

**9 GCA CRIMES AND CORRECTIONS - JUSTIFICATION
CH. 7 EXEMPTIONS AND DEFENSES**

**CHAPTER 7
EXEMPTIONS AND DEFENSES**

- Article 1. Exemptions.
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**ARTICLE 1
EXEMPTIONS**

§ 7.10 Exemption from Criminal Liability Due to Juvenile Status.

§ 7.10. Exemption from Criminal Liability Due to Juvenile Status.

No person may be tried for or convicted of an offense if:

(a) his age at the time he is charged with an offense places him within the exclusive jurisdiction of the Family Division of the Superior Court;

(b) he was made the subject of a petition to commence proceedings in the juvenile court because of having committed the offense and the juvenile court has not made an order that he be prosecuted under general law; or

(c) he was certified to the juvenile court and the juvenile court has not made an order directing that he be prosecuted under general law.

SOURCE: Guam P.C. §26(1) (2); M.P.C. §4.10; Cal. §408 (T.D.1, 1967); *Cal. §500 (1971); Mass. ch. 263, §24; N.J. §2C:4-10; Subsection (a) amended by P.L. 17-12.

CROSS-REFERENCES: Code of Civil Procedure §§252, 253, 255.

COURT DECISIONS: D.C.GUAM:APP.DIV. 1982 § 7.10 (as it existed at the time of this case) repealed by implication portions of §§250 to 253 of the Code of Civil Procedure, with the result that the determination of whether or not a person is a minor depends upon the time the alleged crime was committed, not the age at which the minor was apprehended or charged. *People v. Quinata* D.C. #CR-81-004A; Aff'd C.A.9. [Note that the Legislature, by P.L. 17-8 (Bill 78), repealed and reenacted 9 GCA § 7.10 to, specifically, reverse this decision.]

**ARTICLE 2
MENTAL RESPONSIBILITY**

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- § 7.16 Defense: Mental Disease or Defect.
- § 7.19 Same: Admissibility of Evidence Showing.
- § 7.22 Same: Procedure for Assertion of.
- § 7.25 Psychiatric Examination and Procedure.
- § 7.28 Acquittal: Order for Civil Commitment.
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- § 7.49 Same: Hearing and Procedure When Mental Disease or Defect Occurs After Sentence.
- § 7.52 Transfer of Committed Person Off-Island: Hearing and Notice to Attorney General Required.

§ 7.16. Defense: Mental Disease or Defect.

A person is not criminally responsible for conduct if at the time of such conduct, as a result of mental illness, disease or defect, he lacked substantial capacity to know or understand what he was doing, or to know or understand that his conduct was wrongful, or to control his actions.

SOURCE: Guam PC, §26 Subsection (3) & (4); M.P.C. §4.01; *Cal. §530 (T.D.2 1968); Cal. §535 (1971); Mass. ch. 263 §26; N.J. §2C:4-1. *People v. Wolff*, 61 Cal. 2d 795, 40 Cal. Rptr. 271 (1964).

COMMENT: § 7.16 is based upon the California version of the M'Naghten Rule as it is stated in *People v. Wolff*. In the Wolff case the California Supreme Court made a conscious effort to broaden the exclusive emphasis on the cognitional element of the mind to which the M'Naghten formula is restricted. It did this by emphasizing mere knowledge of the difference between right and wrong is not the proper standard for judging responsibility but that a capacity or ability to understand is also required.

The California test tends to place illogical limits on psychiatric testimony. The last clause of the Section "or to control his actions" is directed specifically to this element volitional capacity in accord with The American Law Institute's approach. The Ninth Circuit has adopted another form of this ALI standard. However, now that Guam has a substantive statutory test for mental responsibility, it would appear that the Ninth Circuit would follow substantive Guam Law as it has in the past.

The words "mental illness, disease or defect" are intended to make it clear that the Section in concerned solely with lack of responsibility resulting from an involuntary condition of the mind which excludes capacity to have criminal intent or control behavior. There is comparable terminology used in the United States Manual for Courts-Martial as well as the words used in the Statutes or decisional law of

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jurisdictions which have followed the pattern of the Model Penal Code. See California Joint Legislative Committee for Revision of the Penal Code, Penal Code Revision Project 72-73 (Tentative draft No. 2, June 1968).

§ 7.19. Same: Admissibility of Evidence Showing.

Evidence that the defendant suffered from mental illness, disease or defect is admissible whenever it is relevant to prove the defendant's state of mind.

SOURCE: M.P.C. §4.02; *Cal. 531 (T.D.2 1968); Mass. ch. 263, §27(1); N.J. §2C:4-2(a).

COMMENT: This Section represent a codification of Guam decisional law and represents no change. See also *People v. Wells*, 33 Cal. 2d 330, 202 Pac. 2d 53 (1949) *People v. Gorshen*, 51 Cal. 2d 716, 336 Pac. 2d 492 (1959).

§ 7.22. Same: Procedure for Assertion of.

(a) Mental illness, disease or defect, precluding responsibility, is an affirmative defense which the defendant must prove by a preponderance of the evidence.

(b) The defendant may not introduce evidence that he is not criminally responsible, as defined in § 7.16, unless he has entered a plea of not guilty by reason of mental illness, disease or defect.

(c) The defendant may not, except upon good cause shown, introduce in his case in chief expert testimony regarding his state of mind pursuant to § 7.19 unless he has given notice as provide in Subsection (d).

(d) The defendant shall plead not guilty by reason of mental illness, disease or defect, or shall give notice, in open court or in writing, that his mental condition will or may be in issue not later than ten days after his arraignment or at such later time as the court for good cause may allow. If such notice is given prior to or at the time of arraignment, the court shall defer the entry of a plea until the filing of the reports provided in § 7.25. Upon the giving of such notice or upon a plea of not guilty by reason of mental illness, disease or defect, the court shall order an examination to be conducted, as provided in § 7.25.

(e) Upon the filing of the reports provided in § 7.25, the defendant shall plead if he has not previously done so and the court shall set a date for trial. The trial shall not be held earlier than ten days after the filing of the reports.

SOURCE: M.P.C. §4.03(1),(2); *Cal. §532 (T.D.2 1968); Mass. ch. 263, §27(a), (b); N.J. §2C:4-3 (a), (b).

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CROSS-REFERENCES: Cal. PC §1026.

COMMENT: This Section is new to Guam and provides a much needed procedure and notice when a defendant is going to raise the issue of sanity. Penal Code procedure is entirely lacking, with the defendant able to bring on such evidence without advance warning to the prosecution with the result that the prosecution cannot adequately prepare a rebuttal to such assertion.

Note that no split trial provisions, such as are found in existing California Penal Code §1026, are provided for. California has developed a concept of "limited responsibility" as a defense without requiring notice or plea and this has largely destroyed the usefulness of the split trial. However, Guam has not yet developed nor accepted the California concept of "limited responsibility". Therefore, it would appear that any mental state less than full responsibility is governed by this Section.

§ 7.25. Psychiatric Examination and Procedure.

(a) Whenever a plea of not guilty by reason of mental illness, disease or defect is entered or a notice is given under § 7.22, the court shall appoint at least one qualified psychiatrist or other qualified person (hereinafter referred to as psychiatrist) to examine the defendant and to report upon his mental condition.

(b) Whenever, in the opinion of the court, any other expert evidence concerning the defendant's mental condition is, or will be required by the court or either party, the court shall appoint one or more such experts to examine the defendant and to report upon his mental condition as the court may direct.

(c) In addition to the expert witness appointed by the court, either party in a criminal action may retain other psychiatrists or other experts to examine the defendant and to report upon his mental condition. Experts retained pursuant to this Section shall be permitted to have reasonable access to the defendant for the purposes of examination and the giving of testimony.

(d) The psychiatrists and other experts appointed by the court and those called by the prosecuting attorney shall be allowed, in addition to their actual traveling expenses, such fees as in the discretion of the court seem reasonable.

(e) On recommendation of the psychiatrists appointed by the court, the court may order the defendant committed to the Guam Memorial Hospital or any other suitable facility for observation and examination as it may designate for a period not to exceed thirty days, unless the court, for good cause, orders a longer period of commitment not to exceed sixty days. Any

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defendant so committed may be given such care and treatment as is determined to be necessary by the psychiatric staff of such institution or facility. A full report of any such care and treatment shall be included in the report required under Subsection (g). The superintendent or other person in charge of such institution or facility shall permit those psychiatrists or other experts appointed under this Section to have reasonable access to the defendant.

(f) Copies of any reports, records, documents or information furnished by either party to the psychiatrists appointed pursuant to this Section shall be given to the other party in the action. Any psychiatrist appointed pursuant to this Section, or retained by either party, shall have the right to inspect and make copies of reports and records relating to the defendant in any facility or institution in which they are located. Compliance with this Section may be required by an appropriate order of the court.

(g) Each psychiatrist appointed by the court who examines the defendant pursuant to this Section shall file a written report with the clerk of the court who shall deliver copies to each party. The report of the examination shall include, but need not be limited to, the following:

- (1) A description of the nature of the examination;
- (2) The number of examinations and duration of each examination;
- (3) The sources of information about the defendant;
- (4) A diagnosis or description of the defendant's mental condition;
- (5) An opinion as to the defendant's competency to be proceeded against, together with the reasons and basis for the opinion;
- (6) If the defendant has been convicted, an opinion as to his competency to be sentenced, together with the reasons and basis for the opinion;
- (7) If prior to conviction, an opinion as to whether or not the defendant was suffering from any mental illness, disease or defect at the time of the conduct alleged to have constituted the offense charged against the defendant and whether, as a result thereof, he lacked substantial capacity to know or understand what he was doing; or to know or understand that his conduct was wrongful or to control his actions; or the extent to which, as a consequence of mental illness, disease or defect, the defendant did or did not have a state of mind or

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the capacity to have a state of mind relevant to any issue in the trial of the action;

(8) A report of the care and treatment received by defendant prior to the examination.

(h) Upon the trial, the psychiatrists appointed by the court may be called as witnesses by either party to the action or by the court and when so called, shall be subject to all legal objections as to competency and bias and as to qualification as an expert witness. When called by the court or by either party to the action, the court may examine the psychiatrist, but either party shall have the same right to object to questions asked by the court and the evidence adduced as though the psychiatrist were called by an adverse party. When the psychiatrist is called and examined by the court, the parties may cross-examine him in the order directed by the court. When called by either party to the action, any adverse party may examine him the same as in the case of any other witness.

(i) When any psychiatrist or other expert who has examined the defendant, whether or not appointed under this Section, testifies concerning the defendant's mental condition, he shall be permitted to make a statement as to (1) the nature of his examination, (2) his diagnosis of the mental condition of the defendant at the time of the commission of the offense charged, (3) an opinion, if relevant, of the extent to which, the defendant, as a result of mental illness, disease or defect, was incapable of knowing or understanding what he was doing, or that he did not know and understand that his conduct was wrongful, or of the extent to which his capacity to control his actions was substantially impaired, (4) an opinion, if relevant, that the defendant did or did not have the state of mind or capacity to have the state of mind which is in issue during the trial, or (5) an opinion, if relevant, of the defendant's competency to be proceeded against or to be sentenced. The psychiatrist shall be permitted to make an explanation reasonably serving to clarify his diagnosis and opinion.

SOURCE: M.P.C. §§4.05, 4.07 (3) & (4); *Cal. §533 (T.D. 2 1968); See Mass. ch. 263, §§27, 29 & 31; N.J. §2C:4-5; 2C:4-7 (d) & (e).

CROSS-REFERENCES: Cal. P.C. §§1026 & 1027.

COMMENT: This Section is not substantially different from current California practice, but it does increase the scope of the court's discretion in the determination of the issue of the defendant's condition and is much more specific with respect to the content of the report of the court-appointed psychiatrist.

§ 7.28. Acquittal: Order for Civil Commitment.

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In any case in which evidence of mental illness, disease or defect has been introduced pursuant to the provisions of § 7.19 and in which the defendant is acquitted, the court may order an evaluation of his condition and initiation of proceedings pursuant to the provisions of 10 GCA Chapter 82.

SOURCE: M.P.C. 4.08; *Cal. §534 (T.D. 2 1968); Mass. ch. 263, §27 (d); N.J. §2C:4-8.

CROSS-REFERENCES: 10 GCA Chapter 82, *Mentally Ill Persons*.

COMMENT: Again, this Section is new to Guam. For the first time, it allows the court to initiate proceedings of a civil nature if a defendant is acquitted by reason of his mental condition. Such has never existed before with the result that persons acquitted by reason of their mental condition are wholly free from any further government action against them. Past acquittals by reason of mental disease, illness or defect have had the same result as a blanket acquittal.

§ 7.31. Acquittal: Verdict Must State Reason as Mental Disease Defect.

Whenever a plea of not guilty by reason of mental illness, disease or defect is entered and the defendant is acquitted on the plea, the verdict or, if trial by jury has been waived, the finding of the court and the judgment shall so state.

SOURCE: M.P.C. §4.03 (3); *Cal. §535 (T.D. 2 1968); Mass. ch. 263 §27(c), N.J. §2C:4-7 (c).

COMMENT: Again, a new Section simply requiring that acquittal for reason of mental illness, etc., be placed upon the record of the case as such.

§ 7.34. Acquittal: Court Order of Commitment or Release; Petition for Discharge.

(a) After entry of judgment of not guilty by reason of mental illness, disease or defect, the court shall, on the basis of the evidence given at the trial or at a separate hearing, make an order as follows:

(1) If the court finds that the person is no longer affected by mental illness, disease or defect, or, if so affected, that he no longer presents a substantial danger to himself or the person or property of others and is not in need of care, supervision or treatment, the court shall order him discharged from custody.

(2) If the court finds that the person is affected by mental illness, disease or defect and that he presents a substantial danger to himself or the person or property of others, but he can be controlled adequately and given proper care, supervision and treatment if he is released on

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supervision, the court shall order him released subject to such supervisory orders of the court, including supervision by the probation department, as are appropriate in the interest of justice and the welfare of the defendant. Conditions of release in such orders may be modified from time to time and supervision may be terminated by order of the court as provided in Subsection (b).

(3) If the court finds that the person presents a substantial risk of danger to himself or the person or property of others and that he is not a proper subject for release on supervision, the court shall order him committed to the Administrator of the Guam Memorial Hospital for custody, care and treatment.

(b) At any time within five years of the original entry of the order of release on supervision made pursuant to Paragraph (2) of Subsection (a), the court shall, upon motion of either the prosecution or such person, or upon its own motion, and after notice to the prosecution and such person, conduct a hearing to determine if, or to what extent, the person remains affected by mental illness, disease or defect. If the court determines that the person remains affected by mental illness, disease or defect, the court may release him on further supervision, as provided in Subsection (a), but for not longer than five years from the original entry of the order of release on supervision, or if the court determines that the person is affected by mental illness, disease or defect and presents a substantial danger to himself or to the person or property of others and cannot adequately be controlled if released on supervision, it may make an order committing the person to the Administrator of the Guam Memorial Hospital for custody, care and treatment. If the court determines that the person has recovered from his mental illness, disease or defect or, if affected by mental illness, disease or defect, no longer presents a substantial danger to himself or the person or property of others and no longer requires supervision, care or treatment, the court shall order him discharged from custody.

(c) If, after at least ninety days from the commitment of any person to the custody of the Administrator, the Administrator is of the opinion that the person is no longer affected by mental illness, disease or defect, or, if so affected, that he no longer presents a substantial danger to himself or the person or property of others, the Administrator may apply to the court which committed the person for an order of discharge. The application shall be accompanied by a report setting forth the facts supporting the opinion of

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the Administrator. Copies of the application and the report shall be transmitted by the clerk of the court to the Attorney General.

(d) Any person who has been committed to the Administrator for custody, care and treatment, after the expiration of ninety days from the date of the order of commitment, may apply to the court by which he was committed for an order or discharge upon the grounds that he is no longer affected by mental illness, disease or defect, or if so affected, that he no longer presents a substantial danger to himself or the person or property of others. Copies of the application and the report shall be transmitted by the clerk of the court to the Attorney General.

(e) The court shall conduct a hearing upon any application for release or modification filed pursuant to Subsections (c) and (d). If the court finds that the person is no longer suffering from mental illness, disease or defect, or, if so affected, that he no longer presents a substantial danger to himself or the person or property of others, the court shall order him discharged from custody or from supervision. If the court finds that the person would not be a substantial danger to himself or to the person or property of others, and can be controlled adequately if he is released on supervision, the court shall order him released as provided in Paragraph (2) of Subsection (a). If the court finds that the person has not recovered from his mental illness, disease or defect and cannot adequately be controlled if he is released on supervision, the court shall order him remanded for care and treatment.

In any hearing under this Subsection, the court may appoint one or more qualified psychiatrists or other qualified persons to examine the person and to submit reports to the court.

Reports filed with the court pursuant to such appointment shall include, but need not be limited to, an opinion as to the mental condition of the person and whether the person presents a substantial danger to himself or the person or property of others. To facilitate the expert's examination of the person, the court may order him placed in the temporary custody of any suitable facility.

(f) Any person who, to this Section, has been in the custody of the Administrator of the Guam Memorial Hospital or on release on supervision by the court for a period in excess of five years shall, in any event, be discharged if he does not present a substantial danger to the person of others.

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SOURCE: M.P.C. §4.08; *Cal. §536 (T.D. 2 1968); See Mass. ch. 263 §27 (d), N.J. §2C:4-8.

CROSS-REFERENCES: § 7.28 of this Code.

COMMENT: Section 7.34 provides specific procedures for the disposition of the defendants found not guilty by reason of mental illness, disease or defect. Complete discharge, partial or full supervision is provided for and the conditions under which each may be imposed are stated. This should substantially limit pleas of mental illness where the defendant intends merely to escape further governmental restraint.

Note, however, that § 7.34 (c) and, possibly, § 7.34 (f) are of doubtful constitutionality since the Supreme Court has recently held, in a case from Maryland, that a person confined based upon an acquittal for reasons of mental disease, in a mental institution may not be confined for a term longer than the maximum sentence provided for the charge for which he was acquitted.

§ 7.37. Mental Disease: a Bar to Proceeding or Sentence.

A person can neither be proceeded against nor sentenced after conviction while he is incompetent as defined in this Section:

(a) A defendant is incompetent to be proceeded against in a criminal action if, as a result of mental illness, disease or defect, he is unable (1) to understand the nature of the proceedings, (2) to assist and cooperate with his counsel, (3) to follow the evidence, or (4) to participate in his defense.

(b) A defendant is incompetent to be sentence if, as a result of mental illness, disease or defect, he is unable (1) to understand the nature of the proceedings, (2) to understand the charge of which he has been convicted, (3) to understand the nature and extent of the sentence imposed upon him or (4) to assist and cooperate with his counsel.

SOURCE: Guam PC 1367; M.P.C. §4.04; *Cal. §537 (T.D. 2 1968); Mass. ch. 263 §28; N.J. §2C:4-4.

COMMENT: Section 7.37 is the direct replacement of former PC §1367. Subsection (a) defines when a person is incompetent to be proceeded against in a criminal case, which definitions are essentially the same as currently used in decisional law of the Guam court. Subsection (b) defines when a person is incompetent to be sentenced and, likewise, the standards used are basically similar to those presently used by the Guam Court.

§ 7.40. Same: Hearing to Determine.

(a) At any time before the commencement of the trial either party may make a motion for a hearing on the defendant's competency to be proceeded against, or the court on its own motion may order such a hearing.

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Thereupon, the court shall suspended all proceedings in the criminal prosecution and proceed as provided in § 7.25.

(b) At any time after the commencement of the trial, but before sentence, if it appears on the motion of either party or the court's own motion that there is reasonable cause to believe the defendant is incompetent to be proceeded against or sentenced, the court shall suspend all proceedings in the criminal prosecution and proceed as provided in § 7.25. The trial jury in the criminal prosecution may be discharged or retained at the discretion of the court until the defendant's competency is determined. The dismissal of the trail jury shall not be a bar to further prosecution.

(c) If the court for any reason once proceeds under § 7.25, then upon a second or subsequent notice or plea under § 7.22, or upon a second or subsequent motion under this Section, the court does not have to suspend the proceedings in the criminal prosecution and again proceed as provided in § 7.25, except upon a showing of good cause of changed conditions.

SOURCE: Guam PC §1368; M.P.C. §4.05; *Cal. §538 (T.D. 2 1968); N.J. §2C:4-5.

COMMENT: his is a restatement of the former Penal Code adding only procedural detail consonant with the Criminal and Correctional Code. Note that this Section deals with a defendant's mental state which would arise after the event for which he was charged and does not relate to it.

§ 7.43. Same: Hearing Procedure for Commitment and Release.

(a) If at least one psychiatrist concludes in hi report filed pursuant to § 7.25 that the defendant may be incompetent to be proceeded against or to be sentenced, the court shall order the issue of his competency to be determined within ten days after the filing of the reports pursuant to § 7.25, unless the court, for good cause, orders the issue tried at a later date.

(b) Any hearing under this Section shall be by the court without a jury.

(c) If the court finds that the defendant is competent to be proceeded against or to be sentenced, the proceedings shall be resumed, or judgment be pronounced.

(d) If the court finds that the defendant is incompetent to be proceeded against or sentenced but that there is a substantial likelihood that he will regain his competency in the foreseeable future, the court shall order him committed to the Administrator of the Guam Memorial Hospital for custody, care and treatment and shall require the Administrator to furnish

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the court with reports on the defendant's progress at least once every six months.

(e) Whenever, in the opinion of the Administrator or any officer designated in writing by him, the defendant regains his competency, the Administrator or such officer shall, in writing, certify that fact to the clerk of the court in which the proceedings are pending. Such certification, unless contested by the defendant or the people, shall be sufficient to authorize the court to find the defendant competent and to order the criminal prosecution to continue. If the certification is contested, a hearing before the court shall be held, after notice to the parties, and the party so contesting shall have the burden of proving by a preponderance of the evidence that the defendant remains incompetent.

Upon a finding of competency, the defendant may apply for his release pending trial in the manner provided by Chapter 40 (commencing with §40.10) of the Criminal Procedure Code.

Upon written request by the court or either party, filed with the clerk of the court and served upon the superintendent of the institution in which the defendant is or was confined, the superintendent shall file with the clerk of the court the defendant's complete medical records, or such portion thereof as is designated in the request, or a certified copy thereof, while at said institution.

(f) If at any time the court determines that the defendant is incompetent and that there is no substantial likelihood that he will regain his competency in the foreseeable future, the court, upon its own motion, or upon motion of either party, and after reasonable notice to the other party and an opportunity to be heard, shall dismiss the pending indictment, information, or other criminal charges and order the defendant to be released or order the commencement of any available civil commitment proceedings.

(g) A finding or certificate that the defendant is mentally competent shall in no way prejudice the defendant in his defense on the plea under § 7.22 or in his defense under § 7.19. Such finding or certificate shall not be introduced in evidence on such issues or otherwise brought to the notice of the jury.

(h) The proceedings under this section shall be part of the criminal proceedings and included in the file of that case.

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(i) Any period for which the defendant is committed pursuant to this Section shall be credited against any sentence which may later be imposed on him for the offense with which he charged.

SOURCE: Guam P.C. §§1368, 1370 & 1372; M.P.C. §4.06; *Cal. §539 (T.D. 2, 1968); N.J. §2C:4-6.

CROSS-REFERENCES: §§ 7.22 & 7.19 of this Code; 10 GCA Chapter 82.

COMMENT: The U.S. Supreme Court in *Jackson v. Indiana*, 406 U.S. 715 (1972) held that indefinite commitment violates the defendant's rights of due process and of equal protection. The Model Penal Code does not reflect this case. Guam law has been modified, through the requirement of Subsection (d) that the hospital administrator report to the court on the defendant's progress at least once every six months, so that any constitutional defect arising from the Jackson case should be eliminated.

§ 7.46. Same: Commitment as Exonerating Bail. The commitment of the defendant pursuant to § 7.43 exonerates any depositor or surety who has provided security pursuant to Chapter 40 (commencing with §40.10) of the Criminal Procedure Code and entitles such person to the return of any money or property he may have deposited.

SOURCE: Guam PC, §1371.

CROSS-REFERENCES: Chapter 165, Crim. Proc. Code.

§ 7.49. Same: Hearing and Procedure When Mental Disease or Defect Occurs After Sentence.

If at any time after the imposition of sentence and during the period a person is in the custody of the Director of Corrections or is subject to a sentence of probation or parole the Director of Correction has reasonable cause to believe that the person may as a result of mental illness, disease or defect, present a substantial danger to himself or the person or property of others, the directors shall so report to the Attorney General who shall file a motion for a judicial determination whether such person should be committed to the Administrator of the Guam Memorial Hospital for custody, care and treatment. A similar motion may be and upon behalf of such person. The motion and the determination shall be made in the manner provided by §§ 7.25, 7.40 and 7.43. If the court finds that the person as a result of mental illness, disease or defect, presents a substantial danger to himself or the person or property of others, the court shall order him to be committed to the custody of the Administrator of the Guam Memorial Hospital. Time spent in such detention shall be counted towards any sentence of confinement previously imposed. Either the Administrator or the person committed may apply for discharge in the manner provided by

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Subsections (c) and (d) of § 7.34. The court shall conduct a hearing on such application in the manner provided by Subsection (e) of § 7.34 and make such order releasing the person or returning him to probation, parole or custody of the Director of Corrections as may be required.

SOURCE: New Section.

CROSS-REFERENCES: Guam PC §1367.

COMMENT: Guam PC §1367 provided that "a person cannot be...punished for a public offense while he is insane". No provision was made for determining whether a person became insane while being punished, nor was there any provision for his treatment if he was found insane. This Section provides both.

§ 7.52. Transfer of Committed Person Off-Island: Hearing and Notice to Attorney General Required.

Nothing in this Article shall be construed to hinder or to prevent the transfer of any person committed pursuant to this article to any hospital outside of Guam, for care and treatment. An application for transfer may be made by either the Administrator of the Guam Memorial Hospital or by or on behalf of the person committed. The application shall be made to the court which committed such person. A transfer may be made only upon court order after such notice to the Attorney General as the court shall require.

SOURCE: Guam PC §1372a.

COMMENT: This Section continues the authority to send committed persons off-island for treatment recognizing that almost no facilities exist on Guam for the criminally insane. This Section places the authority with the committing court and requires notice to the Attorney General of the application for transfer. Transfer may be sought for treatment of both physical and mental conditions.

ARTICLE 3
DEFENSES

- § 7.55 Specific Defenses Defined and Allowed.
- § 7.58 Intoxication.
- § 7.61 Duress or Necessity.
- § 7.64 Other Defenses.
- § 7.67 Appropriateness of Prosecution.

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§ 7.70 Entrapment as Affirmative Defense.

§ 7.73 Specific Defense Defined and Allowed; Ignorance or Mistake; Intoxication; Duress, Compulsion; Consent; De Minimus Infractions; Entrapment; and Renunciation.

§ 7.55. Specific Defenses Defined and Allowed.

(a) A person's ignorance or mistake as to a matter of fact or law is a defense if it negatives the culpable mental state required for the offense or establishes a mental state sufficient under the law to constitute a defense.

(b) A person's belief that his conduct does not constitute a crime is a defense only if it is reasonable and,

(1) if the person's mistaken belief is due to his ignorance of the existence of the law defining the crime, he exercised all the care which, in the circumstances, a law-abiding and prudent person would exercise to ascertain the law; or

(2) if the person's mistaken belief is due to his misconception of the meaning or application of the law defining the crime to his conduct,

(A) he act in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in a statute, judicial decision, administrative order or grant of permission, or an official interpretation of the public officer or body charged by law with the responsibility for interpreting, administering or enforcing the law defining the crime; or

(B) he otherwise diligently pursues all means available to ascertain the meaning and application of the crime to his conduct and honestly and in good faith concludes his conduct is not a crime in circumstances in which a law-abiding and prudent person would also so conclude.

(c) The defendant must prove a defense arising under Subsection (b) by a preponderance of the evidence.

SOURCE: Guam PC §26 (5); M.P.C. §2.04; *Cal. §500 (T.D. 2, 1968); Cal. §560 (1971); Mass. ch. 263 §19, N.J. §2C:2-4.

COMMENT: This Section codifies the defenses of ignorance or mistake, adding that the mistake or ignorance may be of either fact or of law. However, Subsection (b) proceeds to rather carefully define when the defenses set forth in this Section are and

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are not permissible. Subsection (c) provides that this defense must be proven by the defendant by a preponderance of the evidence.

Note that Subsection (b)(2)(A) provides the defense that the person charged acts in reasonable reliance upon an official statement of the law made by, among other sources, the public officer or body charged by law with the responsibility for interpreting, administering or enforcing it. Thus, in the present state of the law, it would be a defense for a person charged with a crime that he is relying upon a good faith opinion of the Attorney General stating that his actions were not a crime. Likewise, he could rely upon the particular body enforcing the law, such as the Guam Gaming Commission, the Director of Public Health, the Director of Land Management, the Director of Revenue and Taxation, all in their respective spheres of enforcement.

Subsection (b) makes applicable this defense only to crimes thereby excluding violations which are subject only to fines. In the case of violations, since fault is dispensed with as a basis of liability it would seem consistent to dispense with absence of fault deriving from the mistake of criminal law as a basis for a defense.

The requirement that the defense must be reasonable necessarily precludes the defense of mistake of law in the great majority of cases where the defendant commits an act whose immorality and criminality are obvious. It is only in the new statutory crimes used for regulatory purposes that a jury is likely to find that a mistake as to criminal prohibition is reasonable. Nevertheless, reasonable is not enough. In this area the jury needs more guidance and, therefore, this Section provides as definite a standard as is possible for such a defense.

§ 7.58. Intoxication.

(a) As used in this Section:

(1) *intoxication* means an impairment of mental or physical capacities resulting from the introduction of alcohol, drugs or other substances into the body.

(2) *self-induced intoxication* means intoxication caused by substances which the person knowingly introduces into his body, the tendency of which to cause intoxication he knows or ought to know, unless he introduces them pursuant to medical advice or under such circumstances as would otherwise afford a defense to a charge of crime.

(b) Except as provided in Subsection (d), intoxication is not a defense to a criminal charge. Evidence of intoxication is admissible whenever it is relevant to negate or to establish an element of the offense charged.

(c) A person is reckless with respect to an element of the offense, even though his disregard thereof is not conscious, if his not being conscious thereof is due to self-induced intoxication.

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(d) Intoxication which is not self-induced is an affirmative defense if, by reason of such intoxication, the person at the time of his conduct lacks substantial capacity either to appreciate its wrongfulness or to conform his conduct to the requirements of the law.

SOURCE: Guam PC §22; M.P.C. §2.08; Cal. §510 (T.D. 1, 1967); Cal §545 (1971); *Mass. ch. 263, §25 N.J. §2C:2-8.

CROSS-REFERENCES: §4.30, this Code.

COMMENT: The Commission believes that § 7.58 retains the substance of existing law, restating it in a form based on the Model Penal Code and New Jersey and Massachusetts proposals. We note, however, that this approach was criticized in California and a proposal was made there to follow New York and treat intoxication as indistinguishable from any other condition of mind relevant to the existence of Mens Rea. No doubt the latter is the logical approach. It was rejected by the draftsmen of the Model Penal Code "because of the weight of the prevailing law and because they concluded that one that becomes so drunk as to destroy his powers of perception and judgment, engages in conduct without any social value when compared with the resulting risk of danger." They also felt that departure from the existing law would create serious problems of proof.

What this Section does is state that intoxication is not a defense but the fact, and degree of, intoxication is relevant to the issue of mental capacity when purpose, motive or intent is a necessary element of the crime.

It should be noted that an "unconscious" act due to intoxication is treated as an exception to the voluntary act requirement of §4.15 of this Code.

§ 7.61. Duress or Necessity.

(a) In a prosecution for any offense it is an affirmative defense that the defendant engaged in the conduct otherwise constituting the offense:

(1) because he was coerced into doing so by the threatened use of unlawful force against his person or the person of another in circumstances where a person of reasonable firmness in his situation would not have done otherwise; or

(2) in order to avoid death or great bodily harm to himself or another in circumstances where a person of reasonable firmness in his situation would not have done otherwise.

(b) The defenses defined in this Section are not available if the offense is murder nor to a person who placed himself intentionally, knowingly or recklessly in a situation in which it was probably that he would be subjected to duress or compulsion.

SOURCE: Guam PC, §26(8)(9); M.P.C. §2.09; *Cal. §520 (T.D. 1, 1967); Cal. §555 (1971); Mass. ch. 263, §41; N.J. 2C:2-9.

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CROSS-REFERENCES: This Section presents the defenses of duress and compulsion, superseding Paragraphs (8) & (9) of PC §26; § 7.76, et seq. of this Code; & §4.30 (A) -(C) of this Code.

COMMENT: The purpose of this Section is to formulate a principle of excuse even in those cases where the harm or evil created by the defendant by violating the criminal law was equal to or greater than the harm or evil that would have resulted if he had not acted. This is distinguished from the situation where the defendant's action is a choice of what could be characterized as a lesser of two evils. The latter situation is dealt with Article 4, commencing with § 7.76, of this Code.

This Section presents two types of defenses, the first being what is commonly called duress, existing in circumstances where a person reasonably believes that the threat may be carried out. The second situation is what is known as necessity. This is a defense to a criminal act undertaken to avoid what appears to be a present or imminent reality, rather than merely a threat.

It is important to note that neither defense is available to the crime of murder nor to a person who puts himself in a situation where duress or compulsion probably would occur. In this latter case, a person must do more than blunder into the situation by negligence. He must enter the situation with some form of knowledge or records abandon similar to the standard required by §4.30 (A)(B) or (C) of this Code.

The scope resistance is stated in the terms of the Model Penal Code's standard of "a person of reasonable firmness." Compare to ordinary firmness as defined in *State vs. Crow*, 23 N.C. 297 (1871); Texas Penal Code, Article 38 (1948). This is substantially the same as the "reasonable cause" standard in Guam Penal Code §26, but it is expressed in terms which make it more clearly apparent that the person subjected to threats, although he is not called upon to be a hero, must not yield too readily to a choice of nonresistance.

§ 7.64. Other Defenses.

(a) The consent of the victim to conduct charges to constitute an offense or to the result thereof is a defense if such consent precludes the infliction of the harm or evil sought to be prevented by the law defining the offense.

(b) When conduct is an offense because it causes or threatens bodily injury, consent to such conduct or to the infliction of such injury is a defense if:

(1) neither the injury inflicted nor the injury threatened is such as to jeopardize life or seriously impair health;

(2) the conduct and the injury are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport;
or

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(3) the conduct and the injury are reasonably foreseeable hazards of an occupation or profession or of medical or scientific experimentation conducted by recognized methods, and the persons subjected to such conduct or injury have been made aware of the risks involved prior to giving consent.

(c) Assent does not constitute consent, within the meaning of this Section, if:

(1) it is given by a person who is legally incompetent to authorize the conduct charged to constitute the offense and such incompetence is manifested or known to the defendant;

(2) it is given by a person who by reason of intoxication as defined in § 7.58, mental illness or defect, or youth, is manifestly unable or known by the defendant to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense; or

(3) it is induced by force, duress or deception.

SOURCE: M.P.C. §1.11; *Mass. ch. 263, §42; N.J. §2C:2-10.

CROSS-REFERENCES: §19.30(A)(3) of this Code, cf. §25.15 (A)(2) of this Code. (Statutory Rape).

COMMENT: This is a new Section based upon Model Penal Code §2.11 and is generally consistent with former law. A defense is not provided where the harm or evil sought to be prevented is not vitiated by the victim's assent, such as in statutory rape.

Subsection (b) provides specific instances where assent is a defense to the infliction of bodily injury. Subsection (c) states certain circumstances where the assent of the victim does not constitute consent to the act.

§ 7.67. Appropriateness of Prosecution.

The court shall dismiss a prosecution if, having regard to the nature of the conduct charged to constitute an offense and the nature of the attendant circumstances, it finds that the defendant's conduct:

(a) Was within a customary license or tolerance, neither expressly negated by the person whose interest was infringed nor inconsistent with the purpose of the law defining the offense;

(b) Did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction; or

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(c) Presents such other extenuations that it cannot reasonably be regarded as envisaged by the Legislature in forbidding the offense. The court shall not dismiss a prosecution under this Subsection without filing a written statement of its reasons.

SOURCE: M.P.C. §2.12; *N.J. §2C:2-11.

COMMENT: This is a new Section to Guam. In criminal law enforcement a number of agencies exercise discretion as to the appropriateness of prosecution in a particular case. The police decide whether to arrest and whether to transmit the reports to the Attorney General; the Attorney General decides whether to file charges and what charges; the grand jury decides upon probable cause in felonies; and the court must decide upon similar issues at preliminary hearings and at requests for search warrant, etc. It would be unrealistic to believe that judges never enter a finding of not guilty even though guilt is proven where a conviction is considered to be inappropriate. All this has been summarized as a "kind of unarticulated authority to mitigate the general provisions of the criminal law to prevent absurd applications."

This Section is intended to codify those areas in which a judge may act.

§ 7.70. Entrapment as Affirmative Defense.

(a) It is an affirmative defense that the defendant committed the offense in response to an entrapment, except as provided in Subsection (c).

(b) Entrapment occurs when a law enforcement agent, for the purpose of obtaining evidence of the commission of an offense, induces or encourages a person to engage in proscribed conduct, using such methods of inducement as to create a substantial risk that the offense would be committed by persons other than those who are ready to commit it. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

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

(d) As used in this Section, law enforcement agent includes personnel of federal and territorial law enforcement agencies, and any person cooperating with such an agency.

(e) The issue of entrapment shall be tried by the trier of fact.

SOURCE: M.P.C. §2.13; Cal. §550 (T.D.1 1967); Cal. §565 (1971); *Mass. ch. 263, §44; N.J. §2C:2-12. Subsection (e) amended by P.L. 19-5:133.

CROSS-REFERENCES: 8 GCA §160.40.

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COMMENT: § 7.70 perhaps limits the defense of entrapment developed under case law, and particularly under case law of Guam. The Commission, however, believes that the substantive defense and the procedural safeguards provided here adequately satisfy the basic policy to deter wrongful conduct on the part of the Government.

Subsection (b) defines and limits entrapment to that conduct by law enforcement agents which induces or encourages a person to commit the crime when a person so induced or encouraged was not a sort "who is ready to commit."

Entrapment is not available to persons who cause or threatened serious bodily injury and the person harmed or threatened is not the person perpetrating the entrapment. Causing or threatening bodily injury is a sufficiently serious crime that there should be no reason that a person committing it should escape the consequences.

For a police officer to pretend he is not a police officer in certain circumstances (drug buys) might, by some, be considered "Entrapment" or at least misrepresentation. This Section, however, would clearly not prohibit such police conduct.

Note that a law enforcement agent includes not only personnel of a law enforcement agency, but any person cooperating with that agency. Thus, informers could be the subject of an entrapment defense. Also, important case law is overruled by this Subsection in that federal law enforcement officials are included within its scope. Previously, evidence obtained by federal officials would have been admissible in a territorial court without defense. Entrapment now applies regardless of who, federal or local, was involved.

COURT DECISIONS: D.C. GUAM, App. Div., 1978. Under former Penal Code, the Court approved of CAL-JIC §4.60 as proper instruction for entrapment even without additional instruction CAL-JIC §4.61 dealing with whether furnishing the opportunity to commit a crime is entrapment. *Flores v. People*, Cr. App. #76-003A.

§ 7.73. Specific Defenses Defined and Allowed; Ignorance or Mistake; Intoxication; Duress, Compulsion; Consent; De Minimis Infractions; Entrapment; and Renunciation.

(a) In a prosecution for an attempt, it is an affirmative defense that, under circumstances manifesting a voluntary and complete renunciation of his criminal intent, the defendant avoided the commission of the crime attempted by abandoning his criminal effort and, if mere abandonment was insufficient to accomplish such avoidance, by taking further and affirmative steps which prevented the commission thereof.

(b) In a prosecution for criminal facilitation, it is an affirmative defense that, prior to the commission of the crime which he facilitated, the defendant made a reasonable effort to prevent the commission of such crime.

(c) In a prosecution for criminal solicitation, or for conspiracy, it is an affirmative defense that, under circumstances manifesting a voluntary and

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complete renunciation of his criminal intent, the defendant prevented the commission of the crime solicited or of the criminal or otherwise unlawful conduct contemplated by the conspiracy, as the case may be.

(d) A renunciation is not "voluntary and complete" within the meaning of this Section if it is motivated in whole or in part by:

(1) a belief that a circumstance exists which increases the probability of detection or apprehension of the defendant or another participant in the criminal operation, or which makes more difficult the consummation of the crime; or

(2) a decision to postpone the criminal conduct until another time or to substitute another victim or another but similar objective.

SOURCE: M.P.C. §§5.01(4), 5.02(3), 5.03(6); Cal. §802 (T.D.2, 1968); Cal. §570 (1971); *Mass. ch. 263, §49(b); N.J. §§2C:5-1(c), 2C:5-2(e).

CROSS-REFERENCES: §§13.10, 4.65, 13.20 and 13.30, all of this Title.

COMMENT: § 7.73 is a new section which substantially narrows the defense of "renunciation" as allowed by case law. The situations in which it is allowed and disallowed are clearly stated within the law. The defense is unavailable to a person who is charged as a principal with a completed crime. It is available only in cases of attempt, criminal facilitation or conspiracy. Further, in all cases the defendant must have taken some affirmative steps to see that the crime is not carried through.

ARTICLE 4
JUSTIFICATION

- § 7.76 Deadly Force Defined.
- § 7.78 Justification a Defense; Civil Remedies Not Impaired by Article.
- § 7.80 Necessity Defined and Allowed.
- § 7.82 Execution of Public Duty Defined and Allowed.
- § 7.84 Self-Defense Defined and Allowed.
- § 7.86 Self-Defense Limited.
- § 7.88 Force in Defense of Third Persons: Defined and Allowed.
- § 7.90 Force in Defense of Property: Defined and Allowed.
- § 7.92 Use of Force in Law Enforcement.
- § 7.94 Use of Force by Person Having Special Care, Duty or Responsibility for Another.
- § 7.96 When Force Allowed by §§ 7.94 and 7.96 is Unavailable.

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§ 7.98 Justification in Seizure of Property.

COMMENT: Article 4 could be treated as a part of Article 3, Defenses. However, it is desirable to provide a separate article and separate consideration for the defense of justification. It should be noted that through out this Article, the law looks not to the offense with which the defendant has been charged, but to the conduct which he seeks to justify. Moreover, the law carefully establishes its standard both as to the right to use force and as to the amount of force which may be used. This Article supersedes the very limited provisions of former §§196 through 199, Guam Penal Code, which provided a defense of justification for homicide.

§ 7.76. Deadly Force Defined.

Deadly force means force which a person uses with the intent of causing, or which he knows to create a substantial risk of causing, death or serious bodily injury. Intentionally firing a firearm in the direction of another person or at a moving vehicle constitutes deadly force. A threat to cause death or serious bodily injury does not constitute deadly force, so long as the defendant's intent is limited to creating an apprehension that he will use deadly force if necessary.

SOURCE: M.P.C. §3.11(2); Cal. §600 (1971); *Mass. ch. 263, §32(c)(2); N.J. §2C:3-11(b).

§ 7.78. Justification a Defense; Civil Remedies Not Impaired by Article.

(a) In a prosecution for an offense, justification as defined in this Article is a defense.

(b) The fact that conduct is justifiable under this Article does not abolish or impair any remedy for such conduct which is available in any civil action.

SOURCE: *M.P.C. §3.01; Cal. §605 (1971); Mass. ch. 263, §32(a); N.J. §2C:3-1.

CROSS-REFERENCES: § 7.55(c); §85.22, Code of Criminal Procedure.

COMMENT: Subsection (a) of § 7.78 makes clear that justification is a defense, but not an "affirmative defense" and when raised as a defense and at trial the prosecution has the burden of disproving beyond a reasonable doubt.

Justification is not, as stated, an "affirmative defense" as provided in 8 GCA (Criminal Procedure) §85.22. This is consistent with all of the sources above. The M.P.C. and N.J. referred to it as an "affirmative defense;" however, the term is used differently there than here. All four sources place the burden on the prosecution to disprove the defense.

Subsection (b) merely states that this Code, by creating certain justifications, does not affect or attempt to affect the civil liability of the actor. However, it is quite

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possible that the justifications described here are also justifications against civil liability.

§ 7.80. Necessity Defined and Allowed.

A person is justified in conduct which would otherwise constitute an offense when such conduct is immediately necessary to avoid an imminent public disaster or serious bodily injury to a person or serious damage to property which is about to occur though no fault of the defendant, and that harm which might reasonably be expected to result from such conduct is less than the harm which the defendant seeks to prevent.

SOURCE: M.P.C. §2.02; *Cal. §610(b) (1971); Mass. ch. 263, §40; N.J. §32-2.

COMMENT: Section 7.80 is new, but codified a principle which has been applied by prosecutors in the past. This Section will justify, for example, breaking into a house in order to make a telephone call essential to saving a person's life or destroying one person's property in order to prevent a fire from spreading into a densely populated community. This Section supplements any defense which might be otherwise available under this Article.

§ 7.82. Execution of Public Duty Defined and Allowed.

(a) Except as otherwise provided in Subsection (b), conduct is justifiable when it is required or authorized by:

(1) the law defining the duties or functions of a public officer or the assistance to be rendered to such officer in the performance of his duties;

(2) the law governing the execution of legal process;

(3) the judgment or order of a competent court;

(4) the law governing the armed services or the lawful conduct of war; or

(5) any other provision of law imposing a public duty.

(b) The other sections of this Article apply to:

(1) the use of force upon or toward the person of another for any of the purposes dealt with in such sections; and

(2) the use of deadly force for any purpose, unless the use of such force is otherwise expressly authorized by law or occurs in the lawful conduct of ward.

(c) The justification afforded by Subsection (a) applies:

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(1) when the defendant believes his conduct to be required or authorized by the judgment or direction of a competent court or in the lawful execution of legal process, notwithstanding lack of jurisdiction of the court or defect in the legal process; and

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

SOURCE: See G.P.C. Sec. 196(1),(2); *M.P.C. Sec. 3.03; Cal. §610(a) (1971); Mass. ch. 263, §4.39; N.J. 2C:3-3.

COMMENT: This Section provides a comprehensive statement of the relationship between justification under the criminal law and the law relating to public duties and functions. This Section is substantively the same as Model Penal Code §3.03.

Subsection (b) places restriction upon the application of this Section and directs the circumstances in which other Sections of this article are to be applied.

Subsection (c) extends the justification afforded by Subsection to cases where the defendant acts in belief that his conduct is required by a judgment or in the lawful execution of legal process or to assist a public officer in the performance of his duties.

§ 7.84. Self-Defense Defined and Allowed.

Except as otherwise provided by §§ 7.86 and 7.96, the use of force upon or toward another person is justifiable when the defendant believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.

SOURCE: G.P.C. §197(1),(3); *M.P.C. §3.04(1); Cal. §630 (1971); Mass. ch. 263, §35(a); N.J. §2C:3-4(a).

CROSS-REFERENCES: § 7.84 and 7.86 of this Code; See Comment after § 7.86.

COMMENT: This Section is the general Section relative to the justification commonly known as "self-defense". The main difference between the treatment of "self-defense in this Section and as it has been treated in the case law of Guam is that this Section limits self-defense to situations where the force is immediately necessary for self protection against unlawful force "on the present occasion." Thus, the common claim of self-defense now used by defendants alleging that they were justified because the victim "was known to" carry fire arms in the past is clearly no longer a defense under this Section. The danger must be present at the time the force is used and reputation along will not serve as a justification. This should severely limit the use of this defense in comparison with practice.

§ 7.86. Self-Defense Limited.

(a) The use of force is not justifiable under § 7.84;

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(1) To resist an arrest which the defendant knows is being made by a peace officer in the performance of his duties, although the arrest is unlawful; or

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

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

(B) the defendant has been unlawfully dispossessed of the property and is making a re-entry or recaption justified by § 7.90, or

(C) the defendant believes that such force is necessary to protect himself against death or serious bodily harm.

(b) The use of deadly force is not justifiable under § 7.84 unless the defendant believes that such force is necessary to protect himself against death, serious bodily harm, kidnapping or rape or sodomy compelled by force or threat; nor is it justifiable if;

(1) the defendant, with the purpose of causing death or serious bodily harm, provoked the use of force against himself in the same encounter; or

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

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

(B) a public officer justified in using force in the performance of his duties or a person justified in using force in his assistance or a person justified in using force in making an arrest or preventing an escape is not obliged to desist from efforts to perform such duty, effect such arrest or prevent such escape

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because of resistance or threatened resistance by or on behalf of the person against whom such action is directed.

(c) Except as otherwise required by Subsections (a) and (b), a person employing protective force may estimate the necessity thereof under the circumstances as he believes them to be when the force is used, without retreating, surrendering possession, doing any other act which he has no legal duty to do or abstaining from any lawful action.

SOURCE: G.P.C. §197(3); *M.P.C. §3.04(2); Cal. §635 (1971); Mass. ch. 263 §35(b), 39; N.J. §2C:3-4(b).

CROSS-REFERENCES: § 7.84 of this Code.

COMMENT: This Section and § 7.84 provide the basic rule for self-defense as a justification. Section 7.84 states the general rule but does not limit its application to "reasonable" belief but only to an honest or actual belief. It is to be expected that the jury will, however, use the reasonableness of the belief as a factor in determining its actuality. Moreover, § 7.96 provides that a justification defense is not available in a prosecution for which either recklessness or negligence is a sufficient probability (e.g., manslaughter), if the defendant was reckless or negligent in forming his belief.

Section 7.86 provides a limitation, and exceptions to this limitations, upon the justifiability of the use of force. These are all clearly set out within the Section. Probably the greatest departure from prior law exists in § 7.86(a) (1) in that use of force is not justifiable to resist an illegal arrest when the defendant knows that the arresting person is a peace officer acting in the performance of his duties. This limitation will limit certain justifications now presented fairly regularly to the courts of Guam.

§ 7.88. Force in Defense of Third Persons: Defined and Allowed.

(a) Except as otherwise provided by this Section and § 7.96, the use of force upon or toward the person of another is justifiable to protect a third person when:

(1) the defendant would be justified under § 7.84 in using such force to protect himself against the injury he believes to be threatened to the person whom he seeks to protect;

(2) under the circumstances as the defendant believes them to be, the person whom he seeks to protect would be justified in using such protective force; and

(3) the defendant believes that his intervention is necessary for the protection of such other person.

(b) Notwithstanding Subsection (a):

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(1) when the defendant would be obliged under Paragraph (2) of Subsection (b) of § 7.86 to retreat or take other action, he is not obliged to do so before using force for the protection of another person, unless he knows that he can thereby secure the complete safety of such other person;

(2) when the person whom the defendant seeks to protect would be obliged under Paragraph (2) of Subsection (b) of § 7.86 to retreat or take similar action if he knew that he could obtain complete safety by so doing, the defendant is obliged to try to cause him to do so before using force in his protection if the defendant knows that he can obtain complete safety in that way; and

(3) neither the defendant nor the person whom he seeks to protect is obliged to retreat when in the other's dwelling or place of work to any greater extent than in his own.

SOURCE: G.P.C. §197(1), (3); M.P.C. §3.05; Cal. §630, 635 (1971); Mass. ch. 263, §36, 39; N.J. §2C:3-5.

CROSS-REFERENCES: §§ 7.86 and 7.96 of this Code.

COMMENT: Section 7.88 continues and expands upon the defense of the use of force to protect a third person as found in present law. This defense is expanded in that the person using force is not limited to any relationship, stated in law, with a person he is protecting. Moreover, the Section permits intervention under the facts as the defendant believes them to be, subject to §§ 7.96 and 7.84 of this Code. It might bear emphasis, that the intervenor might well be protected even though the person on whose behalf he acts could not, in fact, use self-defense.

Nevertheless, this Section limits the right of self-defense, as popularly practiced on Guam, in that a person assisting another in, say, a fight outside a bar, must urge his friend to retreat if retreat is possible before he can claim the right to self-defense. He cannot simply barge in and start fighting without more.

§ 7.90. Force in Defense of Property: Defined and Allowed.

(a) Except as otherwise provided by this Section and § 7.96, the use of force upon or toward the person of another is justifiable when the defendant believes that such force is immediately necessary:

(1) to prevent or terminate an unlawful entry or other trespass upon land or a trespass against or the unlawful carrying away of tangible, movable property, provided that such land or movable property is, or is believed by the defendant to be, in his possession or in the possession of another person for whose protection he acts; or

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(2) to effect an entry or re-entry upon land or to retake tangible movable property, provided that the defendant believes that he or the person by whose authority he acts is entitled to possession, and the force is used immediately or on fresh pursuit after such dispossession.

(b) For the purposes of Subsection (a):

(1) person who has parted with the custody of property to another who refuses to restore it to him is no longer in possession, unless the property is movable and was and still is located on land in his possession;

(2) a person who has a license to use or occupy real property is deemed to be in possession thereof except against the licensor acting under claim of right.

(c) The use of force is justifiable under this Section only if the defendant first request the person against whom such force is used to desist from his interference with the property, unless the defendant believes that:

(1) such request would be useless;

(2) it would be dangerous to himself or another person to make the requests; or

(3) substantial harm will be done to the physical condition of the property which is sought to be protected before the requests can effectively be made.

(d) The use of force to prevent or terminate a trespass is not justifiable under this Section if the defendant knows that the exclusion of the trespasser will expose the trespasser to substantial danger of serious bodily harm.

(e) The use of force to prevent an entry or re-entry upon land or the recaption of movable property is not justifiable under this Section, although the defendant believes that such re-entry or recaption is unlawful, if:

(1) the re-entry or recaption is made by or on behalf of a person who was actually dispossessed of the property; and

(2) it is otherwise justifiable under Paragraph (2) of Subsection (a).

(f) The use of deadly force is not justifiable under this Section unless the defendant believes that:

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

(2) the person against whom the force is used is attempting to commit or consummate arson, burglary, robbery or other felonious theft or property destruction and either:

(A) has employed or threatened deadly force against or in the presence in the defendant; or

(B) the use of force other than deadly force to prevent the commission or the consummation of the crime would expose the defendant or another in his presence to substantial danger of serious bodily harm.

SOURCE: G.P.C. §197(2); M.P.C. §3.08(1) -- (3); Cal. §640(1971); Mass. ch. 263, §37 & 39; N.J. §2-C:3-6.

CROSS-REFERENCES: § 7.98; Distinguish; § 7.96 of this Code.

COMMENT: This Section justifies, under certain limited circumstances, the use of force against persons in order to protect or repossess one's property. This is in contrast with § 7.98 which allows the use of force against property. The defense and its limitations are clearly set forth within this statute.

§ 7.92. Use of Force in Law Enforcement.

(a) Except as otherwise provided by this Section and § 7.96, the use of force upon or toward the person of another is justifiable when the defendant is making or assisting in making an arrest and the defendant believes that such force is immediately necessary to effect a lawful arrest.

(b) The use of force is not justifiable under this Section unless:

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

(2) when the arrest is made under a warrant, the warrant is valid or believed by the defendant to be valid.

(c) The use of deadly force is not justifiable under this Section unless:

(1) the arrest is for a felony;

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

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(3) the defendant believes that the force employed creates no substantial risk of injury to innocent persons; and

(4) the defendant believes that:

(A) the crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or

(B) there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed.

(d) The use of force to prevent the escape of an arrested person from custody is justifiable when the force could justifiably have been employed to effect the arrest under which the person is in custody, except that a guard or other person authorized to act as a peace officer is justified in using any force, including deadly force, which he believes to be immediately necessary to prevent the escape of a person from a jail, prison, or other institution for the detention of person charged with or convicted of a crime.

(e) A private person who is summoned by a peace officer to assist in effecting an unlawful arrest, is justified in using any force which he would be justified in using if the arrest were lawful, provided that he does not believe the arrest is unlawful.

(f) A private person who assists another private person in effecting an unlawful arrest, or who, not being summoned, assists a peace officer in effecting an unlawful arrest, is justified in using any force which he would be justified in using if the arrest were lawful, provided that (1) he believes that the arrest is lawful (2) the arrest would be lawful if the facts were as he believes them to be.

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

(1) any limitations imposed by the other provision of this Article on the justifiable use of force in self-protection, for the protection of others, the protection of property, the effectuation of an arrest or the prevention of an escape from custody shall apply notwithstanding the criminality of the conduct against which such force is used; and

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(2) the use of deadly force is not in any event justifiable under this Subsection unless:

(A) the defendant believes that there is a substantial risk that the person whom he seeks to prevent from committing a crime will cause death or serious bodily harm to another unless the commission or the consummation of the crime is prevented and that the use of such force presents no substantial risk of injury to innocent persons; or

(B) the defendant believes that the use of such force is necessary to suppress a riot or mutiny after the rioters or mutineers have been ordered to disperse and warned, in any particular manner that the law may require, that such force will be used if they do not obey.

SOURCE: G.P.C. §196, 197; *M.P.C. §3.07; Cal. §640-655 (1971); Mass. ch. 263, §34, 39; N.J. §2C:3-7.

CROSS-REFERENCES: § 7.96, § 7.86 (b) (2) (c) of this Code.

COMMENT: A fairly complex set of rules is provided for justification as the defense in several areas related to law enforcement. This Section is based on Model Penal Code §3.07. Subsections [a] through [c] and [d] and [f] deal with arrest and authorize the use of such force is believed to be immediately necessary to make a lawful arrest. This provisions apply to police officers and private citizens alike; however, the latter's privileges are much more limited, particularly as to the right to use deadly force. It should be noted that the issue here is the right to use deadly force solely to affect the arrest. Frequently, issues of self-protection and protection of another arise during such encounters in which case there is no need to retreat and the officer may use deadly force on entirely different grounds. Subsection [b] deals with the use of force to prevent escape from custody. Subsection [g] deals with the use of force to prevent suicide or the commission of a crime.

§ 7.94. Use of Force by Person Having Special Care, Duty or Responsibility for Another.

The use of force upon another person is justified under any of the following circumstances:

(a) a parent, guardian or other person responsible for the care and supervision of a minor less than eighteen years of age, or a person acting at the direction of such person, may use necessary force upon the minor for the purpose of safeguarding or promoting his welfare, including prevention and punishment of his misconduct. The force used for this purpose must not be intended to cause or known to create a substantial risk of causing extreme pain or gross degradation;

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(b) a teacher or a person otherwise responsible for the care and supervision of a minor less than eighteen years of age for a special purpose, or a person acting at the direction of such person, may use necessary force upon any such minor who is disruptive or disorderly for the purpose of maintaining order, restraining that minor or removing him from the place of disturbance. The force used for these purposes must not be intended to cause or known to create a substantial risk of causing extreme pain or gross degradation;

(c) a guardian or other person responsible for the care and supervision of an incompetent person or a person acting at the direction of the guardian or responsible person, may use necessary force upon the incompetent person for the purpose of safeguarding or promoting his welfare, including the prevention of his misconduct or, when he is in a hospital or other institution for care and custody, for the purpose of maintaining reasonable discipline in the institution. The force used for these purposes must not be intended to cause or known to create a substantial risk of causing extreme pain or gross degradation;

(d) a person responsible for the maintenance of order in a vehicle, vessel, aircraft, or other carrier, or in a place where others are assembled, or a person acting at the responsible person's direction, may use necessary force to maintain order;

(e) a duly licensed physician, or a person acting at his direction, may use necessary force in order to administer a recognized form of treatment to promote the physical or mental health of a patient if the treatment is administered: (1) with the consent of the patient, or if the patient is a minor less than sixteen years of age, or an incompetent person, with the consent of his parent or guardian or other person entrusted with his care and supervision; or (2) in an emergency, if the physician reasonably believes that no one competent to consent can be consulted and that a reasonable person concerns for the welfare of the patient would consent.

SOURCE: M.P.C. §3.08; *Mass. ch. 263 §38; N.J. §2C:3-8.

COMMENT: New Section. This Section deals with justification for the use of force by person who have special responsibilities for the care, discipline, safety or control of others such as teachers, parents, guardians and ship's captains.

§ 7.96. When Force Allowed by § 7.94 & 7.96 is Unavailable.

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(a) The justification afforded by §§ 7.84 to 7.92, inclusive, is unavailable when:

(1) the defendant's belief in the unlawfulness of the force or conduct against which he employs protective force or his belief in the lawfulness of an arrest which he endeavors to effect by force is erroneous; and

(2) his error is due to ignorance or mistake as to the provisions of this Code, any other provision of the criminal law or the law governing the legality of an arrest or search.

(b) When the defendant believes that the use of force upon or toward the person of another is necessary for any of the purposes for which such belief would establish a justification under §§ 7.82 to 7.94 but the defendant is reckless or negligent in having such belief or in acquiring or failing to acquire any knowledge or belief which is material to the justifiability of his use of force, the justification afforded by those Sections is unavailable in a prosecution for an offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

(c) When the defendant is justified under §§ 7.84 to 7.94 in using force upon or toward the person of another but he recklessly or negligently injures or creates a risk or injury to innocent persons, the justification afforded by those Sections is unavailable in a prosecution for such recklessness or negligence towards innocent persons.

SOURCE: *M.P.C. §3.09; N.J. §2C:3-9.

CROSS-REFERENCES: §§ 7.84 through 7.92 of this Code.

COMMENT: Subsection [b] makes the defense unavailable whether the defendant is reckless or negligent in having the belief of the justifiability of his actions. Subsection [c] makes the defense unavailable when the defendant recklessly or negligently, in his use of force, injures or creates a risk of injury to innocent persons when the prosecution is because of his use of force against such innocent persons.

§ 7.98. Justification in Seizure of Property.

Conduct involving the appropriation, seizure or destruction of, damage to, intrusion on or interference with property is justifiable under circumstances which would establish a defense of privilege in a civil action based thereon, unless:

(a) the Code or the law defining the offense deal with the specific situation involved; or

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(b) a legislative purpose to exclude the justification claimed otherwise plainly appears.

SOURCE: *M.P.C. §3.10; N.J. §2C:3-10.

CROSS-REFERENCES: See Section 7.80 of this Code.

COMMENT: Section 7.98 is addressed only to the taking, damage or destruction of property and any justification which might exist with respect thereto. This Section adopts the view that in this area the Penal law must accept, on the whole, and build upon the privileges recognized in the law of torts and property, except in those rare situations where a Penal Law departure from the Civil law is made clear.
