establish the legal validity of electronic records, signatures, and contracts. Act 33 protected consumers by making relevant criminal offenses also applicable to electronic statements, documents, or records. Senate

Standing Committee Report No. 3330, House Standing Committee Report No. 260-14.

§710-1017 Commentary:

1. H.R.S. §753-3.

" **[§710-1017.5] Sale or manufacture of deceptive identification document; penalties.** (1) A person commits the offense of sale or manufacture of deceptive identification document if the person intentionally or knowingly manufactures, sells, offers for sale, furnishes, offers to be furnished, transports, offers to be transported, or imports or offers to be imported into this State a deceptive identification document.

(2) As used in this section, "deceptive identification document" means any identification document not issued by a governmental agency that purports to be, or that might deceive a reasonable person into believing that it is, an identification document issued by a governmental agency, including a driver's license, identification card, birth certificate, passport, or social security card.

(3) The sale or manufacture of a deceptive identification document is a class C felony.

(4) Any property used or intended for use in the commission of, attempt to commit, or conspiracy to commit an offense under this section, or that facilitated or assisted such activity, shall be subject to forfeiture under chapter 712A. [L 2001, c 230, §1]

Cross References

Protection of personal information, civil remedies, see chapters 487J, 487N, and 487R.

COMMENTARY ON §710-1017.5

Act 230, Session Laws 2001, created the criminal offense of the sale or manufacture of deceptive identification documents. Testimony regarding the measure indicated that identification documents, such as driver licenses, identification cards, and birth certificates, have become prey to unscrupulous commercial enterprises that have created a market for selling falsified official identification documents. False identification documents could be used in place of authentic documents for everyday purposes, such as proof of identification, age, or citizenship. Senate Standing Committee Report No. 1131.

" **§710-1018 Securing the proceeds of an offense.** (1) A person commits the offense of securing the proceeds of an offense if, with intent to assist another in profiting or benefiting from the commission of a crime, he aids the person in securing the proceeds of the crime.

(2) Securing the proceeds of an offense is a class C felony if the person assisted committed a class A or B felony or murder of any degree; otherwise it is a misdemeanor. [L 1972, c 9, pt of §1; am L 1997, c 149, §5]

COMMENTARY ON §710-1018

This section is aimed at persons who aid others to accomplish the unlawful objects of their crimes, for example, by safeguarding the proceeds thereof or converting the proceeds into a negotiable form. The actor need not have the intent to hinder prosecution required under §§710-1029 and 1030. As the Model Penal Code commentary points out, there would be "a certain artificiality in proceeding on the theory of obstruction of justice [by hindering prosecution] against one who has really linked himself to the principal offense, and whose interest in frustrating detection is bound to be as much for himself as others."[1]

Previous Hawaii law was more limited than the Code and dealt only with receiving stolen goods.[2] The Code deals with all acts of securing the proceeds of an offense.

SUPPLEMENTAL COMMENTARY ON §710-1018

Act 149, Session Laws 1997, amended this section to provide that securing the proceeds of an offense is a class C felony if the person assisted, committed murder of any degree. The legislature found that the offense of murder warrants punishment that is sufficient to fit the grave consequences of the crime. Senate Standing Committee Report No. 1600.

§710-1018 Commentary:

1. M.P.C., Tentative Draft No. 9, comments at 202 (1959).

2. H.R.S. chapter 761.

" **[§710-1019] Destroying or defacing official notices; penalty.** (1) Any person who intentionally or knowingly removes, destroys or defaces any notice posted in compliance

with any statute, rule, order of court, or order of the department of health, before the expiration date of the notice, shall be guilty of a violation subject to a fine of not more than $100.

(2) Any such notice shall prominently include the expiration date and a statement, "THE DESTRUCTION, REMOVAL, OR DEFACEMENT OF THIS NOTICE PRIOR TO THE EXPIRATION DATE IS PROHIBITED BY LAW AND PUNISHABLE BY FINE." [L 1991, c 223, §1]

Revision Note

Subsections redesignated pursuant to §23G-15.

COMMENTARY ON §710-1019

Act 223, Session Laws 1991, added this section which provides a penalty for destroying or defacing official notices. The legislature felt that a protected notice should contain a statement that the destruction, removal or defacement of an official notice is prohibited by law, in order to make it clear to the public the importance of the document. Conference Committee Report No. 46.

"PART III. ESCAPE AND OTHER OFFENSES RELATED TO CUSTODY

§710-1020 Escape in the first degree. (1) A person commits the offense of escape in the first degree if the person intentionally employs physical force, the threat of physical force, or a dangerous instrument against the person of another in escaping from a correctional or detention facility or from custody.

(2) Escape in the first degree is a class B felony. [L 1972, c 9, pt of §1; gen ch 1993]

Case Notes

Defendant escaped from prison when defendant failed to return from furlough. 71 H. 251, 787 P.2d 690 (1990).

" **§710-1021 Escape in the second degree.** (1) A person commits the offense of escape in the second degree if the person intentionally escapes from a correctional or detention facility or from custody.

(2) Escape in the second degree is a class C felony. [L 1972, c 9, pt of 1; gen ch 1993]

Case Notes

Defense of necessity under §703-302 is available in escape situations. 58 H. 252, 566 P.2d 1378 (1977).

Minor failing to return to detention facility after furlough commits escape. 59 H. 456, 583 P.2d 337 (1978).

Sufficiency of indictment. 59 H. 549, 584 P.2d 117 (1978).

Arrest is complete and defendant is in "custody" when defendant has submitted to police and process of taking defendant to police station or to a judge has commenced. 62 H. 99, 612 P.2d 102 (1980).

Although not handcuffed, defendant had been placed under arrest and was therefore in custody for purposes of escape statute. 72 H. 360, 817 P.2d 1060 (1991).

District court erred in holding that defendant's conviction for second degree escape from custody under this section was a "crime of violence" for purposes of U.S. Sentencing Guideline §4B1.1(a). 782 F.3d 510 (2015).

There was no support for the government's argument that §710-1000(3) [defining "custody"] sets forth "elements" that the prosecution must prove in order to sustain a conviction under this section; none of the modes of custody set forth in §710-1000(3) is an element of the crime of escape from custody. 782 F.3d 510 (2015).

COMMENTARY ON §§710-1020 AND 710-1021

The basic offense of escape is punished by the Code as a class C felony. When the aggravating circumstances of force or violence are present, the grade of the offense is increased to a class B felony.

Escape is a fairly serious offense not only because of the potential danger to guards and bystanders incident to the nature of the activity but because it undermines the effectiveness of the system of criminal correction and punishment. From the administrative point of view, there are the disruptions of prison routine and the expense of recapture to consider as additional social evils. Moreover, when a question is raised concerning the legality of the detention, it is desirable to encourage reliance on legal processes, rather than self-help, to terminate any unjustified detention. In the absence of force or violence, the above social dangers and administrative inconvenience, alone, justify the class C felony sanction.

Previous Hawaii law graded escape on the basis of the crime for which the actor was originally in custody.[1] There are two objections to this approach. First, where the actor has been lawfully imprisoned as a sanction for a crime which the actor has committed, the danger presented by the actor's escape is sui

generis and has nothing to do with the offense for which the actor was committed. If a thief and a forger (or an accused thief and an accused forger) were to escape by identical methods, they should be penalized identically, according to the danger presented by their escapes alone. Hence, the Code has rejected this aspect of the former law and grades escapes according to the degree of individual and social danger presented by the actor's conduct.

SUPPLEMENTAL COMMENTARY ON §§710-1020 AND 710-1021

The Code as adopted by the legislature in 1972 differs from the Proposed Draft in two areas. First, it includes escapes from "correctional" as well as "detention" facilities while the Proposed Draft did not. Correctional facilities were included in order to clarify that the offenses apply to existing diagnostic and rehabilitation programs as well as detention facilities. Conference Committee Report No. 2 (1972).

Second, the Code makes the penalty for escape more severe than the Proposed Draft. Under the Code, escape in the first degree is a class B felony, and escape in the second degree is a class C felony. The Proposed Draft had stated the penalties as class C and misdemeanor, respectively.

§§710-1020 And 710-1021 Commentary:

1. H.R.S. §§740-1 through 740-3.

" **§710-1022 Promoting prison contraband in the first degree.** (1) A person commits the offense of promoting prison contraband in the first degree if:

(a) The person intentionally conveys a dangerous instrument or drug to any person confined in a correctional or detention facility; or

(b) Being a person confined in a correctional or detention facility, the person intentionally makes, obtains, or possesses a dangerous instrument or drug.

(2) A "dangerous instrument" shall have the same meaning as defined in section 707-700; a dangerous instrument may only be possessed by or conveyed to a confined person with the facility administrator's express prior approval. A "drug" shall include dangerous drugs, detrimental drugs, harmful drugs, intoxicating compounds, marijuana, and marijuana concentrates as listed in section 712-1240; a drug may only be possessed by or conveyed to a confined person with the facility administrator's express prior approval and under medical supervision.

(3) Promoting prison contraband in the first degree is a class B felony. [L 1972, c 9, pt of §1; am L 1976, c 99, §1; am L 1986, c 339, §79; gen ch 1993]

Case Notes

As suspect classification or fundamental right was not involved, and based upon dissimilar statutory treatment generally accorded to possession of marijuana as opposed to alcohol, where there was a rational basis for dissimilar punishment, section did not violate defendant's equal protection right because it imposed a more severe penalty for marijuana possession than for alcohol possession under §710-1023. 92 H. 217 (App.), 990 P.2d 115 (1999).

Section 710-1023(1)(b) (1993) is a lesser included offense of subsection (1)(b). 92 H. 217 (App.), 990 P.2d 115 (1999).

" **§710-1023 Promoting prison contraband in the second degree.** (1) A person commits the offense of promoting prison contraband in the second degree if:

(a) The person intentionally conveys known contraband to any person confined in a correctional or detention facility; or

(b) Being a person confined in a correctional or detention facility, the person intentionally makes, obtains, or possesses known contraband.

(2) "Contraband" means any article or thing, other than a dangerous instrument or drug as defined in section 710-1022(2), that a person confined in a correctional or detention facility is prohibited from obtaining or possessing by statute, rule, or order.

(3) Promoting prison contraband in the second degree is a class C felony. [L 1972, c 9, pt of §1; gen ch 1993; am L 1999, c 23, §1]

Case Notes

As suspect classification or fundamental right was not involved, and based upon dissimilar statutory treatment generally accorded to possession of marijuana as opposed to alcohol, where there was a rational basis for dissimilar punishment, §710-1022 did not violate defendant's equal protection right because it imposed a more severe penalty for marijuana possession than for alcohol possession under this section. 92 H. 217 (App.), 990 P.2d 115 (1999).

Subsection (1)(b) (1993) is a lesser included offense of §710-1022(1)(b). 92 H. 217 (App.), 990 P.2d 115 (1999).

COMMENTARY ON §§710-1022 AND 710-1023

These sections penalize the introduction into correctional or detention facilities of materials likely to be used to effectuate escape or otherwise contravene prison rules. Where the materials involved are intrinsically dangerous, to the actor or others, the offense is made a class B felony. Otherwise, it is a class C felony. It is clear that the peculiar population in correctional and detention facilities warrants the reinforcement of regulatory measures by criminal penalties.

The definition of "unapproved dangerous instrument" is intended to ensure that it is not criminal "for a prisoner to have articles of potential danger when they are made available to him by prison authorities, e.g., in connection with tasks assigned to the prisoner."[1]

The definition of "unapproved drug" is intended to allow prison authorities to regulate the use of drugs by prisoners under their control. References to "narcotic drugs" or "dangerous drugs" would make the regulatory power of prison authorities depend on the statutory definition of those terms; a result which is undesirable. The power of prison authorities ought not to depend on the ability of the legislature to continually enact amendments which reflect the current drug market. Furthermore, definitions of those terms for purposes of drug abuse offenses would not necessarily serve the needs of prison population control.

Previous Hawaii law made it unlawful for one to bring into or to have possession of "any alcohol, harmful drug, narcotic drug in any amount, or firearm within or on the grounds of" any detention facility, "unless in the course of his duty or profession, without the permission of the superintendent" in charge of the facility.[2] This former offense corresponds roughly to promoting contraband in the first degree in its coverage and penalty. The Code removes alcohol from the first degree offense, but otherwise expands the offense by including "dangerous instruments," not just "firearms." For example, crowbars and knives, as well as pistols, would be covered. Moreover, the statutory definition of "harmful drug" was "specific" in stating the types of drugs regarded as "harmful." The Code makes the definition "procedural" and requires the prior approval of the supervisor of the facility. The residual second degree offense is an addition to the existing law.

SUPPLEMENTAL COMMENTARY ON §§710-1022 AND 710-1023

The Proposed Draft had limited the offense of promoting prison contraband to detention facilities. When the legislature adopted the Code, it added correctional facilities to clarify that the offenses apply to diagnostic and rehabilitation programs as well as detention facilities. Conference Committee Report No. 2 (1972). The legislature also raised the penalties to class B felony and class C felony, instead of class C felony and petty misdemeanor, as recommended by the Proposed Draft.

Act 99, Session Laws 1976, amended §710-1022 to provide more workable definitions for materials prohibited from introduction into correctional and detention facilities. The term "unapproved dangerous instrument or unapproved drug" was replaced by "dangerous instrument or drug" and the meanings of "dangerous instrument" and "drug" were tied to the meanings set forth in §707-700(4) and §712-1240(1) to (3) and (5) to (7).

Act 23, Session Laws 1999, amended §710-1023 by clarifying the definition of contraband as used for the offense of promoting prison contraband in the second degree. The legislature found that §710-1022 (relating to the offense of promoting prison contraband in the first degree) deals exclusively with dangerous instruments and drugs. Section 710-1023 (relating to the offense of promoting prison contraband in the second degree) also includes dangerous instruments and drugs within the definition of "contraband." The term "contraband" as used in §710-1023 includes any article or thing which the inmate is prohibited by law to possess. By definition, this would include dangerous instruments or drugs which are already prohibited in §710-1022. As a result, the prohibitions in §§710-1022 and 710-1023 overlap. Under a current Hawaii supreme court ruling, if two degrees of an offense overlap, the offender must be charged with the lesser offense. As a result, §710-1022, which carries the higher class B felony penalty, is currently ineffectual and cannot be utilized by prosecutors. The legislature found that the Act clarified the ambiguity in the law and gave effect to the original legislative intent of the two provisions. House Standing Committee Report No. 432, Senate Standing Committee Report No. 1388.

§§710-1022 And 710-1023 Commentary:

1. M.P.C., Tentative Draft No. 8, comments at 137 (1958).

2. H.R.S. §353-49.

" **§710-1024 Bail jumping in the first degree.** (1) A person commits the offense of bail jumping in the first degree if,

having been released from custody by court order with or without bail, upon condition that the person will subsequently appear as ordered in connection with a charge of having committed a felony, the person knowingly fails to appear as ordered.

(2) Bail jumping in the first degree is a class C felony. [L 1972, c 9, pt of §1; am L 1993, c 10, §1; am L 2004, c 17, §1]

" **§710-1025 Bail jumping in the second degree.** (1) A person commits the offense of bail jumping in the second degree if, having been released from custody by court order with or without bail, upon condition that the person will subsequently appear as ordered in connection with a charge of having committed a misdemeanor or a petty misdemeanor, the person knowingly fails to appear as ordered.

(2) Bail jumping in the second degree is a misdemeanor. [L 1972, c 9, pt of §1; gen ch 1993; am L 2004, c 17, §2]

COMMENTARY ON §§710-1024 AND 710-1025

Unlike the sections dealing with escape, the sanctions for bail jumping are based upon the actor's breaking of a covenant the actor has made with the law. The actor has promised that the actor will appear before a certain court on a certain date. The seriousness of the breach of the covenant is directly proportional to the gravity of the offense for which the actor must answer at the appointed time. Hence, the sanctions are roughly proportional to the gravity of the offense charged: jumping bail for class A, B or C felonies is a class C felony; jumping bail for lesser offenses is a misdemeanor.

Hawaii previously did not have criminal penalties for forfeiture of bail. This is a reflection of the philosophy of a number of jurisdictions that rely too heavily upon the monetary sanction to secure compliance with an order to appear at some future date. Such a philosophy, when coupled with the fee required by professional bail bondsmen, may lead to disproportionately heavy bails being set for relatively poor individuals. The Code espouses a more general use of the criminal sanction for failure to appear, encouraging the release of relatively poor people either on minimal bail or on their own recognizance, and assuring the appearance of the more wealthy people who might otherwise be inclined to forfeit.

SUPPLEMENTAL COMMENTARY ON §§710-1024 AND 710-1025

The Code as adopted by the legislature differs from the Proposed Draft in two respects. In §710-1024, the term "or C"

was inserted before the term "felony." Thus, a person commits the offense of bail jumping in the first degree if the person fails to appear in connection with a charge of class A or B or C felony.

In §710-1025, the term "a Class C felony" which was in the Proposed Draft was deleted so that the offense of bail jumping in the second degree is restricted to failure to appear involving charges of a misdemeanor or petty misdemeanor only.

Act 10, Session Laws 1993, amended §710-1024 to clarify that bail jumping in the first degree applies to all felonies, including murder in the first and second degrees and other nondesignated felonies specified in the Hawaii Revised Statutes other than in the Penal Code, rather than only to felonies designated as class A, B, or C. Act 10 also made the language in that section gender neutral. House Standing Committee Report No. 864, Senate Standing Committee Report No. 450.

Act 17, Session Laws 2004, amended §§710-1024 and 710-1025 by lowering the state-of-mind requirement for bail jumping offenses from "intentionally" to "knowingly." The legislature found that the change from "intentionally" to "knowingly" failing to appear may deter individuals from missing their court dates and facilitate convictions for bail jumping. House Standing Committee Report No. 201-04, Senate Standing Committee Report No. 3082.

" **§710-1026 Resisting arrest.** (1) A person commits the offense of resisting arrest if the person intentionally prevents a law enforcement officer acting under color of the law enforcement officer's official authority from effecting an arrest by:

(a) Using or threatening to use physical force against the law enforcement officer or another; or

(b) Using any other means creating a substantial risk of causing bodily injury to the law enforcement officer or another.

(2) Resisting arrest is a misdemeanor. [L 1972, c 9, pt of §1; gen ch 1993; am L 2001, c 91, §4]

COMMENTARY ON §710-1026

Resisting arrest is one of the commonest forms of obstructing government operation. The Code deals specifically with resisting arrest out of a desire to confine the offense to forcible resistance that involves some substantial danger to the person. Mere non-submission ought not to be an offense. One who runs away from an arresting officer or who makes an effort to shake off the officer's detaining arm might be said to

obstruct the officer physically,[1] but this type of evasion or minor scuffling is not unusual in an arrest, nor would it be desirable to make it a criminal offense to flee arrest. In this case the proper social course is to authorize police pursuit and use of reasonable force to effect the arrest. If the actor is captured, the actor may be convicted of the underlying offense. If conviction cannot be had, it would be a grave injustice to permit prosecution for an unsuccessful effort, by an innocent person, to evade the police.[2]

Note that the arrest may be either of the actor or of a third person: the social and individual harms involved are the same in either case. Moreover, it is no defense to a charge under this section that the officer was making an unlawful arrest, provided the officer was acting under color of law. American jurisdictions have almost universally rejected the common-law doctrine that it is permissible to resist an unlawful arrest with as much force as one has at one's disposal. In a well-ordered society, the evils involved in allowing such resistance far outweigh the infrequent and usually minor inconvenience of submitting to any arrest made under color of law and disputing it within the legal framework. The requirement that the arrest be made under color of the officer's official authority obviates the necessity for a separate section barring such a defense.

The previous Hawaii law penalizing interference with an arresting police officer was similar to this section of the Code, except that the former law did not require the use of force or the risking of bodily injury. The penalties are roughly the same.[3]

Cases of interference which do not involve force or risk of bodily injury, but which present serious social dangers are included under §§710-1029 and 1030 as cases of hindering prosecution. This section of the Code is in accord with the Model Penal Code and with most recent state revisions in both definition and penalty.[4]

Case Notes

Resisting arrest statute not applicable where defendant's arrest was complete and defendant was in custody before fleeing police. 72 H. 360, 817 P.2d 1060 (1991).

Statutory references in oral charge did not cure the omission of essential elements in resisting arrest and assault against a police officer counts of the charge. 77 H. 309, 884 P.2d 372 (1994).

Mentioned: 9 H. App. 315, 837 P.2d 1313 (1992).

§710-1026 Commentary:

1. But see, §710-1010(2)(a) which limits §710-1010 (obstructing government operations) to non-arrest situations.

2. M.P.C., Tentative Draft No. 8, comments at 128-29 (1958).

3. H.R.S. §740-11.

4. M.P.C. §242.2; Prop. Mich. Rev. Cr. Code §4625; Prop. Pa. Cr. Code §2205.

" **[§710-1026.9] Resisting an order to stop a motor vehicle in the first degree.** (1) A person commits the offense of resisting an order to stop a motor vehicle in the first degree if the person:

(a) Intentionally fails to obey a direction of a law enforcement officer, acting under color of the law enforcement officer's official authority, to stop the person's motor vehicle; and

(b) While intentionally fleeing from or attempting to elude a law enforcement officer:

(i) Operates the person's motor vehicle in reckless disregard of the safety of other persons; or

(ii) Operates the person's motor vehicle in reckless disregard of the risk that the speed of the person's vehicle exceeds:

(A) The applicable state or county speed limit by thirty miles per hour or more; or

(B) Eighty miles per hour or more, irrespective of the applicable state or county speed limit.

For purposes of this section, "the applicable state or county speed limit" shall have the same meaning as in section 291C-105.

(2) Resisting an order to stop a motor vehicle in the first degree is a class C felony. [L 2016, c 231, §47]

COMMENTARY ON §710-1026.9

Act 231, Session Laws 2016, added this section to implement recommendations made by the Penal Code Review Committee convened pursuant to House Concurrent Resolution No. 155, S.D. 1 (2015).

" **§710-1027 Resisting an order to stop a motor vehicle in the second degree.** (1) A person commits the offense of resisting an order to stop a motor vehicle in the second degree if the person intentionally fails to obey a direction of a law

enforcement officer, acting under color of the law enforcement officer's official authority, to stop the person's vehicle.

(2) Resisting an order to stop a motor vehicle in the second degree is a misdemeanor. [L 1972, c 9, pt of §1; gen ch 1993; am L 2001, c 91, §4; am L 2016, c 231, §48]

COMMENTARY ON §710-1027

This section is designed to deal with the special problems incident to motor vehicle direction and apprehension of suspects in motor vehicles. Note that whereas it is not made an offense to evade arrest by running away, if the attempt to escape involves a motor vehicle, this section comes into operation. One reason for this special treatment is the inherent danger involved in escape and pursuit by motor vehicle. Another reason, incident to traffic direction and control, is the desirability of giving a peace officer criminal sanctions to back up the peace officer's reasonable traffic directions.

The section specifies that the actor act intentionally. For conviction the actor must have recognized the person giving the order to be a peace officer. For the same reasons discussed in the commentary to §710-1026, it is no defense that the order given was unlawful.

Previous Hawaii law had no specific provision relating to this situation.

SUPPLEMENTAL COMMENTARY ON §710-1027

Act 231, Session Laws 2016, amended this section by changing the offense of "resisting an order to stop a motor vehicle" to "resisting an order to stop a motor vehicle in the second degree." The amendment implemented recommendations made by the Penal Code Review Committee convened pursuant to House Concurrent Resolution No. 155, S.D. 1 (2015).

Case Notes

Charge was fatally defective for failing to allege intent. 68 H. 586, 723 P.2d 185 (1986).

Evidence held sufficient. 1 H. App. 651, 624 P.2d 940 (1981).

Harm committed by defendant resisting an order to stop a motor vehicle under subsection (1) by driving away after traffic stop not reasonably designed to actually avoid possible serious physical harm to defendant or passenger under §703-302(1)(a). 81 H. 147 (App.), 913 P.2d 558 (1996).

" **§710-1028 Hindering prosecution; definition of rendering assistance.** For the purposes of sections [710-1029 and 710-1030], a person renders assistance to another if he:

(1) Harbors or conceals such person;

(2) Warns such person of impending discovery, apprehension, prosecution, or conviction, except this does not apply to a warning given in connection with an effort to bring another into compliance with the law;

(3) Provides such person with money, transportation, weapon, disguise, or other means of avoiding discovery, apprehension, prosecution, or conviction;

(4) Prevents or obstructs, by means of force, deception, or intimidation, anyone from performing an act that might aid in the discovery, apprehension, prosecution, or conviction of such person; or

(5) Suppresses by an act of concealment, alteration, or destruction any physical evidence that might aid in the discovery, apprehension, prosecution, or conviction of such person. [L 1972, c 9, pt of §1]

" **§710-1029 Hindering prosecution in the first degree.** (1) A person commits the offense of hindering prosecution in the first degree if, with the intent to hinder the apprehension, prosecution, conviction, or punishment of another for a class A, B, or C felony or murder in any degree, the person renders assistance to the other person.

(2) Hindering prosecution in the first degree is a class C felony. [L 1972, c 9, pt of §1; am L 1997, c 149, §6]

Case Notes

Although there was insufficient evidence to support a conviction for hindering prosecution in the first degree, there was sufficient evidence adduced to convict petitioner of the lesser included offense of hindering prosecution in the second degree under §710-1030; evidence was adduced that petitioner used physical force to prevent the officers from pursuing petitioner's son, the officers were acting under the color of law, and the officers informed petitioner that they were seeking to arrest son, which was sufficient evidence that petitioner was aware of the attendant circumstance that son was being apprehended for "a crime". 121 H. 74, 214 P.3d 613 (2009).

Where there was no evidence presented that petitioner was aware of the attendant circumstance that petitioner's son committed a felony, there was an insufficient basis for

petitioner's conviction of a felony under this section. 121 H. 74, 214 P.3d 613 (2009).

" **§710-1030 Hindering prosecution in the second degree.** (1) A person commits the offense of hindering prosecution in the second degree if, with the intent to hinder the apprehension, prosecution, conviction, or punishment of another for a crime, he renders assistance to such person.

(2) Hindering prosecution in the second degree is a misdemeanor. [L 1972, c 9, pt of §1]

Case Notes

Although there was insufficient evidence to support a conviction for hindering prosecution in the first degree, there was sufficient evidence adduced to convict petitioner of the lesser included offense of hindering prosecution in the second degree; evidence was adduced that petitioner used physical force to prevent the officers from pursuing petitioner's son, the officers were acting under the color of law, and the officers informed petitioner that they were seeking to arrest son, which was sufficient evidence that petitioner was aware of the attendant circumstance that son was being apprehended for "a crime", as required under this section. 121 H. 74, 214 P.3d 613 (2009).

COMMENTARY ON §§710-1028 TO 710-1030

These sections, along with §§710-1013 (compounding) and 710-1018 (securing the proceeds of an offense), would have been treated at common law under the heading of accessory after the fact. However, in keeping with the philosophy stated in those earlier sections, liability for conduct relating to an offense which has already been consummated ought to be determined more with regard to the dangerousness of the particular post-offense acts involved than with regard to the dangerousness of the prior substantive offense. Thus, the conduct involved in these sections is treated sui generis as a form of obstructing justice. The offense of hindering prosecution focuses on the fact that the real danger involved in such conduct is that of subverting or obstructing the administration of justice.[1] The particular nature of the prior offense is important only to the extent that it is an index of the general gravity which the associated obstruction represents. However, the gravity of the obstruction is not necessarily equivalent with the gravity of the prior offense. The Code incorporates this index, to the

extent that it has value, by relating the crime which the person assisted has committed to the grading of §§710-1029 and 1030.

The underlying conduct involved in these sections is that of rendering assistance to another. Such assistance is defined in terms of attempts to evade or impede justice at any stage of the apprehension, prosecution, conviction, or punishment of a potential or actual offender. Where the underlying offense is a class A, B or C felony, hindering prosecution is a class C felony. Where the underlying offense is a misdemeanor or petty misdemeanor, or where culpability on the part of the other with respect to class or grade of the underlying cause cannot be proved, hindering prosecution is a misdemeanor.

Previous Hawaii law had no specific provisions equivalent to these sections. Conduct covered by these sections would have been covered, in part, under the former sections relating to principals and accessories,[2] or escape.[3] Prior coverage was spotty and inconsistent. For instance, the accessory section provided no liability for acts of concealment where the underlying offense was not punishable by imprisonment for five years or more.[4] Where an escapee was concealed or harbored, the offense was a misdemeanor[5] notwithstanding the fact that the escape was punishable, under prior law, by only a three-year term.

The Code attempts to treat the offense of hindering prosecution in a general manner rather than on an ad hoc basis. Hindering the apprehension of an escapee is not treated separately; escape being an offense, one who hinders the apprehension of an escapee would come within the coverage of §710-1030. Because the conduct is treated generally, its coverage is more complete and the gradation of offenses more rational than under prior law.

SUPPLEMENTAL COMMENTARY ON §§710-1028 TO 710-1030

The Code differs from the Proposed Draft in that the offense of hindering prosecution in the first degree includes assistance rendered in connection with a class C felony, as well as class A and B felonies.

Act 149, Session Laws 1997, amended §710-1029 to provide that a person commits the offense of hindering prosecution in the first degree if with the intent to hinder the apprehension, prosecution, conviction, or punishment of another for murder in any degree, the person renders assistance to the other person. The legislature found that the offense of murder warrants punishment that is sufficient to fit the grave consequences of the crime. Senate Standing Committee Report No. 1600.

§§710-1028 To 710-1030 Commentary:

1. See M.P.C., Tentative Draft No. 9, comments at 195 (1959).

2. H.R.S. chapter 704.

3. Id. §740-3.

4. Id. §704-5.

5. Id. §740-3.

" **§710-1031 Intimidating a correctional worker.** (1) A person commits the offense of intimidation of a correctional worker if the person uses force upon or a threat of force directed to a correctional worker, or the correctional worker's immediate family, with intent to influence such worker's conduct, decision, action or abstention from action as a correctional worker.

(2) "Correctional worker", as used in this section means any employee of the State or any county who works in a correctional or detention facility, a court, a paroling authority or who by law has jurisdiction over any legally committed offender or any person placed on probation or parole.

(3) "Threat" as used in this section means any threat proscribed by section 707-764(1).

(4) Intimidation of a correctional worker is a class B felony. [L 1974, c 196, §1; am L 1980, c 267, §1; gen ch 1993]

COMMENTARY ON §710-1031

Act 196, Session Laws 1974, added this section "to provide class B felony sanctions against those persons who, by threat of harm directed to a correctional worker or his immediate family, intend to influence or deter the correctional worker in performing his duties." House Standing Committee Report No. 731-74.

The Committee Report further states: "Your Committee notes that under the present law, threatening correctional personnel would be a violation of §707-715 of the Penal Code entitled 'Terroristic threatening', a misdemeanor, or §707-724 of the Penal Code entitled 'Criminal coercion', a class C felony. Your Committee believes that the nature of the crime is such that it should be classified as a class B felony."

"PART IV. BRIBERY

§710-1040 Bribery. (1) A person commits the offense of bribery if:

(a) The person confers, or offers or agrees to confer, directly or indirectly, any pecuniary benefit upon a public servant with the intent to influence the public servant's vote, opinion, judgment, exercise of discretion, or other action in the public servant's official capacity; or

(b) While a public servant, the person solicits, accepts, or agrees to accept, directly or indirectly, any pecuniary benefit with the intent that the person's vote, opinion, judgment, exercise of discretion, or other action as a public servant will thereby be influenced.

(2) It is a defense to a prosecution under subsection (1) that the accused conferred or agreed to confer the pecuniary benefit as a result of extortion or coercion.

(3) For purposes of this section, "public servant" includes in addition to persons who occupy the position of public servant as defined in section [710-1000], persons who have been elected, appointed, or designated to become a public servant although not yet occupying that position.

(4) Bribery is a class B felony. A person convicted of violating this section, notwithstanding any law to the contrary, shall not be eligible for a deferred acceptance of guilty plea or nolo contendere plea under chapter 853. [L 1972, c 9, pt of §1; gen ch 1993; am L 2006, c 230, §47]

COMMENTARY ON §710-1040

In most cases, bribery subverts the efficient functioning of the government to the benefit of a private individual, or a limited class of individuals. Efficiency is undermined because those choices and decisions which are the job of public servants cease to be made solely on the basis of merit, and hence the chance that the alternative most beneficial to the functioning of the government, or to the people collectively, is decreased. The pervasive and far-reaching nature of this offense against public administration warrants the class C felony sanction.

Moreover, both parties to bribery are obviously to be considered culpable, one no less than the other. The victim of this offense is usually the public in general, although in particular instances (particularly competitive bid and judicial or quasi-judicial situations) individuals may suffer more directly. Subsection (1)(a) covers the offeror of the bribe, while subsection (1)(b) covers the offeree.

The defense provided for in subsection (2) is intended to allow the actor who commits bribery as a result of extortion or coercion to have the opportunity to raise these facts as a defense. As with all defenses in this Code which are not made affirmative, once the issue is raised, the prosecution must negate it beyond a reasonable doubt. It is questionable whether the sections on duress (§702-231) or choice of evils (§703-302) adequately cover this situation. Therefore, the defense is specifically provided for by this subsection.

Previous Hawaii law recognized bribery as a criminal offense, but treated bribe giving as a lesser offense than bribe receiving,[1] which carried approximately the same penalty as that provided by the Code. The Code equalizes the penalties. In defining the offense the Code requires that the actor have the intent to influence or the intent to be influenced. Previous law required that, in case of bribery receiving, the actor act "corruptly" and with an "understanding." Under the Code, intent is the relevant state of mind. The Code requires that the actor solicit, accept, or agree to accept the pecuniary benefit with intent that the actor will thereby be influenced. As in the inchoate offense of conspiracy, the Code takes the unilateral approach to penal liability: the offer may be feigned, or made innocently, but if the receiver intended to be influenced thereby liability attaches, notwithstanding an absence of an agreement or understanding.

SUPPLEMENTAL COMMENTARY ON §710-1040

Act 230, Session Laws 2006, amended bribery from a class C to a class B felony, and provided that a person convicted of bribery shall not be eligible for a deferred acceptance of guilty plea or nolo contendere plea under chapter 853.

Case Notes

Plaintiffs failed to establish genuine issue of fact whether five million dollar gift to city and county of Honolulu was a bribe; plaintiffs raised genuine issue of fact whether campaign contributions were bribes. 906 F. Supp. 1377 (1995).

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§710-1040 Commentary:

1. Compare H.R.S. §725-1 with H.R.S. §725-2.

"PART V. PERJURY AND RELATED OFFENSES

§710-1060 Perjury. (1) A person commits the offense of perjury if in any official proceeding the person makes, under an oath required or authorized by law, a false statement which the person does not believe to be true.

(2) No person shall be convicted under this section unless the court rules that the false statement is a "materially false statement" as defined by section [710-1000]. It is not a defense that the declarant mistakenly believed the false statement to be immaterial.

(3) Perjury is a class C felony. [L 1972, c 9, pt of §1; gen ch 1993]

Case Notes

Sufficiency of indictment for perjury. 1 H. App. 510, 620 P.2d 1091 (1980).

" **§710-1061 False swearing in official matters.** (1) A person commits the offense of false swearing in official matters if the person makes, under an oath required or authorized by law, a false statement which the person does not believe to be true, and:

(a) The statement is made in an official proceeding; or

(b) The statement is intended to mislead a public servant in the performance of the public servant's official duty.

(2) False swearing in official matters is a misdemeanor. [L 1972, c 9, pt of §1; gen ch 1993]

" **§710-1062 False swearing.** (1) A person commits the offense of false swearing if the person makes, under oath required or authorized by law, a false statement which the person does not believe to be true.

(2) False swearing is a petty misdemeanor. [L 1972, c 9, pt of §1; gen ch 1993]

" **§710-1063 Unsworn falsification to authorities.** (1) A person commits the offense of unsworn falsification to authorities if, with an intent to mislead a public servant in the performance of the public servant's duty, the person:

(a) Makes any statement, in written, printed, or electronic form, which the person does not believe to be true, in an application for any pecuniary or other benefit or in a record or report required by law to be submitted to any governmental agency;

(b) Submits or invites reliance on any statement, document, or record, in written, printed, or

electronic form, which the person knows to be falsely made, completed, or altered; or

(c) Submits or invites reliance on any sample, specimen, map, boundary-mark, or other object the person knows to be false.

(2) Unsworn falsification to authorities is a misdemeanor.

[L 1972, c 9, pt of §1; gen ch 1993; am L 2014, c 33, §6]

COMMENTARY ON §§710-1060 TO 710-1063

Efficiency and fairness of governmental operations and public confidence in public administration, in general, and the administration of justice, in particular, require that information which the government relies upon not be falsified. Yet a general, undifferentiated penalty for all falsification to governmental authorities would not reflect contemporary social mores.

> False testimony and other misleading information to officials can convert governmental power into an instrument of injustice rather than justice, with unfortunate consequences not only for the individual whose life, freedom or property may be affected, but also for the community's general sense of security and confidence in the state. On the other hand, not all lying to officials can usefully or safely be made criminal. Measures other than punishment are our principal reliance against falsehood in judicial and other proceedings, where cross-examination and the opportunity to produce evidence on both sides of any issue facilitate the process of arriving at truth.[1]

It has been noted that a great difficulty in the law of perjury has been the severity of the penalties specified by the statutes; "in some situations falsification to officials is so widely practiced and tolerated by prevailing moral standards that severe penalties would be unrealistic."[2] For example, a person may claim domicile in a state in order to obtain a divorce when the person's real intent is to satisfy the minimum requirement of physical presence and to leave the state as soon as the decree is obtained. It is essential to distinguish between minor and more aggravated forms of false swearing.

General analysis. These sections divide falsification into four different offenses of three different grades depending on the presence of aggravating circumstances.

The offense of perjury, a class C felony, requires (a) a false statement which the court determines to be "material," (b) made under an oath, (c) in an official proceeding. This is the most serious offense and the only felony in this part. Other forms of falsification, whether under oath or not, are graded as

misdemeanors or petty misdemeanors. Falsification before a court, legislative committee, administrative agency, or other official proceeding, as defined in §710-1000(12), is deemed more culpable and more socially dangerous than similar falsity in a report, license application, or like matter, especially when these types of statements are often prepared by a lawyer.[3]

A false statement made under oath may constitute a misdemeanor if (a) it is made in an official proceeding, or (b) it is made with intent to mislead a public servant in the performance of the public servant's official duty. The statement need not be a "materially false statement." The offense is labeled false swearing to authorities.

False swearing, a residual offense, makes all other false statements, made under an oath required or authorized by law, a petty misdemeanor. In addition to other cases, this offense would cover falsification in a written statement which, pursuant to a requirement or authorization of law, has been sworn to before a notary, in a strictly private transaction. It would also cover a false affidavit filed with the government but not in an official proceeding, regardless of materiality or intent to mislead.

The final offense in this quartet does not require that the statement be under oath. Indeed, that statement need not be written; the falsification can be in the form of submission of, or invitation to rely on, false samples, specimens, maps, boundary-marks, or other objects. However, the falsification must be made with intent to mislead a public servant in the performance of the public servant's official duty.

Mens rea with respect to the truth of the statement. Under the offenses in this part, a defendant is not held liable for a false statement made inadvertently or out of ignorance. For penal liability to occur, the defendant's state of mind with regard to the truth of the statement must be a lack of an affirmative belief in the truth of the matter asserted. The defendant need not know the falsity of the statement, it would be sufficient for conviction if the defendant had no belief with regard to the statement's truthfulness. The defendant may have no idea whether or not the defendant's statement is true; but a lack of belief that it is true will support a conviction. The state of mind required is, in effect, a reckless disregard of the truth of the matter asserted. However, the requisite culpability is not expressed with the word "reckless" because applying that word, as defined in §702-206(3), presents certain difficulties when applied to the falsification offenses of this part. As the commentary to the Model Penal Code explains the problem:

> We have chosen to specify the mental state of lack of belief, in this section, rather than rely on the general definition of "recklessness" in [Section 702-206(3)], for two reasons. First, it requires considerable mental agility to construe [Section 702-206(3)] as applied to perjury, and second, we are satisfied that once lack of belief is established, no further inquiry into "justification" or "degree of culpability" would be useful.[4]

The nature of the oath requirement. The requirement or authorization of an oath is an implied instruction by the legislature to the individual making the statement that the information requested is of special significance, and that special sanctions will attend any falsifications. Since the oath's significance rests partially upon the legislative directive, it follows that an oath which is attended by penal sanctions ought to be one which is specifically required or authorized by law.[5] A public servant or private individual could not, as a matter of local policy or individual whim, require an oath without any basis in law and thereby make falsifications thereunder subject to these sanctions.

Section 710-1000(10), defining "oath," is specifically designed to provide government agencies with a convenient method of demanding the truth in applications and registrations without resort to cumbersome procedures of requiring oaths before notaries. With regard to the function of these falsification offenses, it should not matter whether the State's special emphasis on receiving truthful information is indicated by a requirement of an oath or affirmation, or by written notice on a government form. The notice of special significance of the requested information and the warning of special sanctions are the same in either case.

Materiality; intent to mislead. Materiality with regard to a false statement (required for a perjury conviction) and an intent to mislead a public servant (required for one form of false swearing in official matters and for all forms of unsworn falsification to authorities) are similar in their functional role: each limits the application of an offense when the falsification is not likely to obstruct justice or which is trivial. On the other hand, the terms are not synonymous. A person may not intend to mislead, yet the person's falsification may be material.

Materiality of the falsification distinguishes perjury, a felony, from the lesser offenses in this part. Given the requisite state of mind with regard to truthfulness of the statement, falsification, in an official proceeding, which is

material, constitutes the greatest risk of obstruction of justice. A "materially false statement" means:

> any false statement, regardless of its admissibility under the rules of evidence, which could have affected the course or outcome of the proceeding.[6]

Section 710-1060 holds the actor strictly liable with regard to the actor's knowledge of a false statement's materiality. Materiality is not made an element of the offense; it is not a fact which the trier of fact must find, but a question of law for the court to determine.[7] Beyond the difficulty of proving a culpable state of mind with regard to this factor, the importance of the examination of witnesses in judicial and quasi-judicial proceedings is such that it is extremely unwise to allow a witness to decide what may or may not be material. Witnesses are usually not qualified to make judgments on materiality in the technical sense in which that concept is here employed. A crucial quality of an official proceeding, as defined in §710-1000(12), is that the hearing presents the "opportunity to test the credibility of witnesses by questioning that may begin, or wander, far from the central theme."[8] As the commentary to the Proposed Michigan Criminal Code states:

> A witness who falsifies an answer to a quite distant question he considers irrelevant may be blocking the eventual trial to relevant truth, thereby defeating one of the principal values of the hearing. Where, on the other hand, the false statement is made on a written application or report submitted to the government, there is considerably less likelihood that the actor will be confused about the materiality of the information given.[9]

One form of false swearing to authorities, §710-1061(1)(b), and all forms of unsworn falsification to authorities, §710-1063, require that the actor have an intent to mislead a public servant in the performance of the public servant's official duty. The falsification need not be material, but the actor's intent is crucial. Trivial falsifications which (1) do not impair the examination process of an official proceeding, and (2) are not intended to mislead the public servant, do not warrant the misdemeanor sanction. These falsifications are penalized, if at all, as false swearing (§710-1062), a petty misdemeanor.

The nature of the statement required. "Statement" is defined in §710-1000(16) to mean:

> any representation, but includes a representation of opinion, belief, or other state of mind only if the representation clearly relates to state of mind apart from or in addition to any facts which are the subject of the representation.

A prosecution for perjury or other offense defined by this part can be based on a statement of opinion or belief. The definition of "statement" is intended, however, to preclude liability based on the following logic: (1) the declarant states that X is so; (2) the declarant's statement includes, implicitly, a statement that the declarant believes X to be so; (3) although there is no evidence that X is not so, the declarant may be liable because the declarant did not believe X to be so. "The possibility of such prosecutions is disquieting.... [T]he making of true statements which the declarant believes to be false can hardly obstruct justice...."[10]

Previous Hawaii law. Previous Hawaii law defined perjury as "wilfully, knowingly and falsely stating... some material fact on oath where the oath is required or authorized by law."[11] While there has been very little judicial interpretation of the requirements of "wilfully, knowingly and falsely," stating the fact, the potential confusion with regard to (1) the meaning of "wilfully," as it relates or adds to "knowingly," and (2) the actor's knowledge of the statement's materiality or falsity, is largely obviated by the language of the Code. The Code provides a needed definition of "materiality" which is in substantial accord with court interpretation of that requirement.[12] Like the Code, previous law provided that the oath must be authorized or required by law.[13]

The former sanction of a possible twenty years' imprisonment[14] seems entirely disproportionate to the severity of the offense. Especially in light of the above discussion of overly severe penalties, a maximum penalty which is equivalent to the Code's penalty for murder, rape in the first degree, and kidnapping, probably tends more to undermine certainty of application than it does to deter perjury. As the National Conference of Commissioners on Uniform State Laws has said:

> [A] great difficulty in administering the law of perjury has been the severity of the penalties specified by the statutes. In the less aggravated forms of perjury, much could be gained in effectiveness and respect by making penalties less severe in the books and more frequently applied in the court rooms.[15]

The Code's class C felony sanction for perjury is in accord with that of the Model Penal Code and recent penal revisions.[16]

No provision is made in this Code for subornation of perjury.[17] Such cases are adequately covered by the sections dealing with solicitation.[18] Furthermore, if perjury is committed following the solicitation, the suborner will be liable for the offense of perjury itself on the basis of the

suborner's complicity in, and responsibility for, the conduct of the declarant.[19]

Under previous Hawaii law, all false swearing was either punished as perjury, or not at all. The Code adds to the law two lesser offenses, and grades the falsifications according to the culpability of the defendant and the tendency of the falsification to subvert the administration of justice or the performance of official duty. The Code also adds an offense covering unsworn falsification to authorities. These three new offenses cover wide gaps in the prior law relating to falsification.

SUPPLEMENTAL COMMENTARY ON §§710-1060 TO 710-1063

Act 33, Session Laws 2014, amended §710-1063 to apply to electronic statements, documents, or records. The legislature found that many government and business records are kept in electronic form. However, the current law prohibited only the alteration of records kept in written form. In 2000, Hawaii adopted the Uniform Electronic Transactions Act, chapter 489E, to recognize the need to establish the legal validity of electronic records, signatures, and contracts. Act 33 protected consumers by making relevant criminal offenses also applicable to electronic statements, documents, or records. Senate Standing Committee Report No. 3330, House Standing Committee Report No. 260-14.

§§710-1060 To 710-1063 Commentary:

1. M.P.C., Tentative Draft No. 6, comments at 100 (1957).

2. Id.

3. Prop. Mich. Rev. Cr. Code, comments at 394.

4. M.P.C., Tentative Draft No. 6, comments at 126 (1957).

5. See Prop. Mich. Rev. Cr. Code, comments at 390-391.

6. §710-1000(9).

7. §710-1060(2).

8. M.P.C., Tentative Draft No. 6, comments at 126 (1957). Note that this reasoning would favor imposition of criminal liability regardless of the materiality of the statement: the Code in

fact does this by the misdemeanor offense of false swearing to authorities (§710-1061), if the false swearing occurs in an official proceeding, and by the general residual petty misdemeanor offense of false swearing (§710-1062), which makes any false statement under oath an offense.

9. Prop. Mich. Rev. Cr. Code, comments at 398.

10. M.P.C., Tentative Draft No. 6, comments at 117 (1957).

11. H.R.S. §756-1.

12. See The King v. Angee, 8 Haw. 259 (1891) and In re French, 28 Haw. 47 (1924) (dictum).

13. But see commentary to §710-1068, infra, on the effect of irregularities in administering the oath.

14. H.R.S. §756-5.

15. The National Conference of Commissioners on Uniform State Laws, Model Act on Perjury, Prefatory Note (1952), quoted in M.P.C., Tentative Draft No. 6, comments at 102 (1957).

16. M.P.C. §241.1; N.Y.R.P.L. §210.15; Prop. Del. Cr. Code §722; Prop. Mich. Rev. Cr. Code §4905; Prop. Pa. Cr. Code §2102.

17. See H.R.S. §756-3.

18. Cf. §705-510, et seq.

19. Cf. §702-221, et seq.

" **§710-1064 Retraction.** (1) It is a defense to a prosecution under this part that the defendant retracted the defendant's falsification:

(a) If the falsification was made in an official proceeding, in the course of the same proceeding before discovery of the falsification became known to the defendant; or

(b) If the falsification was not made in an official proceeding, before reliance upon the falsification by the person or body for whom it was intended.

(2) "In the course of the same proceeding" includes separate hearings at separate stages of the same official or administrative proceeding but does not include any stage of the

proceeding after the close of the evidence. [L 1972, c 9, pt of §1; gen ch 1993]

COMMENTARY ON §710-1064

Previous Hawaii law contained no provision or case dealing with the problems of retraction. The common-law rule is that while retraction may be used to show inadvertence in making the statement, perjury once committed cannot be purged even by a correction during the same hearing.[1]

The rationale underlying this section is that it is socially desirable to keep the door open to a defense as an incentive for a witness to correct the witness' misstatement and tell the truth before the end of the proceeding.

[In the Proposed Draft, subsection (2) provided: "Statements made in separate hearings at separate stages of the same official or administrative proceeding shall be deemed to have been made in the course of the same proceeding." The Commentary herein is based on the Proposed Draft.]

Subsection (1)(a) requires that, if the falsification was made in a proceeding, the retraction must be made in the course of the same proceeding. Subsection (2) ensures that the phrase "in the course of the same proceeding" will be sufficiently broadly defined to encompass hearings at separate stages of a proceeding. Perjury committed at a preliminary hearing, for example, could be offset by retraction at the subsequent trial. Also, the retraction must be made before discovery of the falsification becomes known to the actor. This requirement is intended to deny the benefits of retraction to the person whose falsification has already been discovered and who, knowing the discovery, seeks to avoid liability by retraction. The necessity for so providing is the danger that otherwise a liberal retraction defense will encourage falsification. In discussing a claim that retraction even after discovery should constitute a defense, the United States Supreme Court said:

> The argument overlooks the tendency of such a view to encourage false swearing in the belief that if the falsity be not discovered before the end of the hearing it will have its intended effect, but, if discovered, the witness may purge himself of crime by resuming his role as witness and substituting the truth for his previous falsehood.[2]

The language in subsection (1)(a) allows retraction while avoiding this problem.

Subsection (1)(b) deals with falsification not made in a proceeding. Here, the test of "reliance" is used in determining whether any harm has occurred. It is difficult to see a point in punishing the actor where no State agency or employee has

relied upon the falsification in ordering State action or in disbursing State funds.

SUPPLEMENTAL COMMENTARY ON §710-1064

The Code as adopted by the legislature differs from the Proposed Draft in the wording of subsection (2). The Proposed Draft had provided that statements made in separate hearings at separate stages of the same official or administrative proceeding shall be deemed to be made in the course of the same proceeding. The legislature felt that as a defense, that proposal may provide too many avenues to avoid prosecution for perjury or any other related offense. Conference Committee Report No. 2 (1972). Thus, subsection (2) now states that "in the course of the same proceeding" includes separate hearings at separate stages of the same official or administrative proceeding, but does not include any stage of the proceeding after the close of the evidence.

§710-1064 Commentary:

1. Perkins, Criminal Law 392 (1957); see United States v. Norris, 300 U.S. 564 (1937).

2. United States v. Norris, supra at 574.

" **§710-1065 Inconsistent statements.** (1) Where a person has made inconsistent statements, each of which if made with the requisite state of mind and under the requisite circumstances would constitute an offense specified in this part, and both statements have been made within the period of the statute of limitations, the prosecution may proceed by setting forth the inconsistent statements in a single count alleging in the alternative that one or the other was false and not believed by the defendant. In such case it shall not be necessary for the prosecution to prove which statement was false; it shall only be necessary for the prosecution to prove:

(a) That one or the other was false and not believed by the defendant to be true; and

(b) The attendant circumstances and states of mind necessary to constitute each statement, if false, as an offense.

(2) The most serious offense of which a person may be convicted in such an instance shall be determined by hypothetically assuming each statement to be false. If offenses of different classes or grades would be established by the

making of the two statements, the person may only be convicted of the lesser class or grade. [L 1972, c 9, pt of §1]

COMMENTARY ON §710-1065

At common law, no conviction for perjury could be based upon two contradictory sworn statements, even where one of them was obviously intentionally false, unless the prosecution could prove which was the false statement.[1] The common-law rule has suffered much criticism for its apparent logical inconsistency.[2] Moreover, many recent code revisions have rejected the common-law rule.[3]

Accordingly, the Code adopts §710-1065, allowing prosecution on the basis of the inconsistent statements alone, provided that the requisite circumstances and culpability are also proved. The unwitting maker of contradictory statements will be protected by the requirement that the attendant circumstances and requisite state of mind be proved with regard to each statement. Note also that where two contradictory statements carry different sanctions, the declarant may only be convicted of the lesser offense under this section.

Previous Hawaii law contained no specific provisions for inconsistent statements, nor are there any reported Hawaii cases on this point.

§710-1065 Commentary:

1. Regina v. Hughes, 1 Car. & K. 519, 527, 174 Eng. Rep. 919, 923 (1844); see generally Comment, 53 Mich. L. Rev. 1165 (1955); Perkins, Criminal Law 390 (1957).

2. See Young v. United States, 212 F.2d 236, 241, 994 U.S. App. D.C. 54 (1954), cert. denied, 347 U.S. 1015 (1954); United States v. Buckner, 118 F.2d 468 (2d Cir. 1941); A.B.A. Commission on Organized Crime Report, 50-52 (1951).

3. M.P.C. §241.1(5); Ill. Cr. Code §32-2(b); N.Y.R.P.L. §210.20; Prop. Del. Cr. Code §724; Prop. Mich. Rev. Cr. Code §4915.

" **§710-1066 No prosecution based on previous denial of guilt.** No prosecution shall be brought:

(1) Under this part, if the substance of the defendant's false statement is the defendant's denial of guilt of an offense for which the defendant has previously been put in jeopardy; or

(2) For a substantive offense, the denial of which was the basis of a former prosecution under this part. [L 1972, c 9, pt of §1; gen ch 1993]

COMMENTARY ON §710-1066

The basic problem with which this section attempts to deal is concisely stated by the commentary to the Model Penal Code:

> It has been argued, nearly always unsuccessfully, that a defendant who has once been acquitted of a substantive offense ought not to be tried for perjury committed in defending that prosecution, at least where the perjury was as to the "core" of guilt in the first trial. Double jeopardy does not bar the perjury prosecution, since the offenses are different, and honest testimony under oath must be insisted upon even in the case of persons defending themselves against charges of crime. The doctrine of res judicata does not preclude conviction, even where conviction would seem to require direct contradiction of the acquittal of the original prosecution.[1]

The Model Penal Code goes on to admit that there is "almost no escape from the dilemma of either giving immunity to perjury by defendants or permitting the opportunity for abusive retrials of the original charge."[2]

There are, however, some constitutional grounds for barring such prosecutions. In one case,[3] a prosecution for false unsworn statements to FBI agents was dismissed on the ground, among others, that it would be a violation of due process to abandon the substantive charges against the defendants and subsequently indict them for previously denying their complicity therein.

The Code takes the position that this section will serve the worthwhile purpose of implementing the basic policy underlying our double jeopardy prohibition by forbidding a retrial of a substantive offense through the guise of a falsification charge and by barring a prosecution of a substantive offense the denial of which was the subject of a former falsification prosecution. Both prohibitions are necessary to ensure the desired result. If the section were only to bar a falsification prosecution subsequent to the prosecution of the substantive offense, there would be nothing to prevent the State from merely prosecuting the falsification offense first, and then the substantive offense the denial of which led to the first prosecution.

The section, as drafted, leaves open the possibility of prosecuting for false statements on collateral or subsidiary issues. The prohibition of prosecution only runs where the

substance of the alleged false statement is a denial of guilt for an offense.

Previous Hawaii law had no provisions dealing with this problem, nor are there any reported Hawaii cases on this point.

§710-1066 Commentary:

1. M.P.C., Tentative Draft No. 6, comments at 122-23 (1957).

2. Id.

3. United States v. Stark, 131 F. Supp. 190 (D.Md. 1955).

" **§710-1067 Corroboration.** In any prosecution under this part, except a prosecution based upon inconsistent statements pursuant to section 710-1065, falsity of a statement may not be established solely through contradiction by the testimony of a single witness. [L 1972, c 9, pt of §1]

COMMENTARY ON §710-1067

This section forbids convictions for perjury based solely upon the contradictory testimony of a single witness. Either some additional corroborating evidence or the contradictory testimony of an additional witness is needed for conviction.

The rationale for this rule is that the requirement is necessary as a safeguard to induce witnesses to testify freely.[1] Obtaining voluntary testimony in any proceeding would be difficult if the witness might be harassed upon the word of a disappointed litigant.[2] And if the witness were required to testify, it would seem that similar protection ought to be given the witness.

The policy question to be decided, then, is whether the overall protection and encouragement of persons who give statements (in the contexts specified by the offenses in this part) is worth foregoing occasionally the conviction of an apparent falsifier. The Code takes the position that it is. There is also an additional safeguard involved in protecting the innocent person. The protection rests upon the argument that since equally honest persons may well have different recollections of the same events, a conviction for a falsification offense ought not to rest upon the contradiction of two statements. Otherwise, an innocent person would be subject to prosecution every time another person, under oath, disputed the innocent person's recollection.[3]

This section would apply only to a relatively narrow class of cases which would not often be prosecuted. The section operates only where there is no evidence but the testimony of a single contradicting witness. Hence, one may view this section as a special gloss on the requirement of proof beyond a reasonable doubt, equivalent to stating that no case of a contradicting statement under oath, without more, can satisfy the general requirement of proof beyond a reasonable doubt in falsification cases.[4]

The Hawaii case law is that a person accused of perjury may be convicted only upon the testimony of two credible witnesses, or of one credible witness corroborated by other evidence sufficient to satisfy the trier of fact, beyond a reasonable doubt, as to the guilt of the accused.[5] Here, the Code is essentially in accord with the Hawaii rule, but codifies it, lends it greater clarity, and extends it to all falsification offenses in this part.

§710-1067 Commentary:

1. See United States v. Weiler, 323 U.S. 606 (1944).

2. Prop. Mich. Rev. Cr. Code §4920, comments at 402.

3. See Weiler, supra.

4. Prop. Mich. Rev. Cr. Code, comments at 403.

5. See Territory of Hawaii v. Shite, 43 Haw. 203 (1957).

" **§710-1068 Irregularities no defense.** It is not a defense to a prosecution under this part:

(1) That the defendant was not competent, for reasons other than lack of penal responsibility, to make the false statement alleged;

(2) That the statement was inadmissible under the law of evidence;

(3) That the oath was administered or taken in an irregular manner; or

(4) That the person administering the oath lacked authority to do so, if the taking of the oath was required or authorized by law. [L 1972, c 9, pt of §1]

Revision Note

In paragraphs (1) and (2), "or" deleted pursuant to §23G-15.

COMMENTARY ON §710-1068

This section precludes certain defenses which might be raised by a defendant in a prosecution under a section in this part. The same result would probably be reached by court interpretation; however, to avoid confusion this section deals with these defenses specifically.

Subsection (1) precludes a defense based on the incompetency of a defendant to give certain testimony. This subsection does not apply where the incompetency is based on a complete lack of penal responsibility (i.e., the defenses to penal liability provided by chapter 704.).

Subsection (2) precludes a defense based on the inadmissibility, under the rules of evidence, of the false testimony. For example, a defendant in a perjury prosecution could not claim that, because a correct application of the rules of evidence would have precluded the defendant's testimony as being hearsay or irrelevant, the defendant is not guilty of the falsification offense. This subsection follows logically from the definition of "materially false statement" in §710-1000(9), which separates "materiality" from "admissibility." "These provisions are based on the same basic principle that once a person's testimony is admitted he cannot excuse his perjury on the ground that the testimony was subject to objection and should have been excluded in the first instance."[1]

Subsection (3) states the general rule that irregularities in the administration of the oath are not a defense to falsification under oath.

> Section[s 710-1060, 1061, and 1062] deal with statements under oath or affirmation. The guiding principle is that when the community commands or authorizes certain statements to be made with special formality or on notice of special sanction, the seriousness of the demand for honesty is sufficiently evident to warrant application of criminal sanctions. Oath, affirmation for those with religious or other scruples against oaths, or--under Section [710-1000(10)]--notice that the state means to apply criminal penalties to misstatements, should suffice. Technical irregularities in the administration of the oath are of no concern to the defendant, as we have expressly provided in subsection (3).[2]

Subsection (4) "is designed to deal with a situation where the oath was taken as required by law, but was administered by a person who lacked authority to do so,"[3] such as a notary whose commission expired. The Code precludes a defense to falsification under such circumstances.

Previous Hawaii statutory law was silent on the subjects covered in this section. The case law has not dealt with the subjects covered by subsections (1) and (2), is in accord with subsection (3),[4] and is, in an old case, contrary to subsection (4).[5] The Code, in this section, represents an addition to the law and a slight modification of an old decision.

§710-1068 Commentary:

1. Prop. Mich. Rev. Cr. Code, comments at 406.

2. M.P.C., Tentative Draft No. 6, comments at 127 (1957).

3. Prop. Mich. Rev. Cr. Code, comments at 406.

4. Territory v. Kawano, 20 Haw. 469 (1911).

5. The King v. Papa, 1 Haw. 346 (1855).

" **[§710-1069] Misrepresenting a notarized document in the first degree.** (1) A person commits the offense of misrepresenting a notarized document in the first degree if the person submits or invites reliance on a document that the person knows has been altered after the document had been notarized by a notary public in this or any other jurisdiction, and:

(a) The offense was committed with intent to mislead a public servant; or

(b) The offense was committed for purpose of commercial or private financial gain.

(2) Misrepresenting a notarized document in the first degree is a class C felony. [L 2008, c 175, pt of §3]

" **[§710-1069.5] Misrepresenting a notarized document in the second degree.** (1) A person commits the offense of misrepresenting a notarized document in the second degree if, with intent to mislead another, the person submits or invites reliance on a document that the person knows has been altered after the document had been notarized by a notary public in this or any other jurisdiction.

(2) Misrepresenting a notarized document in the second degree is a misdemeanor. [L 2008, c 175, pt of §3]

COMMENTARY ON §§710-1069 AND 710-1069.5

Act 175, Session Laws 2008, added these sections, establishing criminal offenses for misrepresenting a notarized document. Act 175 deterred fraud by strengthening the laws relating to notaries and notarized documents. Conference Committee Report No. 77-08.

"PART VI. OFFENSES RELATED TO JUDICIAL AND OTHER PROCEEDINGS

§710-1070 Bribery of or by a witness. (1) A person commits the offense of bribing a witness if he confers, or offers or agrees to confer, directly or indirectly, any benefit upon a witness or a person he believes is about to be called as a witness in any official proceeding with intent to:

(a) Influence the testimony of that person;

(b) Induce that person to avoid legal process summoning him to testify; or

(c) Induce that person to absent himself from an official proceeding to which he has been legally summoned.

(2) A witness or a person believing he is about to be called as a witness in any official proceeding commits the offense of bribe receiving by a witness if he intentionally solicits, accepts, or agrees to accept, directly or indirectly, any benefit as consideration:

(a) Which will influence his testimony;

(b) For avoiding or attempting to avoid legal process summoning him to testify; or

(c) For absenting or attempting to absent himself from an official proceeding, to which he has been legally summoned.

(3) The offenses defined in this section are class C felonies. [L 1972, c 9, pt of §1]

COMMENTARY ON §710-1070

As stated in the commentary to perjury and related offenses,[1] the integrity of the witness' testimony is one of the fundamental requisites of our jurisprudential system. However, unlike the case of perjury, attention is here focused upon the step prior to perjury, the inducement for the offense. It is the risk of unreliable and false testimony that is the harm sought to be prevented.

It is apparent that substantial interference with any part of the process whereby a witness is called to testify in an official proceeding is to be condemned. And since each part of the process is of unique importance in assuring the availability and integrity of the witness, it follows that the sanction ought to be the same regardless of which part of this process is

obstructed or perverted. Therefore, it is made an offense to interfere, by means of conferring or receiving a benefit with either testimony, service of process, or appearance at the proceeding.

Note that the person whom the actor attempts to induce need not actually be a witness, but may merely be one whom the actor believes is about to be called as a witness. This provision is to avoid confusion as to when an individual actually becomes a witness, thus foreclosing specious defenses and emphasizing that the harm inheres in the attempt to interfere with the course of the official proceeding.

Previous Hawaii law recognized bribery of a witness as a form of suppressing evidence.[2] The section on suppressing evidence, a misdemeanor offense, covered only evading the giving of testimony and suppressing other forms of evidence. Also, it apparently covered only the bribe giver and not the receiver. The misdemeanor sanction was not consistent with the sanction of twenty years' imprisonment permitted by previous law for subornation of perjury. Under this Code, the class C felony sentence provided for the offenses defined in this section is the same as that imposed for perjury.

SUPPLEMENTAL COMMENTARY ON §710-1070

The Code as adopted differs from the Proposed Draft in that the title of the section was changed to "bribery of or by a witness" from "bribery of a witness."

Case Notes

The leap from asking a potential witness to "not show up" or to "not show up and testify" to the conclusion that a defendant thereby intended to induce that witness to avoid service of process was untenable in light of the structure of this section; thus, there was insufficient evidence to lead a person of reasonable caution to the conclusion that defendant intended to induce witness to avoid service of process under subsection (1)(b). 117 H. 218, 177 P.3d 928 (2008).

§710-1070 Commentary:

1. §§710-1060, 1061.

2. H.R.S. §725-4.

" **§710-1071 Intimidating a witness.** (1) A person commits the offense of intimidating a witness if he uses force upon or a threat directed to a witness or a person he believes is about to be called as a witness in any official proceeding, with intent to:

(a) Influence the testimony of that person;

(b) Induce that person to avoid legal process summoning him to testify; or

(c) Induce that person to absent himself from an official proceeding to which he has been legally summoned.

(2) "Threat" as used in this section means any threat proscribed by section 707-764(1).

(3) Intimidating a witness is a class C felony. [L 1972, c 9, pt of §1; am L 1980, c 267, §2]

COMMENTARY ON §710-1071

The potential for harm involved in witness intimidation is essentially similar to that involved in the offense of bribery of a witness, e.g., the undermining of the integrity of an extremely important part of the judicial process. The definition of the offense also parallels that of bribery of a witness, and the sanctions are identical. Note, however, that only the person who directs the force or threat against the witness is guilty of a crime. "Threat," as used in this section is any threat proscribed by the offense of criminal coercion under §707-724. To some extent, it would seem that the section on criminal coercion might suffice to deal with witness intimidation, but since the intimidation of a witness carries the additional harm of interfering with an official proceeding, it seems appropriate to impose a more severe sanction for the present offense.

Previous Hawaii law had no provisions dealing specifically with the offense of witness intimidation.

Case Notes

Terroristic threatening not a lesser included offense of intimidating a witness within the meaning of §701-109(4)(a); multiple conviction of terroristic threatening and intimidating a witness not barred by §701-109(4)(c). 75 H. 517, 865 P.2d 157 (1994).

Sufficient evidence that defendant directed threats to person whom defendant believed was about to be called as a witness where defendant phoned person soon after explicit warning from police officer that such conduct could be inferred as intimidating a witness. 82 H. 419 (App.), 922 P.2d 1032 (1996).

Sufficient evidence that defendant intended to influence person's testimony by making threatening statements during phone call. 82 H. 419 (App.), 922 P.2d 1032 (1996).

" **§710-1072 Tampering with a witness.** (1) A person commits the offense of tampering with a witness if he intentionally engages in conduct to induce a witness or a person he believes is about to be called as a witness in any official proceeding to:

(a) Testify falsely or withhold any testimony which he is not privileged to withhold; or

(b) Absent himself from any official proceeding to which he has been legally summoned.

(2) Tampering with a witness is a misdemeanor. [L 1972, c 9, pt of §1]

COMMENTARY ON §710-1072

The social harm dealt with in this section is the same as that dealt with in the prior two sections, however, the means specified in the definition of this offense (i.e., conduct intended to induce) are not as culpable as in the former sections, hence tampering with a witness is only graded as a misdemeanor. A person who attempts to affect testimony, or the absence of it, by, e.g., persuasion or trickery, as opposed to bribery or intimidation, does not commit an offense grave enough to be condemned as a felony. However, unlike the sections on witness bribery and intimidation,[1] an attempt to induce a prospective witness to avoid process is not made an offense: this is because neither the means nor the end is illegal in itself.[2]

Previous Hawaii law recognized no offense equivalent to tampering with a witness. And, though it is conceivable that such conduct could have been penalized under the general contempt power of the court, there appear no reported cases on the point.

§710-1072 Commentary:

1. §§710-1070 and 1071, respectively.

2. Prop. Mich. Rev. Cr. Code, comments at 414.

" **[§710-1072.2] Retaliating against a witness.** (1) A person commits the offense of retaliating against a witness if the person uses force upon or threatens a witness or another

person or damages the property of a witness or another person because of the attendance of the witness, or any testimony given, or any record, document, or other object produced, by the witness in an official proceeding.

(2) "Threaten" as used in this section means any threat proscribed by sections 707-764(1) and 707-764(2).

(3) Retaliating against a witness is a class C felony. [L 1981, c 156, pt of §1; gen ch 1993]

COMMENTARY ON §710-1072.2

Act 156, Session Laws 1981, enacted this section to provide additional protection to witnesses. Although the prior law penalized force or threats used against a person about to be called as a witness, it had no provisions dealing specifically with the offense of force or threats directed against a person for having served as a witness.

" **§710-1072.5 Obstruction of justice.** (1) A person commits the offense of obstruction of justice if the person intentionally engages in the following conduct: When called as a witness and having been granted immunity pursuant to chapters 480 and 621C before or after having been qualified as a witness, shall refuse to testify or be qualified as a witness when duly directed to testify or be qualified as a witness.

(2) Obstruction of justice is a class C felony. [L 1978, c 211, §1; am L 1980, c 173, §7; gen ch 1993]

COMMENTARY ON §710-1072.5

Act 211, Session Laws 1978, added this section to provide for the situation where a person refuses to testify or be qualified as a witness after having been granted immunity, as distinguished from the situation where, under §710-1077(h), a person refuses to testify or be qualified as a witness without a grant of immunity. Senate Conference Committee Report No. 57-78, House Conference Committee Report No. 56.

Act 173, Session Laws 1980, added the reference to chapter 480 in view of the amendments to that chapter regarding immunity.

" **§710-1073 Bribery of or by a juror.** (1) A person commits the offense of bribing a juror if the person confers, or offers or agrees to confer, directly or indirectly, any benefit upon a juror with intent to influence the juror's vote, opinion, decision, or other action as a juror.

(2) A person is guilty of the offense of bribe receiving by a juror if the person intentionally solicits, accepts, or

agrees to accept, directly or indirectly, any benefit as consideration which will influence the person's vote, opinion, decision, or other action as a juror.

(3) The offenses defined in this section are class C felonies. [L 1972, c 9, pt of §1; gen ch 1993]

" **§710-1074 Intimidating a juror.** (1) A person commits the offense of intimidating a juror if the person uses force or a threat with intent to influence a juror's vote, opinion, decision, or other action as a juror.

(2) "Threat" as used in this section means any threat proscribed by section 707-764(1).

(3) Intimidating a juror is a class B felony. [L 1972, c 9, pt of §1; am L 1980, c 267, §3; gen ch 1993]

" **§710-1075 Jury tampering.** (1) A person commits the offense of jury tampering if, with intent to influence a juror's vote, opinion, decision, or other action in a case, the person attempts directly or indirectly to communicate with a juror other than as part of the proceedings in the trial of the case.

(2) Jury tampering is a class C felony. [L 1972, c 9, pt of §1; gen ch 1993]

COMMENTARY ON §§710-1073 TO 710-1075

These three sections parallel closely §§710-1070, 1071, and 1072 dealing with witness bribery, intimidation, and tampering. The only significant difference from the preceding sections lies in the fact that the integrity of a slightly different part of the judicial process is being protected. It is, however, readily apparent that the juror plays a part in the judicial process of equal importance with that of the witness; the integrity of the juror's function must be protected equally. Since it is the juror's function to decide the facts according to the evidence without any external influences or considerations, it is the imposition of such external influences which is penalized by these three sections. Both the structure of the sections and the sanctions imposed are similar to those described in the preceding witness offenses.

Previous Hawaii law defined bribery of a juror in a generally similar manner to §710-1073, except that the offenses of offeror and of recipient were penalized differently. One who bribed a juror could receive a $500 fine or a two-year term of imprisonment,[1] whereas the juror who accepted a bribe was subject to a fine of $1,000 or a term of five years' imprisonment.[2] The reason for the distinction between the penalties for offeror and recipient remains unarticulated in

other statutes and in judicial interpretation. The consolidation and equal treatment of the two offenses under §710-1073 is based upon the general premise that the sentence should be based upon the danger of harm to society, the magnitude of that harm, and the culpability of the actor. As the offenses are defined in §710-1073, both offeror and recipient would be equal with respect to all three criteria of punishment; therefore, they are graded equally.

The previous law did not deal specifically with intimidation of witnesses or tampering with witnesses as those offenses are defined in the Code. Previous sections on "corruptly influencing" a juror[3] and "intimidation of ... any ... officer charged with any duty in the administration ... of the law ..."[4] might have been employed. However, the difficulty in applying such non-specific language is readily apparent.

SUPPLEMENTAL COMMENTARY ON §§710-1073 TO 710-1075

The legislature changed the title of §710-1073 to "Bribery of or by a juror." The Proposed Draft had provided "Bribery of a juror." The Code differs from the Proposed Draft in that the offense of intimidating a juror under §710-1074 is raised from a class C to a class B felony; and the offense of jury tampering under §710-1075 is raised from a misdemeanor to a class C felony. The penalties were increased because of the central role which the judicial process serves in the preservation of society. Conference Committee Report No. 2 (1972).

§§710-1073 To 710-1075 Commentary:

1. H.R.S. §725-1.

2. Id. §725-2.

3. Id. §725-3.

4. Id. §725-6.

" **[§710-1075.5] Retaliating against a juror.** (1) A person commits the offense of retaliating against a juror if the person uses force upon or threatens a juror or another person because of the vote, opinion, decision, or other action of the juror in an official proceeding.

(2) "Threaten" as used in this section means any threat proscribed in sections 707-764(1) and 707-764(2).

(3) Retaliating against a juror is a class C felony. [L 1981, c 156, pt of §1; gen ch 1993]

COMMENTARY ON §710-1075.5

Act 156, Session Laws 1981, enacted this section to provide additional protection to jurors. Although the prior law penalized force or threats used against a juror before or during a trial, it contained no provision dealing specifically with the offense of force or threats directed against a person for the person's actions as a juror, after the trial.

" **§710-1076 Tampering with physical evidence.** (1) A person commits the offense of tampering with physical evidence if, believing that an official proceeding is pending or about to be instituted, the person:

(a) Destroys, mutilates, conceals, removes, or alters physical evidence with intent to impair its verity in the pending or prospective official proceeding;

(b) Makes, presents, or offers any false physical evidence with intent that it be introduced in the pending or prospective official proceeding.

(2) "Physical evidence," as used in this section includes any article, object, document, record, or other thing of physical substance.

(3) Tampering with physical evidence is a misdemeanor. [L 1972, c 9, pt of §1; gen ch 1993]

COMMENTARY ON §710-1076

Official proceedings rely on the integrity of physical evidence, in addition to the integrity of witnesses and jurors, to achieve equitable results. To allow the impairment or falsification of physical evidence would undermine greatly the fairness and impartiality of the judicial process.

This section makes it an offense both to conceal true evidence and to offer false evidence, since to do either would obviously misrepresent the truth which it is the object of the proceeding to determine. In both cases, the actor must have an intent that the concealment or falsification should have an effect in the proceeding. "Physical evidence" is defined principally to distinguish it from that evidence which is offered as testimony by witnesses.

Previous Hawaii law dealt with the offense of tampering with physical evidence under the general heading of supressing evidence.[1] The prior law provided that any person who "destroys, conceals, or suppresses any deposition or other legal

evidence in any suit or proceeding..."[2] would be subject to a misdemeanor penalty. It had been held that the offense of suppressing evidence is not limited to judicial proceedings.[3] The Code extends the law by specifically covering presentation or fabrication of false physical evidence and any form of tampering when it is believed an official proceeding is about to be instituted.

SUPPLEMENTAL COMMENTARY ON §710-1076

The Code as adopted differs from the Proposed Draft in that in subsection (1)(a) the words "or availability" were deleted after the word "verity."

§710-1076 Commentary:

1. H.R.S. §725-4.

2. Id.

3. Territory v. Achuck, 31 Haw. 474 (1930).

" **§710-1077 Criminal contempt of court.** (1) A person commits the offense of criminal contempt of court if:

(a) The person recklessly engages in disorderly or contemptuous behavior, committed during the sitting of a court in its immediate view and presence, and directly tending to interrupt its proceedings or impair the respect due to its authority;
(b) The person creates a breach of peace or a disturbance with intent to interrupt a court's proceedings;
(c) As an attorney, clerk, or other officer of the court, the person knowingly fails to perform or violates a duty of the person's office, or knowingly disobeys a lawful directive or order of a court;
(d) The person knowingly publishes a false report of a court's proceedings;
(e) Knowing that the person is not authorized to practice law, the person represents the person's self to be an attorney and acts as such in a court proceeding;
(f) The person intentionally records or attempts to record the deliberation of a jury;
(g) The person knowingly disobeys or resists the process, injunction, or other mandate of a court;
(h) The person intentionally refuses to be qualified as a witness in any court or, after being qualified, to

answer any proper interrogatory without a privilege to refuse to answer;

(i) Being a juror, the person intentionally, without permission of the court, fails to attend a trial or official proceeding to which the person has been summoned or at which the person has been chosen to serve; or

(j) The person is in violation or disobedience of any injunction or order expressly provided for in part V of chapter 712.

(2) Except as provided in subsections (3) and (7), criminal contempt of court is a misdemeanor.

(3) The court may treat the commission of an offense under subsection (1) as a petty misdemeanor, in which case:

(a) If the offense was committed in the immediate view and presence of the court, or under such circumstances that the court has knowledge of all of the facts constituting the offense, the court may order summary conviction and disposition; and

(b) If the offense was not committed in the immediate view and presence of the court, nor under such circumstances that the court has knowledge of all of the facts constituting the offense, the court shall order the defendant to appear before it to answer a charge of criminal contempt of court; the trial, if any, upon the charge shall be by the court without a jury; and proof of guilt beyond a reasonable doubt shall be required for conviction.

(4) When the contempt under subsection (1) also constitutes another offense, the contemnor may be charged with and convicted of the other offense notwithstanding the fact that the contemnor has been charged with or convicted of the contempt.

(5) Whenever any person is convicted of criminal contempt of court or sentenced therefor, the particular circumstances of the offense shall be fully set forth in the judgment and in the order or warrant of commitment. In any proceeding for review of the judgment, sentence, or commitment, no presumption of law shall be made in support of the jurisdiction to render the judgment, pronounce the sentence, or order the commitment. A judgment, sentence, or commitment under subsection (3)(a) shall not be subject to review by appeal, but shall be subject to review in an appropriate proceeding for an extraordinary writ or in a special proceeding for review.

All other judgments, sentences, or commitments for criminal contempt of court shall be subject to review by appeal, in a

proceeding for an appropriate extraordinary writ, or in a special proceeding for review.

(6) Nothing in this section shall be construed to alter the court's power to punish civil contempt. When the contempt consists of the refusal to perform an act which the contemnor has the power to perform, the contemnor may be imprisoned until the contemnor has performed it. In such a case the act shall be specified in the warrant of commitment. In any proceeding for review of the judgment or commitment, no presumption of law shall be made in support of the jurisdiction to render the judgment or order the commitment. When a court of competent jurisdiction issues an order compelling a parent to furnish support, including child support, medical support, or other remedial care, for the parent's child, it shall constitute prima facie evidence of a civil contempt of court upon proof that:

(a) The order was made, filed, and served on the parent or proof that the parent was present in court at the time the order was pronounced; and

(b) The parent did not comply with the order.

An order of civil contempt of court based on prima facie evidence under this subsection shall clearly state that the failure to comply with the order of civil contempt of court may subject the parent to a penalty that may include imprisonment or, if imprisonment is immediately ordered, the conditions that must be met for release from imprisonment. A party may also prove civil contempt of court by means other than prima facie evidence under this subsection.

(7) Any violation or disobedience of any injunction or order expressly provided for in part V of chapter 712 is punishable by:

(a) A fine of not less than $400 nor more than $5,000;

(b) Imprisonment for not less than one nor more than six months; or

(c) Both a fine and imprisonment pursuant to paragraphs (a) and (b). [L 1972, c 9, pt of §1; am L 1973, c 136, §8(a); am L 1979, c 181, §3; am L 1987, c 176, §3; am L 1988, c 141, §60; gen ch 1993; am L 2008, c 157, §3; am L 2015, c 35, §27]

Revision Note

In subsection (7)(a), "or" deleted and punctuation changed and in subsection (7)(b), punctuation changed pursuant to §23G-15.

COMMENTARY ON §710-1077

Contempt of court is, perhaps, one of the least understood areas of the law. Perkins has said "a large part of it is clearly outside the area of criminal law and much of the rest hardly more than 'quasi-criminal.'"[1] The contempt proceeding has been called "'an anomaly,' a mixture of the attributes of the criminal process and those of the equity proceeding."[2]

Not the least source of confusion is the various classifications of contempt depending on (1) the type of penalty imposed (civil or criminal), and (2) the proximity of behavior penalized to the judicial proceeding with which it interferes (direct or constructive).

Civil contempt is disobedience to a court order; it is punished by a penalty which is coercive and corrective in nature; the penalty can be avoided by compliance with the court order. For example, for refusal of a witness to answer a proper question, the court may order the witness imprisoned until the witness answers. Criminal contempt is conduct which brings the court into disrespect or which interferes with the administration of justice. The penalty for criminal contempt is a sentence or order which the defendant cannot avoid. Insulting behavior toward the court or an assault on a bailiff would constitute two modes of criminal contempt, for which a court might impose a sentence of imprisonment for a certain period of time. Certain contempt may be both civil and criminal if both types of dispositions are appropriate. Refusal to answer a proper question may be penalized as both criminal and civil contempt; the court may, e.g., order the contemnor to be imprisoned for one day and to be imprisoned thereafter until the contemnor answers the question.

It is often said that a direct contempt is one which takes place in the presence of the court or so near the court as to interfere with judicial proceedings. An indirect or constructive contempt is contempt committed at a distance from the court or proceedings but which degrades the court or interferes with its proceedings. Although couched in substantive terms, the consequences of the distinction are largely procedural. If the contempt is direct, the court may impose punishment summarily, whereas if the contempt is constructive, due process requires that the court issue an order to show cause and hold a hearing thereon before punishment is imposed. This being the case, a more rational "determinant insofar as procedure is concerned is whether or not the contempt was committed under such circumstances that the judge has knowledge of all the facts and hence has no need to hear evidence."[3]

Although often challenged, the United States Supreme Court had held, until recently, mostly on historical grounds,[4] that

contempt proceedings were not intended by the framers of the Constitution to be within the constitutional guarantees of trial by jury,[5] and that "it has always been the law of the land, both state and federal, that the courts--except where specifically precluded by statute--have the power to proceed summarily in contempt matters."[6]

In a recent series of opinions, the Court has redefined the nature of contempt and its relation to constitutional procedural guarantees. In United States v. Barnett (1964),[7] Cheff v. Schnackenburg (1966),[8] Bloom v. Illinois (1968),[9] and Dyke v. Taylor Implement Mfg. Co. (1968)[10] the Court has gradually, and in increments, adopted the position that: (1) the Constitution's criminal jury trial provisions apply to serious offenses and not to petty offenses;[11] (2) criminal contempt "is a crime in every fundamental respect" and, for purposes of the constitutional guarantees to trial by jury in criminal cases, it will be treated the same as other criminal offenses;[12] and (3) where the criminal contempt constitutes a serious offense, the Constitution guarantees the right to trial by jury, where the criminal contempt constitutes a petty offense, it does not.[13]

The Court has distinguished the severity of the penalty authorized or imposed from the seriousness of the offense committed.[14] However, this appears to be a distinction without a difference, because a majority of the Court appear to accept as the best, if not the only, evidence of the seriousness of the offense the penalty authorized or imposed.[15] Although "the exact location of the line between petty offenses and serious crimes" is not settled,[16] a majority of the Court appear to accept the position that where the maximum term of imprisonment may not exceed six months a jury trial is not guaranteed by the Federal Constitution in criminal contempt cases.[17]

Justices Black and Douglas have taken the position that a defendant charged with criminal contempt is entitled, under the Federal Constitution, to a trial by jury.[18] Whether this position results from their characterization of criminal contempt as a serious crime, or from the belief that any imprisonment is a severe penalty which cannot be imposed without trial by jury, is not clear.[19]

The procedural right to trial by jury in cases of criminal contempt, where "severe" punishment is authorized and the offense therefore regarded as "serious," which the Supreme Court has imposed on the states as a matter of constitutional law, has long been recognized by statute in Hawaii.[20] Previous Hawaii law limited the punishment which may be imposed if the Court proceeded summarily without a jury.[21]

Section 710-1077 attempts to preserve as much of the framework of the previous chapter on contempts[22] as is possible, and at the same time, to clarify and, in some instances, expand the statutory law.

Subsection (1) spells out more clearly than the previous code the types of conduct regarded as contumacious. Subsections (1)(a), (1)(b), (1)(g), and (1)(h) are clarifications of former law. Each subsection states specifically the mental culpability required for conviction. Contempt in open court under subsection (1)(a) may be committed recklessly; however, under subsection (1)(b) [breach of the peace], (1)(g) [disobedience or resistance to process, injunction, or mandate], and (1)(h) [refusal to be qualified as a witness or answer proper interrogatory] the actor must act intentionally.

Subsection (1)(d) limits contempt by publication to one who "knowingly publishes a false report of a court's proceedings." The Code eliminates language contained in the previous codification which could be interpreted to penalize as contemptuous constitutionally protected publications.[23]

Subsections (1)(c) [violation of duty or order by officer of court], (1)(e) [unauthorized practice before a court], (1)(f) [recording deliberation of a jury], and (1)(i) [failure of juror to attend trial or official proceeding] are additions to statutory law. Although similar types of behavior have been held to constitute criminal contempt under case law development,[24] the Code proposes codification of conduct regarded as contempt of court. The policy against common-law crimes also weighs heavily against the unrestrained common-law development of loose statutory standards.

Subsection (2) makes the offense a misdemeanor; a slight reduction in the two years' imprisonment previously authorized.[25] As in the case of all misdemeanors the offense is triable as a criminal offense, i.e., by a jury unless jury trial is waived.

Subsection (3) preserves the court's power to dispose of criminal contempts without a jury trial; however, in such cases, the offense must be treated as a petty misdemeanor. The Code makes no distinction, as does the prior law,[26] in the summary punishment which may be imposed by State Supreme, Circuit, and District Courts. The Code's lowest grade of criminal offense, petty misdemeanor, seems easily within the Supreme Court's concept of "petty offense." Disposition of an offense under subsection (3) would not, therefore, violate the defendant's constitutional right to trial by jury. Moreover, the division of subsection (3) into two parts provides due process in another respect. Subsection (3)(b) assures that where the contempt is not direct, i.e., not in the immediate view and presence of the

court, nor under such circumstances that the court has knowledge of all the facts constituting the offense, the defendant must be charged, and, if tried, proved guilty beyond a reasonable doubt.

A majority of the United States Supreme Court has rejected, repeatedly, the position taken by Black and Douglas, JJ., in their dissents in Barnett, Cheff, and Dyke, that a jury trial is guaranteed by the Federal Constitution in all criminal contempt cases. We have considered implementing by statute this policy in favor of jury trials. However, it seems to us that, on the balance, the value in permitting the court to proceed without a jury, in cases where the offense is treated as a petty misdemeanor, outweighs the value of enlarging the defendant's right to jury trial. A contrary decision would force the court, in some instances, to be a witness in its own behalf--a status it would be ill-suited and loath to assume.

Subsection (4) provides that contempts which constitute both contempt and another offense do not relieve the defendant of liability for the other offense merely because its commission was contemptuous of the court. For example, if a person were to cause disorder in a courtroom, during the course of proceedings, by assaulting another person, the person would be guilty of contempt. The person would also be guilty of an assault. The fact that the court imposed summary punishment for the contempt, or the fact that the person was put in jeopardy for the misdemeanor offense of criminal contempt of court, would not allow the defendant to plead double jeopardy to a charge of assault based on the same conduct. Any danger presented by the possibility of multiplicity of convictions is obviated somewhat by the limitation in chapter 706 against ordering that sentences be served consecutively.

Subsection (5) is a concise restatement of former law,[27] with the exception that it eliminates the restriction against district courts trying cases of constructive contempt.

Subsection (6) explicitly preserves the court's power to deal with cases of civil contempt and is otherwise a restatement of prior law.[28]

SUPPLEMENTAL COMMENTARY ON §710-1077

Act 136, Session Laws 1973, amended subsection (5) by amending the last sentence of the first paragraph and by adding the second paragraph. Prior to amendment, the last sentence of the first paragraph read: "A conviction under subsection (3)(a) shall not be subject to review by direct appeal."

Act 181, Session Laws 1979, amended subsection (1) and added subsection (7) as part of an effort to provide a remedy to abate as nuisances, certain offenses against public health and morals.

Act 157, Session Laws 2008, amended subsection (6) to provide that when a court of competent jurisdiction issues an order compelling a parent to furnish the parent's child with support, proof that the order was made, filed, and served on the parent or that the parent was present in court at the time the order was pronounced, and that the parent did not comply with the order, shall constitute prima facie evidence of a civil contempt of court. Act 157 clarified that if an order of civil contempt based on prima facie evidence imposes immediate imprisonment, the order shall set forth the conditions that must be met for release from imprisonment. The Act also clarified that civil contempt of court may be established by means other than by prima facie evidence. Act 157 facilitated the proof of civil contempt of court in proceedings involving enforcement of a court order compelling a parent to pay child support, medical support, or other remedial care for the parent's child. Conference Committee Report No. 21-08, Senate Standing Committee Report No. 873.

Act 35, Session Laws 2015, amended subsection (6) by changing the paragraph designations and subsection (7) by making technical nonsubstantive amendments.

Law Journals and Reviews

Contemporary Contempt: The State of the Law in Hawaii. I HBJ, no. 13, at 59 (1997).

An Evaluation of the Summary Contempt Power of the Court: Balancing the Attorney's Role as an Advocate and the Court's Need for Order. 19 UH L. Rev. 145 (1997).

Case Notes

Court's summary contempt power discussed. 365 F. Supp. 941 (1973).

Whether attorney's conduct in court amounted to contempt. 55 H. 430, 521 P.2d 668 (1974).

Violation of order enjoining unauthorized practice of law as criminal contempt. 55 H. 458, 522 P.2d 460 (1974).

Defendant's failure to appear for trial as directed was direct contempt of court under subsection (3)(a) and was not subject to review by appeal. 56 H. 203, 532 P.2d 663 (1975).

Attorney's absence from court proceeding is not contempt committed within presence of court. 59 H. 425, 583 P.2d 329 (1978).

Refusal to perform an act which the contemnor is unable to perform must be punished as criminal rather than civil contempt. 60 H. 160, 587 P.2d 1220 (1978).

Failure to set forth factual specifications required in subsection (5) warranted reversal of contempt conviction. 60 H. 221, 588 P.2d 428 (1978).

Summary application of section upheld. 65 H. 119, 648 P.2d 1101 (1982).

Where there is a trial without a jury, the judge who lodged the complaint for contempt may not decide the outcome. 70 H. 459, 776 P.2d 1182 (1989).

Oral findings by the trial court are insufficient to meet the requirements of section. 71 H. 564, 798 P.2d 906 (1990).

Compulsory joinder of offenses requirement under §701-109(2) applies to criminal contempt charges. 72 H. 164, 811 P.2d 815 (1991), cert. denied, 502 U.S. 867 (1991).

Where there is no judgment, sentence, or commitment for an appellate court to review pursuant to subsection (5), petition requesting ruling that attorney's conduct was not contemptuous was premature. 74 H. 267, 842 P.2d 255 (1992).

Counsel yelling at the court and blatantly stating, in the presence of the jury, that court was working with opposing counsel, were simply contemptuous acts that supreme court found to be inexcusable. 76 H. 187, 873 P.2d 66 (1994).

Trial court erred by failing to include any factual specifications in its judgment as required under subsection (5); in such case, a judgment of conviction of criminal contempt must be vacated and not reversed. 88 H. 188, 964 P.2d 642 (1998).

Where defendant was appropriately convicted of and sentenced for criminal contempt under subsection (3)(a) and subsection (5) required defendant to seek review in a proceeding for an extraordinary writ or special proceeding, defendant's direct appeal dismissed for lack of appellate jurisdiction. 92 H. 178, 989 P.2d 262 (1999).

Order called for by this section should be in form of a written order to show cause. 7 H. App. 95, 746 P.2d 574 (1987).

When prosecutor is necessary to bring charge for offense under section. 7 H. App. 298, 758 P.2d 690 (1988).

Factual specifications requirement may be satisfied if particular circumstances of the case are described in the district court's oral findings. 7 H. App. 586, 788 P.2d 176 (1990).

Contemnor has no standing to appeal under subsection (3)(a); judgment must be reviewed by extraordinary writ or special proceeding; attorney's tardy court appearance constitutes indirect contempt under subsection (3)(b). 9 H. App. 249, 833 P.2d 85 (1992).

Minor was properly adjudicated a law violator in a criminal contempt proceeding for failing to comply with rules of a

protective supervision order. 96 H. 255 (App.), 30 P.3d 269 (2001).

Where there was no evidence that when defendant failed to appear in court defendant violated subsection (1)(g) by knowingly disobeying or resisting "the process, injunction, or other mandate of a court", defendant could not be convicted of criminal contempt of court under this section. 105 H. 274 (App.), 96 P.3d 603 (2004).

As the no-contact condition of defendant's probation sentence was not a "process, injunction, or other mandate of a court" that, if violated, was punishable as criminal contempt, but rather, was a condition placed on defendant for the privilege of being released into the community on probation rather than being imprisoned, the statutory prerequisites for a criminal-contempt conviction were not present in the case and this section was not applicable to convict defendant for criminal contempt for violating a term of probation. 120 H. 312 (App.), 205 P.3d 577 (2009).

Criminal contempt of court under this section is not available as a sanction for a violation of a condition of probation as there is no provision in chapter 706 that authorizes the use of criminal contempt as a sanction for violation of a condition of probation; the exclusive sanctions for a violation of a condition of probation in chapter 706 are set forth in §706-625. 120 H. 312 (App.), 205 P.3d 577 (2009).

Mentioned: 86 H. 214, 948 P.2d 1055 (1997).

§710-1077 Commentary:

1. Perkins, Criminal Law 456 (1957).

2. Prop. Mich. Rev. Cr. Code, comments at 420.

3. Perkins, supra at 462.

4. Whether the historical analysis was ever sound is subject to doubt. See Bloom v. Illinois, 391 U.S. 194, 198 note 2 (1968).

5. Article III, §2, of the Constitution provides that "[t]he Trial of all Crimes, except in cases of Impeachment, shall be by jury...." The Sixth Amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...." The Fifth and Fourteenth Amendments forbid the federal government and the states from depriving a person of "life, liberty or property without due process of law."

6. United States v. Barnett, 376 U.S. 681, 692, rehearing denied, 377 U.S. 973 (1964). See also Green v. United States, 356 U.S. 165, 183-187 (1958), and the cases collected therein.

7. See note 6 supra.

8. 384 U.S. 373 (1966).

9. See note 4 supra.

10. 391 U.S. 216 (1968).

11. "It is old law that the guarantees of jury trial found in Article III and the Sixth Amendment do not apply to petty offenses. Only today we have reaffirmed that position. Duncan v. Louisiana, 391 U.S. 145, 88 S. Ct. 1444, 20 L.Ed.2d 491 (1968)." Bloom v. Illinois, supra at 210.

12. Bloom v. Illinois, supra at 201-202.

13. Id.

14. United States v. Barnett, supra at 694 note 12.

15. In a note to Duncan v. Louisiana, 391 U.S. 145, 162 (1968), the Court said: "Cheff involved criminal contempt, an offense applied to a wide range of conduct including conduct not so serious as to require jury trial absent a long sentence. In addition criminal contempt is unique in that legislative bodies frequently authorize punishment without stating the extent of the penalty which can be imposed. The contempt statute under which Cheff was prosecuted, 18 U.S.C. §401, treated the extent of punishment as a matter to be determined by the forum court. It is therefore understandable that this Court in Cheff seized upon the penalty actually imposed *as the best evidence* of the seriousness of the offense for which Cheff was tried." (Emphasis added.) This explanation of the largely unstated reasoning in Cheff became, in an opinion decided the same day as Duncan, the "rule in Cheff." In Bloom v. Illinois, supra at 211, the Court said: "Under the rule in Cheff, when the legislature has not expressed a judgment as to the seriousness of an offense by fixing a maximum penalty which may be imposed, we are to look to the penalty actually imposed *as the best evidence* of the seriousness of the offense. See, ante, p. 503, n. 35." (Emphasis added.)

16. Duncan v. Louisiana, supra at 161.

17. See, e.g., Cheff v. Schnackenburg, see note 8 supra, which, however, set the maximum at six months not on the basis of constitutional principles, but on the basis of the Court's supervisory powers, and Dyke v. Taylor Implement Mfg. Co., see note 10 supra, which upheld a conviction for criminal contempt, notwithstanding the fact that the defendant was denied trial by jury, where the punishment was limited by statute to ten days' imprisonment plus fine.

18. Green v. United States, 365 U.S. 165, 193 (1958) (dissenting opinion); United States v. Barnett, supra at 724, (dissenting opinion); Cheff v. Schnackenburg, supra at 384 (dissenting opinion); Dyke v. Taylor Implement Mfg. Co., supra at 223 (dissenting opinion).

19. Compare Barnett, supra at 727 ("[I]f the present defendants committed the acts with which they are charged, their crimes cannot be classified as 'petty,' but are grave indeed."), and Cheff, supra at 387 ("[T]he determination of whether the offense is 'petty' also requires an analysis of the nature of the offense itself; even though short sentences are fixed for a particular offense a jury trial will be constitutionally required if the offense is of a serious character."), with Dyke, supra at 223 ("I am loath to hold whippings or six months' punishment 'as petty.' And here, where the offense is punishable by a $50 fine and 10 days in jail behind bars, I feel the same way. Even though there be some offenses that are 'petty,' I would not hold that this offense falls in that category.")

20. H.R.S. §729-1 ("Whoever, after trial by jury, is adjudged guilty of contempt of any court...shall be fined not more than $500 or imprisoned not more than two years....").

21. Id.

22. H.R.S. chapter 729.

23. See H.R.S. §729-1, which provides inter alia that one commits contempt "by publishing animadversions on the evidence or proceedings in a pending trial tending to prejudice the public respecting the same, and to obstruct and prevent the administration of justice; or by knowingly publishing an unfair report of the proceedings of a court, or malicious invectives against a court or jury tending to bring the court or jury, or

the administration of justice[,] into ridicule, contempt, discredit or odium...."

24. See Perkins, supra at 461.

25. H.R.S. §729-1.

26. Id.

27. Id. §729-5.

28. Id. §729-2.

" **[§710-1078] Disrespect of a house of the legislature.** (1) A person who is not a member of either house of the legislature commits the offense of disrespect of a house of the legislature if, while the person is present at a legislative session of either house or at a hearing of any committee of either house, the person creates a breach of peace or disturbance with intent to interrupt the proceeding.

(2) Whenever there is probable cause to believe that a person has violated subsection (1), the person shall be subject to arrest and removal from the presence of the legislature or either house or any committee of a house, by the sergeant-at-arms of the affected house or by any other law enforcement officer of the State, as directed by the sergeant-at-arms.

(3) Disrespect of a house of the legislature is a petty misdemeanor. [L 2012, c 204, §1]

COMMENTARY ON §710-1078

Act 204, Session Laws 2012, added this section to establish the petty misdemeanor offense of disrespect of a house of the legislature. While instances of contemptuous behavior are rare, the legislature believed that the law needed to be updated to address such possible behavior that can occur at any time. Senate Standing Committee Report No. 2998.