

## CHAPTER H

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The instructions in this chapter are designed to cover the affirmative offenses in §§ 18-1-407; 18-1-503.5; 18-1-504 and 505; 19-1-604; 18-1-701 through -709; 18-1-801,-804; 18-2-101; 18-2-203,-204; 18-2-301; 18-3-304;18-4-407; 18-6-201; 18-8-102; 18-8-108; 18-8-305; 18-8-307; 18-8-508; 18-9-105,-106; 18-9-109; 18-9-305; 18-12-101,-102; 18-12-105; 18-13-105; 18-15-104, C.R.S.

## NOTES ON CHAPTER USE

Under this section "affirmative defense" means that unless the state's evidence raises the issue involving the alleged defense, the defendant, to raise the issue, must present some credible evidence on that issue.

If the issue involved in an affirmative defense is raised, then the guilt of the defendant must be established beyond a reasonable doubt as to that issue as well as to elements of the offense. *People v. Miller*, 113 P.3d 743 (Colo. 2005)

This chapter contains general affirmative defenses and affirmative defenses to specific crimes. Only statutory affirmative defenses are set forth in this chapter. There may be other, non-statutory affirmative defenses. Although the defense of voluntary intoxication has been deemed not to be an "affirmative defense" by the supreme court in *People v. Harlan*, 8 P.3d 448 (Colo. 2000), it has been included in this chapter.

### H:01 AFFIRMATIVE DEFENSES - GENERALLY

In addition to proving all of the elements of the crime charged beyond a reasonable doubt, the prosecution also has the burden to disprove the affirmative defense beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has failed to disprove beyond a reasonable doubt any one or more elements of the affirmative defense, you must return a verdict of not guilty.

## NOTES ON USE

This language should now be included in the concluding paragraphs of affirmative defense instructions and not set forth in a separate instruction.

## SOURCE & AUTHORITY

§18-1-407, C.R.S.

*People v. Garcia*, 113 P.3d 775 (Colo. 2005)

**H:02 EFFECT OF IGNORANCE OR MISTAKE UPON  
CULPABILITY (MISTAKEN BELIEF)**

It is an affirmative defense to the crime of \_\_\_\_\_ that the defendant engaged in the prohibited (insert name of crime) conduct under a mistaken belief, and due to this mistaken belief by the defendant he did not form the particular mental state required in order to commit the offense.

In addition to proving all of the elements of the crime charged beyond a reasonable doubt, the prosecution also has the burden to disprove the affirmative defense beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has failed to disprove beyond a reasonable doubt any one or more elements of the affirmative defense, you must return a verdict of not guilty.

**SOURCE & AUTHORITY**

§§ 18-1-504(1) (a) and (3), C.R.S.

**H:03 EFFECT OF IGNORANCE OR MISTAKE UPON  
CULPABILITY (MISTAKEN BELIEF, LAW)**

It is an affirmative defense to the crime of \_\_\_\_\_ that the defendant engaged in the prohibited (insert name of crime) conduct under a mistaken belief that the conduct did not constitute the crime, only if such conduct is permitted by: [A statute or ordinance binding in this state] [An administrative regulation, order, or grant of permission by a body or official authorized and empowered to make such order or grant the permission under the laws of the State of Colorado] [An official written interpretation of the statute or law relating to the offense, made or issued by a public servant, agency, or body legally charged or empowered with the responsibility of administering, enforcing, or interpreting such statute, ordinance, regulation, order, or law. If such interpretation is by judicial decision, it must be binding in the State of Colorado].

In addition to proving all of the elements of the crime charged beyond a reasonable doubt, the prosecution

also has the burden to disprove the affirmative defense beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has failed to disprove beyond a reasonable doubt any one or more elements of the affirmative defense, you must return a verdict of not guilty.

#### **NOTES ON USE**

Delete inapplicable material.

Some members of the committee believe that this instruction sets forth an issue of law, which should be decided by the court.

Arguably, the previous instruction, on mistaken belief, could be used in place of this instruction, as a mistaken belief of law under the above circumstances means that the defendant did not form the culpable mental state required for the commission of the offense.

#### **SOURCE & AUTHORITY**

§§18-1-504(2),(3), C.R.S.

*People v. Lesslie*, 24 P.3d 22 (Colo. App. 2000)

#### **H:04 CONSENT OF VICTIM**

It is an affirmative defense to the crime of (insert name of crime) that the victim consented, if [the consent negates an element of that offense] [the consent precludes the infliction of the harm or evil sought to be prevented by the law defining that offense].

In addition to proving all of the elements of the crime charged beyond a reasonable doubt, the prosecution also has the burden to disprove the affirmative defense beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has failed to disprove beyond a reasonable doubt any one or more elements of the affirmative defense, you must return a verdict of not guilty.

## NOTES ON USE

See *Dunton v. People*, 898 P.2d 571 (Colo. 1995); *People v. Bush*, 948 P.2d 16 (Colo.App. 1997); *People v. Cruz*, 923 P.2d 311 (Colo.App. 1996); *People v. Williams*, 899 P.2d 306 (Colo.App. 1995); *People v. Martinez*, 36 P.3d 154 (Colo. App. 2001); *People v. Holwuttel*, 155 P.3d 447 (Colo. App. 2006)(use of this statute and §18-3-401(1.5) not error); *People v. Platt*, 170 P.3d 802 (Colo.App. 2007).

Reference should be made to the special rules at the end of this chapter, particularly "When Assent Does Not Constitute Consent".

In charges of sexual assault, the instruction following §18-3-408.5, C.R.S. should be given if requested by either party. Statutorily, this definition of consent applies only in cases of sexual assault, but it may be used as guidance in drafting an appropriate definitional instruction in other consent cases.

The parties should define the harm or evil set forth in the second bracketed alternative.

## SOURCE & AUTHORITY

§18-1-505(1),(4), C.R.S.

### **H:05 CONSENT OF VICTIM (OFFENSES INVOLVING BODILY INJURY OR THREAT OF BODILY INJURY)**

It is an affirmative defense to the crime of (insert name of crime) that the victim consented, if [the bodily injury consented to or threatened by the conduct consented to is not serious] [the conduct and the injury are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport].

In addition to proving all of the elements of the crime charged beyond a reasonable doubt, the prosecution also has the burden to disprove the affirmative defense beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has failed to disprove beyond a reasonable doubt any one or more elements of the affirmative defense,

you must return a verdict of not guilty.

#### NOTES ON USE

Reference should be made to the special rules at the end of this chapter, particularly that addressing the situation in which assent does not constitute consent.

This instruction is designed to cover only the consent of a victim of an offense against person. For other offenses, the previous instruction should be used.

#### SOURCE & AUTHORITY

§18-1-505(2), C.R.S.

#### **H:06 DEFENDANT AS VICTIM OR INCIDENTAL ACTOR**

It is an affirmative defense to the crime of (insert name of crime), that:

1. the behavior of another constitutes an offense, and
2. [the defendant is a victim of that offense][the defendant's conduct is inevitably incidental to the commission of that offense].

In addition to proving all of the elements of the crime charged beyond a reasonable doubt, the prosecution also has the burden to disprove the affirmative defense beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has failed to disprove beyond a reasonable doubt any one or more elements of the affirmative defense, you must return a verdict of not guilty.

#### NOTES ON USE

See *People v. Hart*, 787 P.2d 186 (Colo.App. 1989).

*People v. Grace*, 55 P.3d 165 (Colo. App. 2001)  
(discussing application of the defense).

This instruction should be given only where the defendant's criminal liability for the behavior of another is an issue at trial.

**SOURCE & AUTHORITY**

§18-1-604(1), C.R.S.

**H:07 WARNING TO LAW ENFORCEMENT AUTHORITY OR VICTIM**

It is an affirmative defense to the crime of (insert name of crime) that, prior to the commission of that offense, the defendant terminated [his][her] effort to promote or facilitate its commission and either gave timely warning to law enforcement authorities or gave timely warning to the intended victim.

In addition to proving all of the elements of the crime charged beyond a reasonable doubt, the prosecution also has the burden to disprove the affirmative defense beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has failed to disprove beyond a reasonable doubt any one or more elements of the affirmative defense, you must return a verdict of not guilty.

**NOTES ON USE**

This instruction should be given only in cases where the defendant's criminal liability is based upon the behavior of another.

**SOURCE & AUTHORITY**

§18-1-604(2), C.R.S.

**H:08 EXECUTION OF PUBLIC DUTY**

It is an affirmative defense to the crime of (insert name of crime) that the defendant's conduct was required or authorized by a provision of law or a judicial decree binding in Colorado.

In addition to proving all of the elements of the crime charged beyond a reasonable doubt, the prosecution also has the burden to disprove the affirmative defense beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has failed to disprove beyond a reasonable doubt any one or more elements of the affirmative defense, you must return a verdict of not guilty.

#### NOTES ON USE

This affirmative defense is available unless inconsistent with other provisions of §§18-1-702 through-710, C.R.S., defining the justifiable use of physical force, and any other provision of law. "Provision of law" and "judicial decree" are specifically defined in the definitions chapter and in § 18-1-701(2), C.R.S.

#### SOURCE & AUTHORITY

§18-1-701, C.R.S.

#### H:09 CHOICE OF EVILS

It is an affirmative defense to the crime of \_\_\_\_\_ that the conduct engaged in by the  
(insert name of crime)  
defendant was:

1. necessary as an emergency measure to avoid an imminent public or private injury,

2. which was about to occur because of a situation occasioned or developed through no conduct of the defendant, and

3. which was of sufficient gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury clearly outweighed the desirability of avoiding the injury sought to be prevented by the statute defining (insert name of crime)

In addition to proving all of the elements of the crime charged beyond a reasonable doubt, the prosecution also has the burden to disprove the affirmative defense beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has failed to disprove beyond a reasonable doubt any one or more elements of the affirmative defense, you must return a verdict of not guilty.

#### NOTES ON USE

This affirmative defense is available unless inconsistent with other provisions of C.R.S. §§18-1-703 and 707, defining the justifiable use of physical force, and to any other provision of law.

The choice of evils defense is not available to a defendant in addition to the defense of duress (18-1-708) unless separate facts exist which warrant its application.

For discussion and procedure required to raise this defense, see C.R.S. §18-1-702(2). See also: *People v. McKnight*, 626 P.2d 678 (Colo. 1981); *People v. Strock*, 623 P.2d 42 (Colo. 1981); *People v. Shepard*, 43 P.3d 693 (Colo. App. 2001) *People v. Brandyberry*, 812 P.2d 674 (Colo. App. 1990); *Andrews v. People*, 800 P.2d 607 (Colo. 1990).

#### SOURCE & AUTHORITY

§18-1-702, C.R.S.

#### H:10 DURESS

It is an affirmative defense to the crime of (insert name of crime) that:

1. the defendant engaged in the prohibited conduct at the direction of another,
2. because of the use or threatened use of unlawful force upon him or upon another person,
3. which a reasonable person in the defendant's

situation  
would have been unable to resist, and

4. the defendant did not intentionally or recklessly place himself in a situation where it was foreseeable that he would be subjected to such force or threatened use thereof.

In addition to proving all of the elements of the crime charged beyond a reasonable doubt, the prosecution also has the burden to disprove the affirmative defense beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has failed to disprove beyond a reasonable doubt any one or more elements of the affirmative defense, you must return a verdict of not guilty.

#### **NOTES ON USE**

This affirmative defense is not available in a prosecution for a class 1 felony. See, *Stevens v. People*, 29 P.3d 305 (Colo. 2001), *People v. Yaklich*, 833 P.2d 758 (Colo.App. 1992), *People v. Strock*, 623 P.2d 42 (Colo. 1981); *People v. Nunn*, 148 P.3d 222 (Colo. App. 2006) (approving instruction); *People v. Speer*, 2007 WL 3025312, \*4 (Colo.App. Oct 18, 2007) (NO. 05CA0206)

See Colorado Jury Instructions, Civil, for definition of "foreseeability."

#### **SOURCE & AUTHORITY**

§18-1-708, C.R.S.

#### **H:11 AFFIRMATIVE DEFENSE FELONY MURDER**

See Instruction 3-1:03.

#### **H:12 ENTRAPMENT**

It is an affirmative defense to the crime of (insert name of crime) that the defendant engaged in such conduct because he was entrapped. The defendant was entrapped if:

1. the defendant would not have conceived of or engaged in

the offense unless the inducement was offered,

2. the defendant engaged in the offense because he was induced to do so by a law enforcement official or any person acting under their direction, and not as a result of the defendant's own predisposition,

3. the methods used created a substantial risk that this particular defendant would engage in the offense, and

4. the methods used were more persuasive than merely affording the defendant an opportunity to commit the offense, even if representations or inducements were made to overcome the defendant's fear of detection.

In addition to proving all of the elements of the crime charged beyond a reasonable doubt, the prosecution also has the burden to disprove the affirmative defense beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has failed to disprove beyond a reasonable doubt any one or more elements of the affirmative defense, you must return a verdict of not guilty.

#### NOTES ON USE

*People v. Sprouse*, 983 P.2d 771 (1999)

*Evans v. People*, 706 P.2d 795 at 801, n.6 (Colo. 1985)

*People v. Grizzle*, 140 P. 3d 224 (Colo. App. 2006) (discussion of elements and necessity that defendant admit all elements of charged offense before entitlement to entrapment defense)

#### SOURCE & AUTHORITY

§18-1-709, C.R.S.

### H:13 INSUFFICIENT AGE-UNDER TEN

It is an affirmative defense to the crime of \_\_\_\_\_ that the defendant was under ten years

(insert name of crime)  
of age at the time of the commission of the alleged crime.

In addition to proving all of the elements of the crime charged beyond a reasonable doubt, the prosecution also has the burden to disprove the affirmative defense beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has failed to disprove beyond a reasonable doubt any one or more elements of the affirmative defense, you must return a verdict of not guilty.

#### **NOTES ON USE**

This affirmative defense applies to *any* offense committed when the defendant is under ten years of age. Under certain circumstances, these issues may be determined by the court as a preliminary matter and would operate as a complete bar to prosecution.

#### **SOURCE & AUTHORITY**

§18-1-801, C.R.S.

#### **H:14 INTOXICATION - VOLUNTARY**

You may consider evidence of self-induced intoxication in determining whether or not such intoxication negates the existence of the element(s) of [with intent] [after deliberation and with intent] [intentionally].

The prosecution has the burden of proving all the elements of the crimes charged beyond a reasonable doubt. If you find the defendant was intoxicated to such a degree that s/he did not have the mental state of [with intent] [after deliberation and with intent] [intentionally] which is a required element of the crime(s) of (insert name(s) of specific intent crime(s), you should find the defendant not guilty of [those] [this] charge(s).

[This defense does not apply to the crime(s) of (insert name(s) of specific intent crime(s).]

## NOTES ON USE

This instruction is available only for offenses that require "intent", "intentionally" or "after deliberation and with intent" as an element, but not for crimes of general intent.

If there is question as to the voluntariness of the defendant's intoxication, give both this instruction and Instruction H:15. See also Special Rule G1(2), regarding involuntary intoxication.

## SOURCE & AUTHORITY

§18-1-804(1), C.R.S.

*People v. Harlan*, 8 P.3d 448 (Colo. 2000).

*People v. Miller*, 113 P.3d 743 (Colo. 2005).

*People v. Vigil*, 127 P.3d 916 (Colo. 2006)(self-induced intoxication is not a defense to a general intent crime).

## H:15 INTOXICATION - INVOLUNTARY

It is an affirmative defense to the crime of (insert name of crime) that the defendant lacked the capacity to conform his conduct to the requirements of the law because of intoxication that was not self-induced.

In addition to proving all of the elements of the crime charged beyond a reasonable doubt, the prosecution also has the burden to disprove the affirmative defense beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has failed to disprove beyond a reasonable doubt any one or more elements of the affirmative defense, you must return a verdict of not guilty.

## NOTES ON USE

This instruction can only be used when there has been evidence introduced that the intoxication was not self-induced. In all other situations concerning intoxication, the previous instruction is the only instruction applicable.

When this instruction is used, the definitions of "self-induced intoxication" and "intoxication", must be used.

## SOURCE & AUTHORITY

§ 18-1-804(3), C.R.S.

*People v. Garcia*, 87 P.3d 159 (Colo. 2003)

## H:16 USE OF PHYSICAL FORCE - SPECIAL RELATIONSHIPS

It is an affirmative defense to the crime of \_\_\_\_\_  
(insert name of crime)  
that the defendant used physical force under any of the following circumstances:

[A parent, guardian, or other person entrusted with the care and supervision of a minor or an incompetent person] [A teacher or other person entrusted with the care and supervision of a minor] may use reasonable and appropriate physical force upon the minor [or incompetent person] when and to the extent it is reasonably necessary and appropriate to maintain discipline or promote the welfare of the minor [or incompetent person].

-or-

[A superintendent or other authorized official of a jail, prison, or correctional institution may, in order to maintain order and discipline, use reasonable and appropriate physical force when and to the extent that he reasonably believes it necessary to maintain order and discipline, but he may use deadly physical force only when he reasonably believes it necessary to prevent death or serious bodily injury.]

-or-

[A person responsible for the maintenance of order in a common carrier of passengers, or a person acting under his direction, may use reasonable and appropriate physical force when and to the extent that it is necessary to maintain order and discipline, but he may use deadly physical force only when it is reasonably necessary to prevent death or serious bodily injury.]

-or-

[A person acting under a reasonable belief that another person is about to commit suicide or to inflict serious bodily injury upon himself may use reasonable and appropriate physical force upon that person to the extent that it is reasonably necessary to thwart the result.]

-or-

[A duly licensed physician, advanced practice nurse or a person acting under his or her direction, may use reasonable and appropriate physical force for the purpose of administering a recognized form of treatment that he or she reasonably believes to be adapted to promoting the physical or mental health of the patient, if:

[The treatment is administered with the consent of the patient, or if the patient is a minor or an incompetent person, with the consent of his parent, guardian, or other person entrusted with his care and supervision.]

-or-

[The treatment is administered in an emergency when the physician or advanced practice nurse reasonably believes that no one competent to consent can be consulted and that a reasonable person, wishing to safeguard the welfare of the patient, would consent.]]

In addition to proving all of the elements of the crime charged beyond a reasonable doubt, the prosecution also has the burden to disprove the affirmative defense beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has failed to disprove beyond a reasonable

doubt any one or more elements of the affirmative defense, you must return a verdict of not guilty.

#### SOURCE & AUTHORITY

§18-1-703, C.R.S.

#### H:17 USE OF PHYSICAL FORCE - DEFENSE OF PERSON

It is an affirmative defense to the crime of\_(insert name of crime)\_that the defendant used physical force upon another person:

1. in order to defend himself or a third person from what he/she reasonably believed to be the use or imminent use of unlawful physical force by the victim, and

2. he/she used the degree of force which he/she reasonably believed to be necessary for that purpose.

[The defendant is not required to retreat in order to claim the right to employ force in his/her defense.]

[The defendant is not justified in using physical force if:

1. with intent to cause bodily injury or death to another person,

2. he/she provoked the use of unlawful physical force by that person.]

[The defendant is not justified in using physical force if he/she is the initial aggressor, except that his use of physical force under the circumstances is justifiable if:

1. he/she withdraws from the encounter, and

2. effectively communicates to the other person his/her

intent to withdraw, and

3. the other person continues or threatens the use of unlawful physical force.]

[The defendant is not justified in using physical force if:

1. the physical force involved is the product of combat by agreement, and

2. the combat is not specifically authorized by law.]

In addition to proving all of the elements of the crime charged beyond a reasonable doubt, the prosecution also has the burden to disprove the affirmative defense beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has failed to disprove beyond a reasonable doubt any one or more elements of the affirmative defense, you must return a verdict of not guilty.

#### **NOTES ON USE**

Delete inapplicable bracketed material.

This affirmative defense is subject to the provisions of §§18-1-704(2) and (3), C.R.S., the following instruction on deadly physical force, and the special rule(s) on non-justifiable use of physical force. When this instruction is used, refer to the special rule(s) on retreat to the wall. See *Cassels v. People*, 92 P.3d 951 (Colo. 2004); *People v. Garcia*, 28 P.3d 340 (Colo. 2001); *People v. Roberts*, 983 P.2d 11(Colo. App. 1998). If the victim is alleged to have used unjustified physical force, see the special rule on use of physical force. When there is an issue of combat by agreement, the definition of "combat by agreement" should be given. If there is a question as to whether the victim is the initial aggressor, use the general instruction on Non-justifiable Use of physical Force.

The use of the bracketed material should be limited to the issues presented by the evidence in the case.

**SOURCE & AUTHORITY**

§18-1-704(1), C.R.S.

*Idrogo v. People*, 818 P.2d 752 (Colo. 1991)

*People v. Toler*, 9 P.3d 341 (Colo. 2000)

*People v. Cuevas*, 740 P.2d 25 (Colo. App. 1987)

*People v. Garcia*, 28 P.3d 340 (Colo. 2001)

**H:18 USE OF PHYSICAL FORCE-DEADLY PHYSICAL FORCE  
(IMMINENT DANGER OF DEATH OR SERIOUS BODILY INJURY  
BY VICTIM)**

It is an affirmative defense to the crime of (Insert name of crime) that the defendant used deadly physical force:

1. in order to defend [himself] [or] [a third person] from what he reasonably believed to be the use or imminent use of unlawful physical force by the other person,

2. he used a degree of force which he reasonably believed to be necessary for that purpose, and

3. he/she reasonably believed a lesser degree of force was inadequate, and

4. had reasonable grounds to believe, and did believe, that he or another person was in imminent danger of being killed or of receiving great bodily injury.

[The defendant is not required to retreat in order to claim the right to employ force in his/her defense.]

[The defendant is not justified in using physical force if:

1. with intent to cause bodily injury or death to another

person,

2. he/she provoked the use of unlawful physical force by that person.]

[The defendant is not justified in using physical force if he/she is the initial aggressor, except that his/her use of physical force under the circumstances is justifiable if:

1. he/she withdraws from the encounter, and

2. effectively communicates to the other person his/her intent to withdraw, and

3. the other person continues or threatens the use of unlawful physical force.]

[The defendant is not justified in using physical force if:

1. the physical force involved is the product of combat by agreement, and

2. the combat is not specifically authorized by law.]

In addition to proving all of the elements of the crime charged beyond a reasonable doubt, the prosecution also has the burden to disprove the affirmative defense beyond a reasonable doubt.

After considering the evidence concerning the affirmative defense, with all the other evidence in this case, if you are not convinced beyond a reasonable doubt of the defendant's guilt, you must return a verdict of not guilty.

#### **NOTES ON USE**

Delete inapplicable bracket material. This instruction should only be used if the victim dies.

The definitions of "deadly physical force" and "great

bodily injury" must be defined. "Great bodily injury" has same meaning as "serious bodily injury". *People v. Reed*, 695 P.2d 806 (Colo.App. 1984). If combat by agreement is an issue then the definition of "combat by agreement" should be used. If the victim is alleged to have used unjustified physical force, see the special rule on use of physical force. If there is a question as to whether the victim is the initial aggressor, use the general instruction on Non-justifiable Use of physical Force. If the defendant is threatened by multiple assailants, the instruction must be modified consistent with *People v. Jones*, 675 P.2d 9 (Colo. 1994).

The use of the bracketed material should be limited to the issues presented by the evidence in the case.

#### SOURCE & AUTHORITY

§18-1-704, C.R.S.

*People v. Garcia*, 28 P.3d 340 (Colo. 2001)

*People v. Cuevas*, 740 P.2d 25 (Colo.App. 1987)

*Idrogo v. People*, 818 P.2d 752 (Colo. 1991)

*People v. Toler*, 9 P.3d 341 (Colo. 2000)

#### **H:19 USE OF PHYSICAL FORCE - DEADLY PHYSICAL FORCE (COMMISSION OF KIDNAPPING/ROBBERY/SEXUAL ASSAULT/ASSAULT FIRST OR SECOND DEGREE BY VICTIM)**

It is an affirmative defense to the crime of \_\_\_\_\_ that the defendant used deadly  
(Insert name of crime)  
physical force:

1. in order to defend [himself] [or] [a third person] from what he reasonably believed to be the use or imminent use of unlawful physical force by the other person,

2. he used a degree of force which he reasonably believed to be necessary for that purpose, and

3. he/she reasonably believed a lesser degree of force was inadequate, and

4. \_\_\_\_\_ was committing or reasonably appeared

(Insert name of victim)  
to be about to commit [kidnapping] [robbery] [sexual assault] [assault in the first degree] [assault in the second degree].

[The defendant is not required to retreat in order to claim the right to employ force in his/her defense.]

In addition to proving all of the elements of the crime charged beyond a reasonable doubt, the prosecution also has the burden to disprove the affirmative defense beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has failed to disprove beyond a reasonable doubt any one or more elements of the affirmative defense, you must return a verdict of not guilty.

#### NOTES ON USE

This instruction should only be used if the victim dies. Delete inapplicable bracketed material. "Deadly physical force" must be defined. The appropriate definition of the bracketed crime must be given. If the defendant is threatened by multiple assailants, the instruction must be modified consistent with *People v. Jones*, 675 P.2d 9 (Colo. 1994).

#### SOURCE & AUTHORITY

§18-1-704 C.R.S.

*Idrogo v. People*, 818 P.2d 752 (Colo. 1991)

*People v. Toler*, 9 P.3d 341 (Colo. 2000)

*People v. Garcia*, 28 P.3d 340 (Colo. 2001)

**H:20 USE OF PHYSICAL FORCE-DEADLY PHYSICAL FORCE  
(FORCE AGAINST OCCUPANT/BURGLARY)**

It is an affirmative defense to the crime of (Insert name of crime) that the defendant used deadly physical force:

1. in order to defend [himself] [or] [a third person] from what he reasonably believed to be the use or imminent use of unlawful physical force by the other person,

2. he used a degree of force which he reasonably believed to be necessary for that purpose, and

3. he/she reasonably believed a lesser degree of force was inadequate, and

4. \_(Insert name of victim)\_ was using or reasonably appeared to be about to use physical force against an occupant of a dwelling or business establishment while committing or attempting to commit burglary.

[The defendant is not required to retreat in order to claim the right to employ force in his/her defense.]

In addition to proving all of the elements of the crime charged beyond a reasonable doubt, the prosecution also has the burden to disprove the affirmative defense beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has failed to disprove beyond a reasonable doubt any one or more elements of the affirmative defense, you must return a verdict of not guilty.

**NOTES ON USE**

This instruction should only be used if the victim dies. The applicable definition of burglary must be included in the instruction. The definition of "deadly physical force" must be given with this instruction. If the defendant is threatened by multiple assailants, the instruction must be modified consistent with *People v.*

*Jones*, 675 P.2d 9 (Colo. 1994).

#### **SOURCE & AUTHORITY**

§18-1-704, C.R.S.

*Idrogo v. People*, 818 P.2d 752 (Colo. 1991)

*People v. Toler*, 9 P.3d 341 (Colo. 2000)

*People v. Garcia*, 28 P.3d 340 (Colo. 2001)

#### **H:21 USE OF PHYSICAL FORCE IN DEFENSE OF PREMISES**

It is an affirmative defense to the crime of (insert name of crime) that the defendant:

1. was in possession or control of any building, real estate, or other premises, or was licensed or privileged to be thereon, and

2. used reasonable and appropriate physical force upon another person,

3. to prevent or terminate what he reasonably believed to be the commission or attempted commission of an unlawful trespass by the other person in or upon the building, real estate, or premises.

In addition to proving all of the elements of the crime charged beyond a reasonable doubt, the prosecution also has the burden to disprove the affirmative defense beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has failed to disprove beyond a reasonable doubt any one or more elements of the affirmative defense, you must return a verdict of not guilty.

**NOTES ON USE**

Deadly physical force may be used by the defendant only in defense of himself or another as described in §18-1-704, C.R.S., or when he reasonably believes it necessary to prevent what he reasonably believes to be an attempt by a trespasser to commit first degree arson.

**SOURCE & AUTHORITY**

§18-1-705, C.R.S.

**H:22 USE OF DEADLY PHYSICAL FORCE IN DEFENSE OF PREMISES**

It is an affirmative defense to the crime of (Insert name of crime) that the defendant used deadly physical force because:

1. he reasonably believed it necessary to prevent
2. what he reasonably believed to be an attempt by a trespasser to commit first degree arson.

In addition to proving all of the elements of the crime charged beyond a reasonable doubt, the prosecution also has the burden to disprove the affirmative defense beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has failed to disprove beyond a reasonable doubt any one or more elements of the affirmative defense, you must return a verdict of not guilty.

**NOTES ON USE**

This instruction should only be used if the victim dies. A definition of "trespass," "first degree arson" and "deadly physical force" must be given.

**SOURCE & AUTHORITY**

§18-1-705, C.R.S.

## H:23 USE OF DEADLY PHYSICAL FORCE AGAINST AN INTRUDER

It is an affirmative defense to the crime of \_\_\_\_\_ (insert name of crime) that the defendant used physical force, including deadly physical force, against another person,

1. while the defendant was an occupant of a dwelling, and

2. the other person made an unlawful entry into that dwelling, and

3. the defendant had a reasonable belief that the other person had committed, was committing, or intended to commit a crime in the dwelling in addition to the uninvited entry, and

4. the defendant reasonably believed the other person might have used any physical force, no matter how slight, against any occupant of the dwelling.

[The defendant is not required to retreat in order to claim the right to employ force in his/her defense.]

In addition to proving all of the elements of the crime charged beyond a reasonable doubt, the prosecution also has the burden to disprove the affirmative defense beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has failed to disprove beyond a reasonable doubt any one or more elements of the affirmative defense, you must return a verdict of not guilty.

### NOTES ON USE

This instruction should only be used if the victim dies. Delete inapplicable bracketed material. "Deadly physical force" must be defined. Denial of defendant's pretrial motion to dismiss based on immunity does not preclude him from raising justification as an affirmative defense in the criminal prosecution. Procedure and

allocation of burden of proof in the trial are the same as with any other affirmative defense in a criminal action.

#### **SOURCE & AUTHORITY**

§18-1-704.5, C.R.S.

*People v. Janes*, 962 P.2d 315 (Colo. 1998).

*People v. McNeese*, 892 P.2d 304 (Colo. 1995).

*People v. Malczewski*, 744 P.2d 62 (Colo. 1987).

*People v. Guenther*, 740 P.2d 971 (Colo. 1987).

*People v. Phillips*, 91 P.3d 476 (Colo. App. 2004).

#### **H:24 USE OF PHYSICAL FORCE IN DEFENSE OF PROPERTY**

It is an affirmative defense to the crime of (insert name of crime) that the defendant

1. used reasonable and appropriate physical force upon another person
2. when and to the extent that he reasonably believed it necessary to prevent
3. what he reasonably believed to be an attempt by the other person to commit [theft] [criminal mischief] or [criminal tampering involving property].

In addition to proving all of the elements of the crime charged beyond a reasonable doubt, the prosecution also has the burden to disprove the affirmative defense beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has failed to disprove beyond a reasonable doubt any one or more elements of the affirmative defense, you must return a verdict of not guilty.

## NOTES ON USE

The elements and definitions relating to "theft", "criminal mischief" or "criminal tampering involving property" must be given with this instruction.

## SOURCE & AUTHORITY

§18-1-706, C.R.S.

### **H:25 USE OF PHYSICAL FORCE IN MAKING AN ARREST OR IN PREVENTING AN ESCAPE - PEACE OFFICER**

It is an affirmative defense to the crime of (insert name of crime) that the defendant

1. was a peace officer, and
2. used reasonable and appropriate physical force when and to the extent he reasonably believed it was necessary
3. [to defend himself or a third person from what he reasonably believed to be the use or imminent use of physical force [while effecting or attempting to effect an arrest] [while preventing or attempting to prevent the escape from custody of an arrested person].]

-or-

[to effect an arrest] [to prevent the escape from custody of an arrested person].

4. unless the defendant knew that the arrest was unauthorized.]

In addition to proving all of the elements of the crime charged beyond a reasonable doubt, the prosecution also has the burden to disprove the affirmative defense beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has failed to disprove beyond a reasonable doubt any one or more elements of the affirmative defense,

you must return a verdict of not guilty.

#### NOTES ON USE

A definition of "peace officer" must be given with this instruction. Delete inapplicable bracketed material.

#### SOURCE & AUTHORITY

§18-1-707(1), C.R.S.

*People v. Joyce*, 68 P.3d 521 (Colo. App. 2002).

#### **H:26 USE OF DEADLY FORCE IN MAKING AN ARREST OR IN PREVENTING AN ESCAPE—PEACE OFFICER**

It is an affirmative defense to the crime of (insert name of crime) that the defendant

1. was a peace officer, and
2. used deadly physical force,
3. [to defend himself or a third person from what he reasonably believed to be the use or imminent use of deadly physical force.]

—or—

[to effect an arrest or prevent the escape from custody, of a person whom he reasonably believed [had committed or attempted to commit a felony involving the use or threatened use of a deadly weapon] [was attempting to escape by use of a deadly weapon] [had indicated, other than by a motor vehicle violation, that he was likely to endanger human life or to inflict serious bodily injury to another unless apprehended without delay].]

In addition to proving all of the elements of the crime charged beyond a reasonable doubt, the prosecution also has the burden to disprove the affirmative defense beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has failed to disprove beyond a reasonable doubt any one or more elements of the affirmative defense, you must return a verdict of not guilty.

#### NOTES ON USE

This instruction should only be used if the victim dies. Delete inapplicable bracketed material. Definitions of "peace officer", "deadly physical force", "deadly weapon" and "serious bodily injury" must be given, as appropriate, when this instruction is used.

#### SOURCE & AUTHORITY

§18-1-707 (2), C.R.S.

#### **H:27 USE OF PHYSICAL FORCE IN MAKING AN ARREST OR IN PREVENTING AN ESCAPE (PRIVATE PERSON - DIRECTION OF PEACE OFFICER)**

It is an affirmative defense to the crime of \_\_\_\_\_ that the defendant  
(insert name of crime)

1. was directed by a peace officer to assist him to effect an arrest or to prevent an escape from custody, and

2. he/she that force to be necessary to carry out the peace officer's direction, unless he knew that the arrest or prospective arrest was not authorized.

In addition to proving all of the elements of the crime charged beyond a reasonable doubt, the prosecution also has the burden to disprove the affirmative defense beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has failed to disprove beyond a reasonable doubt any one or more elements of the affirmative defense, you must return a verdict of not guilty.

## NOTES ON USE

Insert the name of the appropriate crime. This affirmative defense is subject to §18-1-707(6), C.R.S. and the instruction on the use of deadly force.

## SOURCE & AUTHORITY

§18-1-707(5), C.R.S.

### **H:28 USE OF PHYSICAL FORCE IN MAKING AN ARREST OR IN PREVENTING AN ESCAPE (PRIVATE PERSON, DIRECTION OF PEACE OFFICER DEADLY FORCE)**

It is an affirmative defense to the crime of (insert name of crime) that the defendant, who was directed to assist a peace officer, used deadly physical force to effect on arrest or to prevent an escape when:

[he reasonably believed that force to be necessary to defend himself or a third person from what he reasonably believed to be the use or imminent use of deadly physical force].

-or-

[he was directed or authorized by the peace officer to use deadly physical force and did not know that the peace officer was not authorized to use deadly physical force under the circumstances].

In addition to proving all of the elements of the crime charged beyond a reasonable doubt, the prosecution also has the burden to disprove the affirmative defense beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has failed to disprove beyond a reasonable doubt any one or more elements of the affirmative defense, you must return a verdict of not guilty.

## NOTES ON USE

This instruction should only be used if the victim dies. Definitions of "peace officer" and "deadly physical force" must be given with this instruction, Definitions of "bodily injury" and "serious bodily injury" are likely to be also required.

## SOURCE & AUTHORITY

§18-1-707(6), C.R.S.

See also §16-3-202(3), C.R.S.

*People v. Joyce*, 68 P.3d 521 (Colo. App. 2002).

## **H:29 USE OF PHYSICAL FORCE IN MAKING AN ARREST OR IN PREVENTING AN ESCAPE (PRIVATE PERSON, ACTING ON HIS OWN)**

It is an affirmative defense to the crime of \_\_\_\_\_ the defendant, acting on his own (insert name of crime) account, used reasonable and appropriate physical force upon another person when and to the extent that he reasonably believed it necessary to effect an arrest, or to prevent the escape from custody a of an arrested person who had committed a crime in his presence.

In addition to proving all of the elements of the crime charged beyond a reasonable doubt, the prosecution also has the burden to disprove the affirmative defense beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has failed to disprove beyond a reasonable doubt any one or more elements of the affirmative defense, you must return a verdict of not guilty.

## SOURCE & AUTHORITY

§18-1-707(7), C.R.S.

§16-3-201, C.R.S.

*People v. Joyce*, 68 P.3d 521 (Colo. App. 2002)

**H:30 USE OF PHYSICAL FORCE IN MAKING AN ARREST OR  
IN PREVENTING AN ESCAPE (PRIVATE PERSON, ACTING ON  
HIS OWN DEADLY FORCE)**

It is an affirmative defense to the crime of (insert name of crime) that the defendant, acting on his own account, used deadly physical force upon another person to effect an arrest, or prevent the escape from custody of an arrested person who had committed an offense in his presence, and he reasonably believed it necessary to defend himself or a third person from what he reasonably believed to be the use or imminent use of deadly physical force.

In addition to proving all of the elements of the crime charged beyond a reasonable doubt, the prosecution also has the burden to disprove the affirmative defense beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has failed to disprove beyond a reasonable doubt any one or more elements of the affirmative defense, you must return a verdict of not guilty.

**NOTES ON USE**

This instruction should only be used if the victim dies. Definition of "deadly physical force" must be given with this instruction.

**SOURCE & AUTHORITY**

§18-1-707(7), C.R.S.

*People v. Joyce*, 68 P.3d 521 (Colo. App. 2002).

**H:31 USE OF PHYSICAL FORCE IN MAKING AN ARREST OR  
IN PREVENTING AN ESCAPE (DETENTION FACILITY)**

It is an affirmative defense to the crime of \_\_ (insert name of crime) \_ that the defendant

1. was a [peace officer] [guard] employed in a detention facility, and

2. used reasonable and appropriate physical force,

3. when and to the extent that he reasonably believed it necessary to prevent what he reasonably believed to be the escape of a prisoner from a detention facility.

In addition to proving all of the elements of the crime charged beyond a reasonable doubt, the prosecution also has the burden to disprove the affirmative defense beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has failed to disprove beyond a reasonable doubt any one or more elements of the affirmative defense, you must return a verdict of not guilty.

#### **NOTES ON USE**

This Instruction cannot be used if deadly physical force is involved. The previous instruction covers that situation.

Definitions of "peace officer" and "detention facility" must be given.

#### **SOURCE & AUTHORITY**

§18-1-707(8)(b), C.R.S.

### **H:32 USE OF PHYSICAL FORCE IN MAKING AN ARREST OR IN PREVENTING AN ESCAPE (DETENTION FACILITY - DEADLY FORCE)**

It is an affirmative defense to the crime of \_\_\_\_\_ that the defendant  
(insert name of crime)

1. was a [peace officer] [guard] employed in a detention facility, and

2. used deadly physical force when he reasonably believed it necessary to prevent the escape of a prisoner convicted of, charged with, or held for (insert name of felony) , or confined under the maximum security rules of such detention facility.

In addition to proving all of the elements of the crime charged beyond a reasonable doubt, the prosecution also has the burden to disprove the affirmative defense beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has failed to disprove beyond a reasonable doubt any one or more elements of the affirmative defense, you must return a verdict of not guilty.

#### **NOTES ON USE**

This instruction should only be used if the victim dies. Definitions of "peace officer", "detention facility", and "deadly physical force" must be given.

#### **SOURCE & AUTHORITY**

§18-1-707, C.R.S.

#### **AFFIRMATIVE DEFENSES TO SPECIFIC OFFENSES**

##### **H:33 CRIMINAL ATTEMPT-ABANDONING EFFORT**

It is an affirmative defense to the crime of criminal attempt that the defendant abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting the complete and voluntary renunciation of his criminal intent.

In addition to proving all of the elements of the crime charged beyond a reasonable doubt, the prosecution

also has the burden to disprove the affirmative defense beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has failed to disprove beyond a reasonable doubt any one or more elements of the affirmative defense, you must return a verdict of not guilty.

#### **SOURCE & AUTHORITY**

§18-2-101(3), C.R.S.

*People v. Lehnert*, 163 P.3d 1111 (Colo. 2007)

*Melina v. People*, 161 P.3d 635 (Colo. 2007)

*People v. Scialabba*, 55 P.3d 207 (Colo. App. 2002)

#### **H:34 CONSPIRACY-ABANDONING**

It is an affirmative defense to the crime of conspiracy that the defendant abandoned the conspiracy by:

1. [giving timely notice of his abandonment,
2. to those with whom he conspired, and
3. such notice was evidenced by circumstances corroborating the giving of the notice].

—or—

1. [informing the law enforcement authorities having jurisdiction,

2. of the existence of the conspiracy and of his participation therein].

In addition to proving all of the elements of the crime charged beyond a reasonable doubt, the prosecution also has the burden to disprove the affirmative defense beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has failed to disprove beyond a reasonable doubt any one or more elements of the affirmative defense, you must return a verdict of not guilty.

#### **SOURCE & AUTHORITY**

§18-2-204(3), C.R.S.

*Johnson v. People*, 384 P.2d 454 (Colo. 1963).

### **H:35 CONSPIRACY-RENUNCIATION OF CRIMINAL PURPOSE**

It is an affirmative defense to the crime of conspiracy that the defendant, after conspiring to commit a crime, thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal intent.

In addition to proving all of the elements of the crime charged beyond a reasonable doubt, the prosecution also has the burden to disprove the affirmative defense beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has failed to disprove beyond a reasonable doubt any one or more elements of the affirmative defense, you must return a verdict of not guilty.

#### **SOURCE & AUTHORITY**

§18-2-203, C.R.S.

### **H:36 CRIMINAL SOLICITATION-OBJECT ACHIEVED**

It is an affirmative defense to the crime of criminal solicitation that, if the criminal object was achieved, [the defendant would be the sole victim of the crime] [the crime is so defined that the defendant's conduct would be inevitably incident to its commission or he otherwise would not be guilty under the statute defining the crime].

In addition to proving all of the elements of the crime charged beyond a reasonable doubt, the prosecution

also has the burden to disprove the affirmative defense beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has failed to disprove beyond a reasonable doubt any one or more elements of the affirmative defense, you must return a verdict of not guilty.

#### **SOURCE & AUTHORITY**

§18-2-301, C.R.S.

*Alonzi v. People*, 198 Colo. 160, 597 P.2d 560 (1979).

#### **H:37 CRIMINAL SOLICITATION-PREVENT COMMISSION**

It is an affirmative defense to the crime of criminal solicitation that the defendant, after soliciting another person to commit (insert name of felony), persuaded him not to do so, or otherwise prevented the commission of the crime, under circumstances manifesting a complete and voluntary renunciation of the defendant's criminal intent.

In addition to proving all of the elements of the crime charged beyond a reasonable doubt, the prosecution also has the burden to disprove the affirmative defense beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has failed to disprove beyond a reasonable doubt any one or more elements of the affirmative defense, you must return a verdict of not guilty.

#### **SOURCE & AUTHORITY**

§18-2-301(4), C.R.S.

*Melina v. People*, 161 P.3d 635 (Colo. 2007)

*People v. Jacobs*, 91 P.3d 438 (Colo. App. 2003)(renunciation and abandonment are affirmative defenses to general solicitation statute but not child solicitation offense).

### **H:38 AFFIRMATIVE DEFENSE - COMPLICITY**

It is an affirmative defense to complicity to commit \_\_\_\_\_ that:  
(insert name of crime(s))

1. Prior to the commission of the offense,
2. the defendant terminated his effort to promote or facilitate its commission, and
3. [gave timely warning to law enforcement authorities] or [gave timely warning to the intended victim].

In addition to proving all of the elements of the crime charged beyond a reasonable doubt, the prosecution also has the burden to disprove the affirmative defense beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has failed to disprove beyond a reasonable doubt any one or more elements of the affirmative defense, you must return a verdict of not guilty.

#### **NOTES ON USE**

This instruction should only be used when the prosecution is relying on the theory of complicity. Delete inapplicable bracketed material. Although complicity is not an "offense", the committee believes this instruction is necessary pursuant to statute.

#### **SOURCE AND AUTHORITY**

§18-1-604(2) C.R.S.

### **H:39 FELONY MURDER - TWO OR MORE PARTICIPANTS DEFENDANT ATTEMPTS TO DISENGAGE HIMSELF**

This instruction is located at 3-1:3 in the Homicide chapter.

**H:40 FALSE IMPRISONMENT QUESTIONING OF PERSON  
SUSPECTED OF THEFT WITHOUT LIABILITY**

It is an affirmative defense to the crime of false imprisonment that:

1. (Insert name of victim)concealed upon his person or otherwise carried away any unpurchased goods, wares, or merchandise held or owned by any store or mercantile establishment, and

2. the defendant, acting in good faith and upon probable cause based upon reasonable grounds therefor,

3. detained and questioned Insert name of victim)in a reasonable manner,

4. for the purpose of ascertaining whether (Insert name of victim)\_was guilty of theft.

In addition to proving all of the elements of the crime charged beyond a reasonable doubt, the prosecution also has the burden to disprove the affirmative defense beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has failed to disprove beyond a reasonable doubt any one or more elements of the affirmative defense, you must return a verdict of not guilty.

**NOTES ON USE**

A definition of "theft" must be given with this instruction.

**SOURCE & AUTHORITY**

§18-4-407, C.R.S.

## **H:41 VIOLATION OF CUSTODY**

It is an affirmative defense to the crime of violation of custody that:

[The defendant reasonably believed that his conduct was necessary to preserve the child from danger to its welfare.]

-or-

1. [The child was at the time more than fourteen years old,  
and
2. was taken away,
3. at the child's own instigation,
4. without enticement, and
5. the defendant had no purpose to commit a crime with  
or  
against the child.]

In addition to proving all of the elements of the crime charged beyond a reasonable doubt, the prosecution also has the burden to disprove the affirmative defense beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has failed to disprove beyond a reasonable doubt any one or more elements of the affirmative defense, you must return a verdict of not guilty.

### **SOURCE & AUTHORITY**

§18-3-304(3), C.R.S.

*People v. Mossman*, 17 P.3d 165 (Colo. App. 2000).

## **H:42 CRIMINALITY OF CONDUCT-AGE OF VICTIM**

It is an affirmative defense to the crime of \_\_\_\_\_ that the defendant reasonably

believed

(Insert name of crime)

the child to be eighteen years of age or older and such child was at least fifteen years of age.

In addition to proving all of the elements of the crime charged beyond a reasonable doubt, the prosecution also has the burden to disprove the affirmative defense beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has failed to disprove beyond a reasonable doubt any one or more elements of the affirmative defense, you must return a verdict of not guilty.

#### **NOTES ON USE**

This instruction should only be used when the criminality of a sex offense depends upon the victim being a child under the age of 18.

#### **SOURCE & AUTHORITY**

§18-1-503.5, C.R.S.

*Gorman v. People*, 19 P.3d 662 (Colo. 2000).

#### **H:43 OBSTRUCTING GOVERNMENTAL OPERATIONS**

It is an affirmative defense to the crime of obstructing governmental operations that the obstruction, impairment, or hindrance was [of unlawful action by a public servant [of the making of an arrest] [by lawful activities in connection with a labor dispute with the government]].

In addition to proving all of the elements of the crime charged beyond a reasonable doubt, the prosecution also has the burden to disprove the affirmative defense beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has failed to disprove beyond a reasonable doubt any one or more elements of the affirmative defense, you must return a verdict of not guilty.

## **SOURCE AND AUTHORITY**

§18-8-102, C.R.S.

### **H:44 COMPOUNDING-BELIEF AMOUNT DUE DEFENDANT**

It is an affirmative defense to the crime of compounding that the benefit received by the defendant did not exceed an amount which the defendant reasonably believed to be due as restitution or indemnification for harm caused by the crime.

In addition to proving all of the elements of the crime charged beyond a reasonable doubt, the prosecution also has the burden to disprove the affirmative defense beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has failed to disprove beyond a reasonable doubt any one or more elements of the affirmative defense, you must return a verdict of not guilty.

## **SOURCE & AUTHORITY**

§18-8-108(2), C.R.S.

### **H:45 TRADING IN PUBLIC OFFICE**

It is an affirmative defense to the crime of trading in public office that the defendant [offered, conferred, or agreed to confer] [solicited, accepted, or agreed to accept] any pecuniary benefit that was a customary contribution to political campaign funds solicited and received by lawfully constituted political parties.

In addition to proving all of the elements of the crime charged beyond a reasonable doubt, the prosecution also has the burden to disprove the affirmative defense beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has failed to disprove beyond a reasonable doubt any one or more elements of the affirmative defense, you must return a verdict of not guilty.

## **NOTES ON USE**

The first bracketed material is applicable to use when the defendant offers, confers or agrees to confer a pecuniary benefit to a public servant or party officer. The second is applicable when the public servant or party officer solicits, accepts, or agrees to accept a pecuniary benefit.

## **SOURCE & AUTHORITY**

§18-8-305(2), C.R.S.

## **H:46 DESIGNATION OF SUPPLIER**

It is an affirmative defense to the crime of designation of supplier that the defendant was a public servant acting within the scope of his authority exercising the right to reject any material, subcontractor, service, bond, or contract tendered by a bidder or contractor because it did not meet bone fide specifications or requirements relating to quality, availability, form, experience, or financial responsibility.

In addition to proving all of the elements of the crime charged beyond a reasonable doubt, the prosecution also has the burden to disprove the affirmative defense beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has failed to disprove beyond a reasonable doubt any one or more elements of the affirmative defense, you must return a verdict of not guilty.

## **SOURCE & AUTHORITY**

§18-8-307(3), C.R.S.

#### **H:47 PERJURY-RETRACTION**

It is an affirmative defense to the crime of perjury in the first degree that the defendant retracted his false statement during the same proceeding in which it was made. Statements made in separate hearings at separate stages of the same trial or administrative proceedings shall be deemed to have been made during the same proceeding.

In addition to proving all of the elements of the crime charged beyond a reasonable doubt, the prosecution also has the burden to disprove the affirmative defense beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has failed to disprove beyond a reasonable doubt any one or more elements of the affirmative defense, you must return a verdict of not guilty.

#### **SOURCE & AUTHORITY**

18-8-508, C.R.S.

#### **H:48 DISOBEDIENCE OF PUBLIC SAFETY ORDERS UNDER RIOT CONDITIONS**

It is an affirmative defense to the crime of disobedience of a public safety order under riot conditions that the defendant

1. was a news reporter or other person observing or recording the events on behalf of the public press or other news media, and

2. was not physically obstructing efforts by police, fire, military or other forces to cope with the riot or impending riot.

In addition to proving all of the elements of the crime charged beyond a reasonable doubt, the prosecution also has the burden to disprove the affirmative defense beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has failed to disprove beyond a reasonable doubt any one or more elements of the affirmative defense, you must return a verdict of not guilty.

#### **SOURCE & AUTHORITY**

§18-9-105, C.R.S.

#### **H:49 KNIFE-HUNTING OR FISHING**

It is an affirmative defense to the crime of (insert name of crime) that the knife in possession of the defendant was a hunting or fishing knife carried for sports use.

In addition to proving all of the elements of the crime charged beyond a reasonable doubt, the prosecution also has the burden to disprove the affirmative defense beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has failed to disprove beyond a reasonable doubt any one or more elements of the affirmative defense, you must return a verdict of not guilty.

#### **NOTES ON USE**

This affirmative defense is for use only against violations of §18-12-105(1)(a), C.R.S., unlawfully carrying a concealed weapon, and § 18-12-108, C.R.S. possession of weapons by previous offenders.

#### **SOURCE & AUTHORITY**

§18-12-102(5), C.R.S.

**H:50 UNLAWFULLY CARRYING A CONCEALED WEAPON (OWN PROPERTY OR AUTOMOBILE)(PERMIT)**

It is an affirmative defense to the crime of unlawfully carrying a concealed weapon that the defendant was

1. [in his own dwelling or place of business, or on property owned or under his control at the time of the act of carrying.]

-or-

[in a private automobile or other private means of conveyance, and

2. carried a weapon for lawful protection of his or another's person or property,

3. while traveling.]

-or-

1. [had been issued a written permit to carry the weapon, by the chief of police of a city or city and county, or the sheriff of a county,

2. prior to the time of carrying a concealed weapon.]

In addition to proving all of the elements of the crime charged beyond a reasonable doubt, the prosecution also has the burden to disprove the affirmative defense beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has failed to disprove beyond a reasonable doubt any one or more elements of the affirmative defense, you must return a verdict of not guilty.

**NOTES ON USE**

Delete inapplicable bracketed material. Under certain circumstances, these issues may be determined by the court as a preliminary matter and would operate as a complete bar

to prosecution.

#### **SOURCE & AUTHORITY**

§18-12-105(2), C.R.S.

#### **H:51 POSSESSION OF WEAPON BY PREVIOUS OFFENDER PURPOSE OF POSSESSION**

It is an affirmative defense to the crime of possession of weapons by a previous offender that the defendant possessed the weapon for the purpose of defending his [home] [person] [property].

In addition to proving all of the elements of the crime charged beyond a reasonable doubt, the prosecution also has the burden to disprove the affirmative defense beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has failed to disprove beyond a reasonable doubt any one or more elements of the affirmative defense, you must return a verdict of not guilty.

#### **NOTES ON USE**

Delete inapplicable bracketed material.

#### **SOURCE & AUTHORITY**

Colo. Const. Art. II, § 13.

*People v. Ford*, 193 Colo. 459, 568 P.2d 26 (1977).

#### **H:52 OFFENSES RELATING TO FIREARMS AND WEAPONS PEACE OFFICERS**

It is an affirmative defense to the crime of (insert name of crime)\_that the defendant was a peace officer acting in the lawful discharge of his duties.

In addition to proving all of the elements of the crime charged beyond a reasonable doubt, the prosecution also has the burden to disprove the affirmative defense beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has failed to disprove beyond a reasonable doubt any one or more elements of the affirmative defense, you must return a verdict of not guilty.

#### **NOTES ON USE**

When this instruction is used, the definition of "peace officer" must be given. This instruction should be given only when a peace officer is charged with a weapons offense.

#### **SOURCE & AUTHORITY**

§§18-12-101(2), -102(2), C.R.S.

#### **H:53 POSSESSING AN ILLEGAL OR DANGEROUS WEAPON- EXCEPTION**

It is an affirmative defense to the crime of possessing [an illegal weapon] [a dangerous weapon] that the defendant was a [member of the [Armed Forces of the United States] [Colorado National Guard] acting in the lawful discharge of his duties] [person who had a valid permit and license for such weapon].

In addition to proving all of the elements of the crime charged beyond a reasonable doubt, the prosecution also has the burden to disprove the affirmative defense beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has failed to disprove beyond a reasonable doubt any one or more elements of the affirmative defense, you must return a verdict of not guilty.

#### **NOTES ON USE**

Delete inapplicable bracketed materials. This instruction is applicable only when the defendant is charged with a violation of §18-12-102(3) or (4), C.R.S.

#### **SOURCE & AUTHORITY**

§18-12-102(2), C.R.S.

### **H:54 DISORDERLY CONDUCT-PROVOCATION**

It is an affirmative defense to the crime of abusing or threatening a person in a public place that the defendant had significant provocation for his abusive or threatening conduct.

In addition to proving all of the elements of the crime charged beyond a reasonable doubt, the prosecution also has the burden to disprove the affirmative defense beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has failed to disprove beyond a reasonable doubt any one or more elements of the affirmative defense, you must return a verdict of not guilty.

#### **NOTES ON USE**

This is an affirmative defense to a charge of disorderly conduct as defined in §18-9-106(1)(b), C.R.S. This subsection of Disorderly Conduct was deleted July 1, 2000. The affirmative defense of provocation was repealed in a conforming amendment as of June 1, 2006.

#### **SOURCE & AUTHORITY**

§18-9-106(2), C.R.S., (deleted by amendment, effective July 1, 2000).

## **H:55 LIBEL-TRUTH OF STATEMENT**

It is an affirmative defense to the crime of libel that the statement published was true.

In addition to proving all of the elements of the crime charged beyond a reasonable doubt, the prosecution also has the burden to disprove the affirmative defense beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has failed to disprove beyond a reasonable doubt any one or more elements of the affirmative defense, you must return a verdict of not guilty.

### **NOTES ON USE**

This affirmative defense does not apply to libels tending to blacken the memory of the dead, to expose the natural defects of the living.

### **SOURCE & AUTHORITY**

§18-13-105(2), C.R.S.

## **H:56 CRIMINAL USURY**

It is an affirmative defense to the crime of criminal usury that

1. [at the time of making the loan finance charge it could not have been determined by a mathematical computation that the annual percentage rate would exceed an annual percentage rate of forty-five percent],

-or-

[the loan finance charge was not in excess of an annual percentage rate of forty-five percent when the rate of the finance charge was calculated on the unpaid balance of the debt on the assumption that the debt was to be paid according to its terms and was not paid before the end of

the agreed term],

2. and the provisions relating to the loan finance charge are set forth in a written agreement signed by all the parties.

In addition to proving all of the elements of the crime charged beyond a reasonable doubt, the prosecution also has the burden to disprove the affirmative defense beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has failed to disprove beyond a reasonable doubt any one or more elements of the affirmative defense, you must return a verdict of not guilty.

#### **NOTES ON USE**

The written agreement referred to in element (2) must have been submitted to the court and the district attorney at least ten days prior to trial. §18-15-104(3), C.R.S.

#### **SOURCE & AUTHORITY**

§§18-15-104(2) and (3), C.R.S.

#### **H:57 COMMUNICATION-NEWS AGENCY**

It is an affirmative defense to the crime of (insert name of crime) that the defendant was a news agency or an employee thereof, using the accepted tools and equipment of that news medium in the course of reporting or investigating a public and newsworthy event.

#### **NOTES ON USE**

This affirmative defense is applicable to offenses relating to wiretapping and eavesdropping. The crime to be inserted is one of those included in §§ 18-9-302 through 18-9-304, C.R.S.

#### **SOURCE & AUTHORITY**

§18-9-305(1), C.R.S.

COLJI-Crim. No. 7:53 (1983).

#### **H:58 COMMUNICATIONS-PERSONAL PREMISES**

It is an affirmative defense to the crime of (insert name of crime) that the defendant was using [wiretapping] [eavesdropping] devices on his own premises for [security] [business purposes] and reasonable notice of the use of such devices is given to the public.

#### **NOTES ON USE**

This affirmative defense is applicable wiretapping and eavesdropping offenses. The crime to be inserted is one of those included in §§ 18-9-302 through -304, C.R.S. Delete inapplicable bracketed material.

#### **SOURCE & AUTHORITY**

§18-9-305(1), C.R.S.

COLJI-Crim. No. 7:54 (1983).

#### **H:59 COMMUNICATIONS-COMMON CARRIER**

It is an affirmative defense to the crime of (insert name of crime) that the defendant was normally using services, facilities, and equipment provided by a common carrier pursuant to its tariffs on file with the Public Utilities Commission of the State of Colorado and with the Federal Communications Commission.

#### **NOTES ON USE**

This affirmative defense is applicable to wiretapping and eavesdropping offenses. The crime to be inserted is one of those included in §§ 18-9-302 through 18-9-304,

C.R.S. Those crimes are reflected in the aforementioned instructions.

#### **SOURCE & AUTHORITY**

§ 18-9-305(2), C.R.S.

COLJI-Crim. No. 7:55 (1983).

#### **H:60 COMMUNICATION-PROHIBITED ACT**

It is an affirmative defense to the crime of (insert name of crime) that the defendant's actions were the normal functions of

1. an [operator of a switchboard] [officer, agent, or employee of a common carrier] [person engaged in the business of providing service, equipment and facilities for communication], and

2. the defendant performed an otherwise prohibited act, and

3. such act was necessary [to provide communication services, equipment, or facilities] [in the construction, maintenance, repair, operations or use of communication services, equipment or facilities including the obtaining of billing and accounting information] [for the protection of communication services, equipment, and facilities from illegal use in violation of tariffs on file with the Public Utilities Commission of the State of Colorado and with the Federal Communication Commission] [for the protection of a common carrier from the commission of a fraud against it] [to provide requested information in response to a subpoena or court order issued by a court of competent jurisdiction or on demand of other lawful authority].

#### **NOTES ON USE**

Delete inapplicable bracketed material.

This affirmative defense is applicable to wiretapping and eavesdropping. The crime to be inserted is one of those included in §§ 18-9-302 through -304, C.R.S.

**SOURCE & AUTHORITY**

§ 18-9-305 (2), C.R.S.

COLJI-Crim. No. 7:56 (1983).

**H:61 OFFENSE INVOLVING COMMUNICATION**

It is an affirmative defense to the crime of (insert name of crime) that the defendant in good faith relied on an order issued by a court of competent jurisdiction permitting the (insert name of crime).

**NOTES ON USE**

This defense is applicable to wiretapping and eavesdropping offenses, which were taken from §§ 18-9-302 through -304, C.R.S.

**SOURCE & AUTHORITY**

§ 18-9-305 (4), C.R.S.

COLJI-Crim. No. 7:57 (1983).

**H:62 BIGAMY**

It is an affirmative defense to the crime of bigamy that at the time of the cohabitation or subsequent marriage:

[the defendant reasonably believed the prior spouse to be dead.]

-or-

[the prior spouse had been continually absent for a period of five years during which time the defendant did not know the prior spouse to be alive.]

-or-

[the defendant reasonably believed that he was legally eligible to remarry.]

#### **NOTES ON USE**

Delete inapplicable bracketed material.

#### **SOURCE & AUTHORITY**

§ 18-6-201, C.R.S.

### **H:63 INTERFERENCE WITH STAFF, FACULTY, OR STUDENTS OF EDUCATIONAL INSTITUTIONS**

If is an affirmative defense to the crime of interference with staff, faculty, or students of educational institutions that the defendant was exercising his right to lawful assembly and peaceful and orderly petition for the redress of grievances [including any labor dispute between an educational institution and its employees, any contractor or subcontractor, or any employee thereof].

#### **NOTES ON USE**

This defense is applicable to the offense of interference with staff, students or faculty at educational institutions.

The bracketed material should or need only be used if a labor dispute is involved in the development of the charge.

#### **SOURCE & AUTHORITY**

§18-9-109(4), C.R.S.

COLJI-Crim. No. 7:51 (1983).

## **SPECIAL RULES**

### **H(1) WHEN ASSENT DOES NOT CONSTITUTE CONSENT**

Assent does not constitute consent if

[it is given by a person who is legally incompetent to authorize the conduct charged to constitute the offense]

-or-

[it is given by a person who, by reason of immaturity, mental disease, mental defect, or intoxication, is manifestly unable and is known or reasonably should be known by the defendant to be unable to make a reasonable judgment as to the nature or harmfulness of conduct charged to constitute the offense]

-or-

[it is given by a person whose conduct is sought to be prevented by the law defining the offense]

-or-

[it is induced by force, duress, or deception].

### **NOTES ON USE**

When the an affirmative defense of consent of victim is raised, this rule may be applicable.

### **SOURCE & AUTHORITY**

§18-1-505(3), C.R.S.

### **H(2) NON-JUSTIFIABLE USE OF FORCE BY A PEACE OFFICER**

A peace officer has no justification for his [reckless] [criminally negligent] conduct with respect to innocent persons whom he is not seeking to arrest or retain

in custody.

#### **NOTES ON USE**

This rule may be used only when there is deadly physical force and the defendant is a peace officer charged with acting in a reckless or criminally negligent fashion. The rule may only be used when the deadly physical force is used to effect an arrest of a person when the evidence raises the affirmative defense set forth in §18-1-707(2)(b), C.R.S.

Delete inapplicable bracketed materials.

#### **SOURCE & AUTHORITY**

§18-1-707(3), C.R.S.

### **H(3) NON-JUSTIFIABLE USE OF PHYSICAL FORCE**

A person is not justified in using physical force if [with intent to cause bodily injury or death to another person, he provoked the use of unlawful physical force by that person] [he was the initial aggressor, except that his use of physical force upon another person under the circumstances is justifiable if he withdraws from the encounter and effectively communicates to the other person his intent to do so, but the latter nevertheless continues or threatens the use of unlawful physical force] [the physical force involved was the product of a combat by agreement not specifically authorized by law.

#### **NOTES ON USE**

When an affirmative defense instruction is raised, this rule may be applicable. For example, where there is a question as to whether the victim is the initial aggressor, or in other situations where the defendant is claiming his/her use of force is lawful in response to the victim's actions.

Delete the inapplicable bracketed materials.

**SOURCE & AUTHORITY**

§18-1-704, C.R.S.

**H(4) NON-JUSTIFIABLE USE OF FORCE IN MAKING AN  
ARREST OR IN PREVENTING AN ESCAPE FROM CUSTODY**

A peace officer is not justified in using force to [make an arrest] [prevent an escape from custody] if facts or circumstances which the peace officer reasonably and erroneously believed to be true would not have constituted an offense in law had they been true.

**NOTES ON USE**

Delete inapplicable bracketed materials.

**SOURCE & AUTHORITY**

§18-1-707(4), C.R.S.