UTAH JUDICIAL COUNCIL
STANDING COMMITTEE ON MODEL UTAH CRIMINAL JURY INSTRUCTIONS
MEETING AGENDA

Via WebEx
September 2, 2020 – 12:00 p.m. to 1:30 p.m.

12:00	Welcome and Approval of Minutes	Discussion / Action	Tab 1	Judge Blanch
	"Indecent liberties" definition for CR1601	Discussion / Action	Tab 2	Staff
	Battered Person Mitigation	Discussion / Action	Tab 3	Karen Klucznik
	Review public comments on published instructions – assignment follow up	Discussion / Action	Tab 5	Committee Members
1:30	Adjourn			

COMMITTEE WEB PAGE: https://www.utcourts.gov/utc/muji-criminal/

UPCOMING MEETING SCHEDULE:
Meetings are held at the Matheson Courthouse in the Judicial Council Room (N301), on the first Wednesday of each month from 12:00 noon to 1:30 p.m. (unless otherwise specifically noted):

March 4, 2020
April 1, 2020
May 6, 2020
June 3, 2020
September 2, 2020
October 7, 2020
November 4, 2020
December 2, 2020

UPCOMING ASSIGNMENTS:
1. Sandi Johnson = Burglary; Robbery
2. Judge McCullagh = DUI; Traffic
3. Karen Klucznik & Mark Fields = Murder
4. Stephen Nelson = Use of Force; Prisoner Offenses
5. Judge Jones = Wildlife Offenses

TAB 1

Meeting Minutes – August 05, 2020

NOTES:

UTAH JUDICIAL COUNCIL
STANDING COMMITTEE ON MODEL UTAH CRIMINAL JURY INSTRUCTIONS
MEETING MINUTES

Via WebEx
August 5, 2020 – 12:00 p.m. to 1:30 p.m.

DRAFT

MEMBERS:	**PRESENT**	**EXCUSED**
Judge James Blanch, *Chair*	•	
Jennifer Andrus		•
Melinda Bowen	•	
Mark Field	•	
Sandi Johnson	•	
Judge Linda Jones, *Emeritus*	•	
Karen Klucznik	•	
Elise Lockwood		•
Judge Brendan McCullagh	•	
Debra Nelson	•	
Stephen Nelson	•	
Nathan Phelps	•	
Judge Michael Westfall		•
Scott Young		•

GUESTS:

None

STAFF:

Michael Drechsel
Jiro Johnson (minutes)

(1) WELCOME AND APPROVAL OF MINUTES:

Judge Blanch welcomed the committee to the meeting. The committee considered the minutes from the June 3, 2020 meeting. Mr. Nelson moved to approve the draft minutes, with the previously identified amendment. Ms. Johnson seconded the motion. The motion passed and the minutes are approved.

(2) JURY UNANIMITY:

The committee resumed its discussion of jury unanimity, which had originally been raised by the committee at the January 2020 meeting, with subsequent consideration in February 2020. Ms. Klucznik reintroduced the topic by briefly explaining that recent appellate cases has made efforts to differentiate between elements of the offense and the means for committing those elements, specifically identifying *State v. Hummel*, 2017 UT 19. Previously, Ms. Klucznik and Ms. Nelson had provided some materials for the committee's consideration. Since that time, they have come to realization that there is a more advisable approach, which is to include a committee note in the MUJI instructions. Proposed language prepared by Ms. Klucznik and Ms. Nelson was outlined in the meeting materials on page 11. Ms. Klucznik described some of the challenges that have been encountered in trying to draft jury instructions on the unanimity requirement. She summarized the *State v. Alires* case (2019 UT App 206).

Judge Blanch discussed his experience with the issue of unanimity, explaining that his initial thought would be to require that the jury instructions / special verdict forms in each case be crafted to identify and match to specific charges / alleged criminal acts.

Ms. Johnson explained that Judge Blanch's approach might work in many cases, but not all. There is not a jury instruction that can be drafted to cover all of the various possibilities. She explained her experience in a specific case where she learned that such an approach (associating an act with a charge) doesn't work. For instance, where the case involves many different criminal acts spanning a long period of time (i.e., sexual abuse), victims won't remember specific dates or date ranges. And even if you could dial in on a time, the jury would have to unanimously find that the same act occurred during that specific time / time period, AND that the defendant had the correct mens rea at that specific time. One of the challenges with *Alires* is that there were possible innocent explanations for some of the alleged criminal conduct. Ultimately, she believes a committee note is a great start and that the best solution is that prosecutors need to be wise in how the charges are filed in a case.

Ms. Klucznik and Ms. Nelson reaffirmed that the previous materials from February 2020 do not represent the best approach. Ms. Klucznik described why her thinking has changed over time, highlighting the challenge posed by various types of cases (homicide vs. sexual assault).

Judge Blanch acknowledged the challenges that arise in various cases. A theft case is simple because you can simply identify the stolen item(s) in each elements instruction. But in sexual assault cases, it is not as simple as that.

After discussion, the committee membership agreed that the best approach would be to pursue a general committee note (similar to meeting materials page 11) rather than to create instructions (like those found on meeting materials page 12). The primary reason is because to draft such instructions in a way that might address all of the various permutations would be so complicated as to render the instructions very difficult to use.

With agreement that a "committee note approach" was the correct path forward, the committee turned to wordsmithing the proposed committee note language on meeting materials page 11. The starting point language was as follows:

Committee Note
Jury unanimity is required under the Utah constitution. However, what jury unanimity means appears to depend on the statutory definition of the crime. In particular, Utah's appellate courts have tried to distinguish between elements of a crime--on which a jury must be unanimous as to time, place, and act-and theories of a crime--the means of committing a crime, on which a jury does not have to be unanimous.

The line between elements and theories, however, is not clearly defined in the case law. Furthermore, no case has addressed how the unanimity requirement applies to charges that allow juries to consider whether the aggregate of a defendant's conduct proves a crime. For these reasons, the Committee has not adopted any set unanimity instructions. Rather, the Committee encourages the parties to refer to case law on the matter.

Relevant cases:
State v. Hummel, 2017 UT 19, 393 P.3d 314 (elements vs. theories);
State v. Whytock, 2020 UT App 107, ___ P.3d ___
State v. Case, 2020 UT App 81, ___ P.3d ___
State v. Alires, 2019 UT App 206, 455 P.3d 636

The committee had a detailed discussion of each line in the committee note language. After significant discussion, the committee crafted the following language:

Committee Note
Utah's courts have directed that, under certain circumstances, juries must be instructed on something more than simply being unanimous as to the verdict. In cases where different acts and mental states can satisfy the same element, practitioners should add or amend proposed jury instructions and verdict forms to address unanimity concerns.

Utah's appellate courts have tried to distinguish between elements of a crime—on which a jury must be unanimous—and theories of a crime—on which a jury does not have to be unanimous. The line between elements and theories, however, is not clearly defined in the case law. Thus, the nature of the additional required instruction will vary depending upon the crimes charged and the facts and circumstances of a particular case. For these reasons, the Committee has not adopted any specific model unanimity instructions beyond the general instruction in CR216 and CR218. Rather, the Committee encourages the parties to refer to case law on the matter.

Relevant cases:
State v. Hummel, 2017 UT 19, 393 P.3d 314 (elements vs. theories);
State v. Whytock, 2020 UT App 107, ___ P.3d ___
State v. Case, 2020 UT App 81, ___ P.3d ___
State v. Alires, 2019 UT App 206, 455 P.3d 636

The committee discussed the location for this committee note within the MUJI instructions. By reviewing the various existing instructions, the committee identified and agreed that it would be appropriate and most useful to include the committee note in CR2016 and CR2018. With that, Ms. Klucznik made motion to adopt this language. Mr. Field seconded the motion. The committee voted unanimously in support of the motion.

(3) DUI AND RELATED TRAFFIC INSTRUCTIONS:

This matter was not addressed by the committee at this meeting. It will be addressed at a future meeting.

(4) BATTERED PERSON MITIGATION:

These materials were not considered by the committee at this meeting. They will be addressed at a future meeting.

(5) REVIEW PUBLIC COMMENTS ON PUBLISHED INSTRUCTIONS:

The committee had received many public comments on the large number of instructions and verdict forms that had been published for public comment on June 3, 2020. The comment period had closed on July 19, 2020. The comments were organized by instruction area in the meeting materials.

"Indecent Liberties" Definition

Judge Blanch first turned the committee's attention to the comments regarding CR1601 Definitions (for "Sexual Offenses"). The committee had previously adopted a definition for "indecent liberties." That definition was

derived from case law. Since that time, the legislature has enacted a statutory definition of "indecent liberties" in Utah Code § 76-5-416. Ms. Klucznik provided the statutory language to the committee. Ms. Johnson asked whether there is a need to preserve the old definition for those cases that arose before the statutory definition was enacted. The committee briefly discussed the previous general decision to only maintain the current version of instructions, without maintaining prior instructions that have since been superseded. Because the MUJI jury instruction system is not currently geared to provide an archive of prior instructions, the committee would continue to only provide current instructions.

Ms. Johnson and Ms. Klucznik suggested that because indecent liberties is such a common factor in many sexual offenses that predate the statutory definition, the committee should consider adding a committee note to the statutory definitional instruction that flags for practitioners the statutory enactment date and the prior key cases relevant to the previous definition. The committee agreed that would be the best course of action under these specific circumstances. The committee drafted language for the explanatory committee note, as follows:

Committee Note:
The legislature enacted the above definition, effective May 14, 2019. Before that date, the definition was based upon case law. See, e.g., State v. Lewis, 2014 UT App 241, 337 P.3d 1053; State v. Peters, 796 P.2d 708 (Utah App. 1990)

The committee then instructed staff to make any necessary stylistic changes to the statutory definition so that it is harmonious with the styles of the other definitions in this section of the MUJI instructions. Ms. Johnson made motion to adopt the statutory definition for purposes of the MUJI instructions; Ms. Klucznik seconded the motion. The motion passed, subject to the committee's final approval of the requested stylistic edits.

Other Public Comment Review Assignments

Judge Blanch then assigned the following committee members to make review of the public comments in the meeting materials:

- DUI instructions – Judge McCullagh
- assault instructions – Ms. Johnson
- homicide instructions – Ms. Klucznik and Mr. Field
- sexual offenses – Ms. Johnson
- defense of habitation – Ms. Klucznik
- miscellaneous instructions – reviewed by committee at future meeting

The assigned committee member will review the relevant public comments in Tab 5 of the meeting materials and recommend to the full committee how to proceed. Judge Blanch noted that the level of feedback from the public is impressive and helpful. Judge Blanch wanted it to be clear to those who took time to comment that their feedback is very appreciated. Staff will ensure that those who commented are aware of the committee's gratitude for their participation in the public comment process.

(7) ADJOURN

The meeting adjourned at approximately 1:30 p.m. The next meeting will be held on September 2, 2020, starting at 12:00 noon, via WebEx.

TAB 2

“Indecent Liberties” definition for CR1601

NOTES: At the last meeting, the committee adopted the statutory definition of “indecent liberties for inclusion in the MUJI criminal instructions. The committee instructed staff to make minor stylistic revisions to the statutory definition to bring consistency with the other MUJI definitions. The following draft is presented for committee review prior to final publication.

[To replace the current definition in CR1601 "Definitions"]

"~~Take~~ indecent liberties" means:

TODO: publish in CR1601

(1) ~~the actor~~ touching [(VICTIM'S NAME) (MINOR'S INITIALS)]'s genitals, anus, buttocks, pubic area, or female breast;

(2) causing any part of [(VICTIM'S NAME) (MINOR'S INITIALS)]'s body to touch the actor's or another's genitals, pubic area, anus, buttocks, or female breast;

(3) simulating or pretending to engage in sexual intercourse with [(VICTIM'S NAME) (MINOR'S INITIALS)], including genital-genital, oral-genital, anal-genital, or oral-anal intercourse; or

(4) causing [(VICTIM'S NAME) (MINOR'S INITIALS)] to simulate or pretend to engage in sexual intercourse with the actor or another, including genital-genital, oral-genital, anal-genital, or oral-anal intercourse.

Reference:
Utah Code Ann. § 76-5-416

Committee Note:
The legislature enacted the above definition, effective May 14, 2019. Before that date, the definition was based upon case law. *See, e.g.*, *State v. Lewis*, 2014 UT App 241, 337 P.3d 1053; *State v. Peters*, 796 P.2d 708 (Utah App. 1990)

TAB 3

Karen will rework these materials in light of the committee's discussion.

Battered Person Mitigation

NOTES: At the May 6, 2020 meeting, Ms. Karen Klucznik agreed to prepare draft materials in response to SB0238 2 "Battered Person Mitigation Amendments." Those materials are included for committee consideration. This will be the first time the committee considers these materials.

Draft instructions for Battered Person Mitigation
(Utah Code Ann. §76-2-409, effective May 12, 2020)

Note that the statute defining this mitigation defense does not identify the crimes to which it applies.

Also note that the definitions of "abuse" and "cohabitant" refer to statutes that were amended effective *after* May 12, 2020. This makes the instruction defining those terms very messy.

RELEVANT STATUTES

Utah Code Add. § 76-2-409 (Battered Person Mitigation)

(1) As used in this section:
(a) "Abuse" means the same as that term is defined in Section 78B-7-102.
(b) "Cohabitant" means:
(i) the same as that term is defined in Section 78B-7-102; or
(ii) the relationship of a minor and a natural parent, an adoptive parent, a stepparent, or an individual living with the minor's natural parent as if a stepparent to the minor.

(2)(a) An individual is entitled to battered person mitigation if:
(i) the individual committed a criminal offense that was not legally justified;
(ii) the individual committed the criminal offense against a cohabitant who demonstrated a pattern of abuse against the individual or another cohabitant of the individual; and
(iii) the individual reasonably believed that the criminal offense was necessary to end the pattern of abuse.
(b) A reasonable belief under Subsection (2)(a) is determined from the viewpoint of a reasonable person in the individual's circumstances, as the individual's circumstances are perceived by the individual.

(3) An individual claiming mitigation under Subsection (2)(a) has the burden of proving, by clear and convincing evidence, each element that would entitle the individual to mitigation under Subsection (2)(a).

(4) Mitigation under Subsection (2)(a) results in a one-step reduction of the level of offense of which the individual is convicted.

(5)(a) If the trier of fact is a jury, an individual is not entitled to mitigation under Subsection (2)(a) unless the jury:
(i) finds the individual proved, in accordance with Subsection (3), that the individual is entitled to mitigation by unanimous vote; and
(ii) returns a special verdict for the reduced charge at the same time the jury returns the general verdict.
(b) A nonunanimous vote by the jury on the question of mitigation under Subsection (2)(a) does not result in a hung jury.
(6) An individual intending to claim mitigation under Subsection (2)(a) at the individual's trial shall give notice of the individual's intent to claim mitigation under Subsection (2)(a) to the prosecuting agency at least 30 days before the individual's trial.

Statutes relevant to definition of "abuse"

Utah Code Ann. § 76-2-409(1)(a) (effective May 12, 2020) (the battered person mitigation defense statute)
(1)(a) "Abuse" means the same as that term is defined in Section 78B-7-102.

Utah Code Ann. § 78B-7-102 (1) (effective May 12 to July 1, 2020):
(1) "Abuse" means intentionally or knowingly causing or attempting to cause a cohabitant physical harm or intentionally or knowingly placing a cohabitant in reasonable fear of imminent physical harm.

Utah Code Ann. § 78B-7-102 (1) (effective July 1, 2020):
(1) "Abuse" means, except as provided in Section 78B–7–201, intentionally or knowingly causing or attempting to cause ~~a cohabitant physical harm or intentionally or knowingly placing a cohabitant~~ another individual physical harm or intentionally or knowingly placing another individual in reasonable fear of imminent physical harm.

Utah Code Ann. § 78B-7-201 (same as before May 12, 2020)
(1) "Abuse" means:
(a) physical abuse;
(b) sexual abuse;
(c) any sexual offense described in Title 76, Chapter 5b, Part 2, Sexual Exploitation; or
(d) human trafficking of a child for sexual exploitation under Section 76–5–308.5.

Statutes relevant to definition of "cohabitant"

Utah Code Ann. § 76-2-409(1)(b) (effective May 12, 2020) (the battered person mitigation defense statute)

(1)(b) "Cohabitant" means:

(i) the same as that term is defined in Section 78B-7-102; or

(ii) the relationship of a minor and a natural parent, an adoptive parent, a stepparent, or an individual living with the minor's natural parent as if a stepparent to the minor.

Utah Code Ann. § 78B-7-102(2),(3) (May 12, 2020 to July 1, 2020)

(3)(a) "Cohabitant" means an emancipated person pursuant to Section 15-2-1 or a person who is 16 years of age or older who:

(i) is or was a spouse of the other party;

(ii) is or was living as if a spouse of the other party;

(iii) is related by blood or marriage to the other party as the person's parent, grandparent, sibling, or any other person related to the person by consanguinity or affinity to the second degree;

(iv) has or had one or more children in common with the other party;

(v) is the biological parent of the other party's unborn child;

(vi) resides or has resided in the same residence as the other party; or

(vii) is or was in a consensual sexual relationship with the other party.

(b) "Cohabitant" does not include:

(i) the relationship of natural parent, adoptive parent, or step-parent to a minor; or

(ii) the relationship between natural, adoptive, step, or foster siblings who are under 18 years of age.

(4) "Consanguinity" means the same as that term is defined in Section 76-1-601.

Utah Code Ann. § 76-1-601(6) (effective May 12, 2020)

(6) "Consanguinity" means a relationship by blood to the first or second degree, including an individual's parent, grandparent, sibling, child, aunt, uncle, niece, or nephew.

Utah Code Ann. § 78B-7-102(4)(a),(b) (effective July 1, 2020)

~~(2)~~(5)(a) "Cohabitant" means an emancipated ~~person pursuant to~~ individual under Section 15–2–1 or ~~a person~~ an individual who is 16 years of age or older who:

~~(a)~~(i) is or was a spouse of the other party;

~~(b)~~(ii) is or was living as if a spouse of the other party;

~~(c)~~(iii) is related by blood or marriage to the other party as the ~~person's~~ individual's parent, grandparent, sibling, or any other ~~person~~ individual related to the ~~person~~ individual by consanguinity or affinity to the second degree;

~~(d)~~(iv) has or had one or more children in common with the other party;

~~(e)~~(v) is the biological parent of the other party's unborn child;

~~(f)~~(vi) resides or has resided in the same residence as the other party; or

~~(g)~~(vii) is or was in a consensual sexual relationship with the other party.

~~(3)~~(b) Notwithstanding Subsection ~~(2)~~ (4)(a), "cohabitant" does not include:

~~(a)~~(i) the relationship of natural parent, adoptive parent, or step-parent to a minor; or

~~(b)~~(ii) the relationship between natural, adoptive, step, or foster siblings who are under 18 years of age.

(6) "Consanguinity" means the same as that term is defined in Section 76-1-601.

Utah Code Ann. § 76-1-601(6) (effective May 12, 2020)

(6) "Consanguinity" means a relationship by blood to the first or second degree, including an individual's parent, grandparent, sibling, child, aunt, uncle, niece, or nephew.

CR___ Special Verdict Form - Battered Person Mitigation

If you find that the State has proved all the elements of [name applicable crime] beyond a reasonable doubt, you must complete the special verdict form titled "Special Verdict Battered Person Mitigation."

- Check ONLY ONE box on the form.
- The foreperson MUST sign the special verdict form.

Committee Note

Whenever the battered person mitigation defense is submitted to the jury,

- use both the applicable battered person mitigation instructions and the "Special Verdict Battered - Person Mitigation" special verdict form; and
- add the following paragraph at the bottom of the underlying crime's elements instruction:

  "If you are convinced that the State has proved each and every element of [name applicable crime], you must decide whether the battered person mitigation defense applies and complete the special verdict form concerning that defense. The battered person mitigation defense is addressed in Instructions _____."

CR___ Explanation of Battered Person Mitigation Defense

You must consider the battered person mitigation defense only if you find the State has proved all the elements of [name applicable crime] beyond a reasonable doubt. The battered person mitigation defense is a partial defense to [name applicable crime]. The effect of the mitigation defense is to reduce the level of the offense. Your decision will be reflected in the special verdict form titled "Special Verdict Battered Person Mitigation Defense."

Committee Note

Whenever the battered person mitigation defense is submitted to the jury,

- use both the applicable battered person mitigation instructions and the "Special Verdict Battered - Person Mitigation" special verdict form; and
- add the following paragraph at the bottom of the underlying crime's elements instruction:

  "If you are convinced that the State has proved each and every element of [name applicable crime], you must decide whether the battered person mitigation defense applies and complete the special verdict form concerning that defense. The battered person mitigation defense is addressed in Instructions _____."

CR___ Definition of Battered Person Mitigation Defense

The battered person mitigation defense applies if you unanimously find:

1. The defendant committed an offense that was not legally justified;
2. The defendant committed the defense against a cohabitant;
3. The cohabitant had demonstrated a pattern of abuse against the defendant or another cohabitant; and
4. The defendant reasonably believed the offense was necessary to end the pattern of abuse.

The defendant must prove by clear and convincing evidence that battered person mitigation defense applies. [**Taken from the civil instruction:** To prove something by clear and convincing evidence, the defendant must present sufficient evidence to persuade you to the point that there remains no serious or substantial doubt as to the truth of the fact. Proof by clear and convincing evidence thus requires a greater degree of persuasion than proof by a preponderance of the evidence but less than proof beyond a reasonable doubt.]

Committee Note

Whenever the battered person mitigation defense is submitted to the jury,

- use the applicable battered person mitigation instructions and the "Special Verdict Battered - Person Mitigation" special verdict form; and
- add the following paragraph at the bottom of the underlying crime's elements instruction:

  "If you are convinced that the State has proved each and every element of [name applicable crime], you must decide whether the battered person mitigation defense applies and complete the special verdict form concerning that defense. The battered person mitigation defense is addressed in Instructions _____."

CR____. Definitions applicable to Battered Persons Mitigation Defense

The following definitions apply to the battered person mitigation defense:

1. "Abuse" means intentionally or knowingly causing or attempting to cause another individual physical harm [**or sexual abuse or sexual exploitation or human trafficking of a child for sexual exploitation (78B-7-201(1)]]** or intentionally or knowingly placing another individual in reasonable fear of imminent physical harm [**or sexual abuse or sexual exploitation or human trafficking of a child for sexual exploitation (78B-7-201(1)]]**.

2. "Cohabitant" means

(a) **[the same as defined in section 78B-7-102]** an emancipated individual **[under Section 15–2–1]** or an individual who is 16 years of age or older who:

(i) is or was a spouse of the other party;

(ii) is or was living as if a spouse of the other party;

(iii) is related by blood or marriage to the other party as the person's individual's parent, grandparent, sibling, or any other person individual related to the person individual by consanguinity or affinity to the second degree;

(iv) has or had one or more children in common with the other party;

(v) is the biological parent of the other party's unborn child;

(vi) resides or has resided in the same residence as the other party; or

(vii) is or was in a consensual sexual relationship with the other party.

(b) the relationship of a minor and a natural parent, an adoptive parent, a stepparent, or an individual living with the minor's natural parent as if a stepparent to the minor.

[78B-7-102(4)(b)] Notwithstanding any of the above definitions, "cohabitant" does not include the relationship between natural, adoptive, step, or foster siblings who are under 18 years of age.

(3) "Reasonable belief" is determined from the viewpoint of a reasonable person in the individual's circumstances, as the individual's circumstances are perceived by the individual.

Committee Note

Whenever the battered person mitigation defense is submitted to the jury,

- use both the applicable battered person mitigation instructions and the "Special Verdict Battered - Person Mitigation" special verdict form; and

- add the following paragraph at the bottom of the underlying crime's elements instruction:

  "If you are convinced that the State has proved each and every element of [name applicable crime], you must decide whether the battered person mitigation defense applies and complete the special verdict form concerning that defense. The battered person mitigation defense is addressed in Instructions _____."

SVF ____. Battered Person Mitigation Defense

(LOCATION) JUDICIAL DISTRICT COURT, [_____ DEPARTMENT,]
IN AND FOR (COUNTY) COUNTY, STATE OF UTAH

THE STATE OF UTAH,	:	
	:	**SPECIAL VERDICT**
Plaintiff,	:	**BATTERED PERSON**
	:	**MITIGATION DEFENSE**
-vs-	:	
		Count (#)
(DEFENDANT'S NAME),		
Defendant.		
		Case No. (**)

Having found the State has proved all the elements of [name applicable crime], as charged in Count [#],

Check ONLY ONE of the following boxes:

☐ We unanimously find (DEFENDANT'S NAME) has proved by clear and convincing evidence that the battered person mitigation defense applies, and thus we unanimously find (DEFENDANT'S NAME) guilty of [name applicable lesser crime].

OR

☐ We do not unanimously find (DEFENDANT'S NAME) has proved by clear and convincing evidence that the battered person mitigation defense applies, and thus we unanimously find (DEFENDANT'S NAME) guilty of [name applicable crime].

DATED this _____ day of (Month), 20(**).

_____
Foreperson

Committee Note

Whenever the battered person mitigation defense is submitted to the jury,

- use both the applicable battered person mitigation instructions and the "Special Verdict Battered - Person Mitigation" special verdict form; and
- add the following paragraph at the bottom of the underlying crime's elements instruction:

  "If you are convinced that the State has proved each and every element of [name applicable crime], you must decide whether the battered person mitigation defense applies and complete the special verdict form concerning that defense. The battered person mitigation defense is addressed in Instructions _____."

Tab 4 has been skipped in this packet.

TAB 5

Public Comments on Published Instructions

NOTES: On June 3, 2020, committee staff published a large number of committee-approved instructions and special verdict forms. The public comment period ran from June 3, 2020, through July 19, 2020. During the comment period, 16 individuals provided over 30 comments. Several of the comments identified minor clerical issues that have committee staff has already resolved without need for any committee consideration.

The remaining comments have been grouped into sub-tabs, as follows:

- **Tab 5A – DUI Instructions (1000 series):** Judge McCullagh
  Elements Instructions (CR1003, CR1004, CR1005) – one comment

- **Tab 5B – Assault Instructions (1300 series):** Sandi Johnson
  CR1301 – four comments
  CR1302 – two comments
  CR1320 – two comment
  CR1322 – two comments

- **Tab 5C – Homicide Instructions (1400 series):** Karen Klucznik, Mark Field
  CR1411 – two comments
  CR1451, CR1452, SVF1450 – three comments

- **Tab 5D – Sexual Offenses Instructions (1600 series):** Sandi Johnson
  CR1601 – three comments
  CR1613, SVF1613 – two comments
  CR1616A – four comments

- **Tab 5E – Defense of Habitation / Self / Others (500 series):** Karen Klucznik
  CR520 through CR523 – two comments
  CR530 through CR533 – four comments

- **Tab 5F – Miscellaneous Instructions:** by committee at future meeting
  CR411 – two comments
  In General – one comment

TAB 5A

Public Comment:
DUI Instructions (1000 series)

NOTES: The committee received the following comment related to the committee notes for the three DUI elements instructions (CR1003 – MB, CR1004 – MA, and CR1005 – F3):

Hyrum Hemingway: *"The committee notes are misleading. Contrary to their assertion, it is not 'an open question whether a mens rea is required with respect to the operation of actual physical control element of DUI' for offenses occurring before HB0139 takes effect. The amended committee notes are equally problematic, as they persist in suggesting it is unresolved whether DUI is a strict liability offense for offenses occurring before HB0139.*

"The only authority relied on for the proposition that DUI is not a strict liability offense is State v. Vialpando, 2004 UT App 95, ¶26. In that case, the Court of Appeals considered whether the trial court erred by failing to instruct the jury that the State was required to prove intent in an actual physical control case. The Court ultimate [sic] concluded no such showing was necessary. In reaching its decision, the Court recognized that the plain text of the former DUI statute (Utah Code § 41-6-44) did not contain a mens rea requirement. In the absence of such requirement, the Court fell back on the general presumption in Utah Code § 76-2-102 that in the absence of a specified mens rea for a specific offense, the code requires evidence of intent, knowledge, or recklessness. The decision made no mention of Utah Code § 76-2-101's plain text, which stated, '[t]hese standards of criminal responsibility shall not apply to the violations set forth in Title 41, Chapter 6, unless specifically provided by law.' It is unclear why the Court failed to address this controlling text, as it is simply not acknowledged in any fashion.

"In 2015, the Utah Supreme Court interpreted Utah Code Ann. 76-2-101, holding that "[v]iolations of the Utah Traffic Code . . . are strict liability offenses "unless specifically provided by law." State v. Bird, 2015 UT 7, ¶ 18 (quoting Utah Code § 76–2–101(2)). When Bird is considered with Vialpando, the only logical outcome is that Vialpando's holding that DUI had any mens rea requirement was overruled. Vialpando expressly held that the DUI statute (which has not materially changed since Vialpando was decided) contains no mens rea requirement. Vialpando relied on Utah Code § 76-2-102 for the default mens rea applicable to all criminal offenses that do not contain a mens rea requirement. However, the Supreme Court's decision in Bird makes clear that Vialpando's reliance on Utah Code § 76-2-102 was erroneous. DUI is part of the traffic code. In the absence of anything specifically providing otherwise, Utah Code § 76–2–101(2) renders DUI a strict liability offense.

"Subsequent to Bird, the Court of Appeals has twice interpreted the DUI statute (now Utah Code § 41-6a-502) and Utah Code § 76-2-101(2) as creating a strict liability crime. State v. Thompson, 2017 UT App 183, ¶ 52 ('But driving under the influence of alcohol is a strict-liability crime and therefore does

not have a mens rea requirement.'); State v. Higley, 2020 UT App 45, ¶22 (same). While these two cases were not directly deciding whether it was error to refuse to instruct a jury about whether DUI contains any mental state, there is no reason to believe such a case would result in a different result. The controlling statutes would be the same. And any decision addressing such an argument would have to grapple with Bird, which leaves little room for debate. The Court of Appeals' decisions subsequent to Vialpando, which account for the Supreme Court's interpretation of Utah Code § 76-2-101(2) in Bird, have undermined any persuasive force left in Vialpando, to the extent it suggested DUI is anything other than a strict liability offense.

"If some believe Vialpando's mens rea analysis is still good law, that belief does not have sufficient legal justification to be published in a model jury instruction. Vialpando ignored the legislature's clear direction that the traffic code was exempted from the standards of Utah Code § 76-2-102. Subsequent to the Supreme Court's decision in Bird, the Court of Appeals has twice interpreted the DUI statute and Utah Code § 76-2-101(2) as creating a strict liability offense. Publishing an official model jury instruction stating it is an 'open question' or 'unresolved' gives too much weight to Vialpando and ignores what has happened since.

"Finally, floor remarks from Senator Curtis S. Bramble on March 4 and March 5, 2020, discussing HB0139 clearly state the bill was 'clarifying' and 'clarifies' that DUI was a strict liability offense. Repeated use of the root verb 'clarify' signals the legislature's opinion was that Utah Traffic Code section 502 has always been a strict liability offense. That suggests the legislature meant what it said in Utah Code Ann. § 76-2-101."

TAB 5B

Public Comment:
Assault Instructions (1300 series)

NOTES: ==========

Recklessly attempting assault in Utah

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One comment raised the issue of whether it is even possible to "recklessly attempt to assault" in Utah:

Brent Huff: *CR1302 states the elements of Assault to include "Intentionally, knowingly, or recklessly" attempting, with unlawful force or violence, to do bodily injury." Can a person recklessly attempt in Utah?*

In CR1302, CR1303, CR1304, CR1305, CR1306, CR1320, and CR1321 the instructions all read:

1) DEFENDANT'S NAME;
2) Intentionally, knowingly, or recklessly;
3) Attempted . . .

The issue raised in the comment is whether it is even possible for a person to "recklessly attempt" to assault someone in Utah. Utah Code § 76-4-101 says "attempt" =

(1)(a) engaging in conduct constituting a substantial step; AND
(1)(b)(i) intending to commit the crime; OR
(1)(b)(ii) acting with awareness that the conduct is reasonably certain to cause the result (i.e., knowingly)

That is the general attempt statute. But Utah Code § 76-4-301 says that an attempt that is specifically designated in statute (perhaps like the specific mention of "attempt" in the assault statute) prevails over the general attempt statute.

Should these instructions be modified?

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CR1301 – Definition changes

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There were a few public comments suggesting minor changes or additional definitions be included in CR1301:

Corey Sherwin: *The one potential assault-related definition the proposed instruction does not have is* ***"act"*** *(UCA 76-1-601(1)). While not frequently in need of explanation, the term "act" has a specific definition under the law and ought to be included in the instruction.*

Janet Lawrence: *In the "Targeting a Law Enforcement Officer" definition, the term* ***"commission of"*** *is not in common usage and is not plain English. I would change "the commission of" to "committing." The* ***"military servicemember in uniform"*** *and* ***"peace officer"*** *definitions refer the jury to sections of the code that are not defined. The jury should not be referring to the code, so these need to be defined. For example, the second element in the "military servicemember in uniform" now worded "a member of the National Guard serving as provided in Section 39-1-5 or 39-1-9" could be worded as "a member of the National Guard who the governor has ordered into active service or who the President of the United States has called into service."*

Katie Ellis: *We could possibly add a few more definitions:*
"Emergency medical service worker" *means a person licensed under Section 26-8a-302. See Utah Code § 76-5-102.7(3)(b).*
"Health care provider" *includes any person, partnership, association, corporation, or other facility or institution who causes to be rendered or who renders health care or professional services as a hospital, health care facility, physician, physician assistant, registered nurse, licensed practical nurse, nurse-midwife, licensed direct-entry midwife, dentist, dental hygienist, optometrist, clinical laboratory technologist, pharmacist, physical therapist, physical therapist assistant, podiatric physician, psychologist, chiropractic physician, naturopathic physician, osteopathic physician, osteopathic physician and surgeon, audiologist, speech-language pathologist, clinical social worker, certified social worker, social service worker, marriage and family counselor, practitioner of obstetrics, licensed athletic trainer, or others rendering similar care and services relating to or arising out of the health needs of persons or groups of persons and officers, employees, or agents of any of the above acting in the course and scope of their employment. See Utah Code §§ 76-5-102.7(3)(c); 78B-3-403.*

Tom Brunker: *Consider removing the definition of* ***"targeting a law enforcement officer."*** *CR1322 presents an elements instruction for aggravated assault involving targeting a law enforcement officer. That could be used as a model for other offenses that involve targeting a law enforcement officer. The statutory language defining targeting a law enforcement officer is hard to follow; repeating that language for the jury is not helpful. Breaking it out into elements, as in CR1322, is helpful.*
If you remove the definition of "targeting a law enforcement officer" from CR1301 and keep the elements instruction for aggravated assault—targeting a law enforcement officer (CR1322), then targeting a law enforcement officer should be eliminated from the special form.

==========

Structure of CR1302 and CR1320 – Assault Enhancements

==========

Tom Brunker: *[On CR1302] CR1302 purports to cover both class B and class A misdemeanor assault. But when there are aggravators at issue that may increase the assault to a class A misdemeanor, the instruction, as written, allows the jury only to either convict or acquit of the higher crime. It should allow for a conviction of the lower crime if the State fails to prove the aggravator.*

The elements instruction says (both before and after the listed elements) that the jury must find that each of the elements applies before it can convict. Elements 3 and 4 list alternative facts that must be found by the jury to enhance the penalty to a class A misdemeanor. If neither of those facts are found, but every other element is found, then the defendant is still guilty of a class B misdemeanor. But as the instruction is written, the jury is required to find the enhancement in order to find the defendant guilty of any assault. In other words, including elements 3 and 4 effectively eliminates class B misdemeanor assault as a crime. Elements 3 and 4 should be handled through a special verdict form rather than the elements instruction.

Tom Brunker: *[On CR1320] The enhancement element on aggravated assault (element 3) raises a similar problem. Again, the elements instruction says (both before and after the listed elements) that the jury must find that each of the elements applies before it can convict. Element 3 lists facts that must be found by the jury to enhance the penalty to a second-degree felony. If none of those facts are found, but every other element is found, then the defendant is still guilty of a third-degree felony. But as the instruction is written, the jury is required to find the enhancement facts in order to find the defendant guilty of aggravated assault. In other words, including element 3 effectively eliminates third degree felony aggravated assault as a crime.*

==========

Feedback on Committee Note to CR1320 re: Cohabitancy Status

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Hyrum Hemingway: *The note includes a suggestion that co-habitancy status may require proof of mens rea. This suggestion comes from of an accurate statement, but the statement appears to be a solution in search of a problem that does not exist. The note cites to State v. Barela, 2015 UT 22, ¶26, which stands for the proposition that Utah's "criminal code requires proof of mens rea for each element of a non-strict liability crime." Indeed, Utah Code Ann. 76-2-101 states that for every criminal offense, "a person is not guilty of an offense unless . . . the person acts intentionally, knowingly, recklessly, with criminal negligence . . . or the person's acts constitute an offense involving strict liability."*

However, an offense does not become a domestic violence offense based off any action not already contemplated by the underlying offense. An Aggravated Assault has the same elements as Aggravated Assault – Domestic Violence, except for the identity of the victim. To convict a defendant of a domestic violence offense, the State must prove the underlying offense occurred, and then prove it was "committed by one cohabitant against another." Utah Code Ann. 77-36-1(4). Any consequences of a finding regarding cohabitancy is not based on any action, but solely on status.

The proposed special verdict form for DV offense (SVF 1331) is written in the passive voice, accurately reflecting that whether or not a DV status exists does not depend on any action. However, when mens rea terms are inserted, the form becomes nonsensical:

We, the jury, have found the defendant, (DEFENDANT'S NAME), guilty of [CRIME(S)], as charged in

Count(s) [#,#,#]. We also unanimously find the State: ¨ has ¨ has not proven beyond a reasonable doubt (DEFENDANT'S NAME) and (VICTIM'S NAME) were intentionally, knowingly, or recklessly cohabitants at the time of [this][these] offense(s)

Whose actions is the jury being asked to assess? What actions are they assessing?

This confusion appears to arise from a mistaken notion that every portion of a criminal offense must include proof of a specific mental state. As noted above, the general rule in the code requires that actions be accompanied with a mental state, unless the offense is one of strict liability.

Attendant circumstances may be an element of a criminal offense. Utah Code Ann. 76-1-501(2). "Attendant circumstances" are those circumstances that may be required to be present for criminal liability in addition to the requisite physical conduct, or actus reus, and the mens rea specified for the offense. State v. Vigil, 842 P.2d 843, 846, n.4 (Utah 1992), overruled on other grounds by State v. Casey, 2003 UT 55. The presence or absence of a cohabitant relationship is best understood as a question of whether a certain attendant circumstance exists. As noted by the Court in Vigil, it is rare for an offense to require a mental state for an attendant circumstance. Id. When an attendant circumstance does require proof of a mental state, the determination is made based off the language of the specific offense. See id. In the absence of any language defining what constitutes a domestic violence offense, the proposed note, while technically accurate, will mislead parties into believing that the code's requirement that actions be accompanied with a mental state extends to attendant circumstances, when no such general requirement is found in the code.

==========

CR1322 – Eliminate duplicative element re: bodily injury?

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Blake Hills: *Parts 1b and 2 should be combined to state in 1b that serious bodily injury was caused, since that is the only way to commit the crime.*

Tom Brunker: *The MUJI is confusing because it effectively requires the jury to find both bodily injury and serious bodily. But aggravated assault targeting a law enforcement officer requires serious bodily injury. So element 2 should be eliminated and 1(b) changed to require a finding of serious bodily injury. If the intent was to try to capture both a greater and lesser offense, the better approach would be to suggest in committee notes asking for separate instructions on aggravated assault targeting a law enforcement officer and aggravated assault.*

The relevant elements of that instruction state:

1. (DEFENDANT'S NAME) intentionally, knowingly, or recklessly;
a. committed an act with unlawful force or violence that
b. **caused bodily injury** to (VICTIM'S NAME) by:

[list of methods]; and

2. (DEFENDANT'S NAME)'s actions **caused serious bodily injury**; and

TAB 5C

Public Comment:
Homicide Instructions (1400 series)

NOTES: ==========

CR1411 – Felony Murder: victim as participant

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The committee received two similar comments outlining the need for additional language in the instruction to make clear that the victim cannot be a participant in the underlying felony:

Fred Burmester: *The murder elements instruction is fine with one exception; the victim in the case of felony murder theory must not be a participant in the felony. Thus I think the following language must be added to the elements instruction:*
"d. While engaging in the commission, attempted commission, or immediate flight from the commission or attempted commission of [the predicate offense(s)], or as a party to [the predicate offense(s)],
i. (VICTIM'S NAME), ***[ADD THIS LANGUAGE: "who was not a participant in the predicate offense(s)"]*** *was killed; and…"*

Sean Brian: *(2)(d)(i) Pursuant to Utah Code § 76-5-203(2)(d)(ii), the victim cannot be a party to the predicate offense.*
(2)(d)(ii) A jury may not be able to determine the appropriate level of intent applicable to the predicate offense. The instruction would be clearer if the level of intent were directly stated.

==========

CR1411 – Felony Murder: level of intent

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Sean Brian: *(2)(d)(ii) A jury may not be able to determine the appropriate level of intent applicable to the predicate offense. The instruction would be clearer if the level of intent were directly stated.*

==========

CR1450-1452 / SVF1450 – imperfect self-defense

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Tom Brunker: *The [AG's Appellate] Division has seen several cases with defective imperfect self-defense instructions. As the practitioner's note points out, it has been particularly problematic when the instructions try to fold imperfect self-defense into the elements instruction. It has resulted in either misstating who has the burden of proof or potentially misleading the jury into believing that it must reach unanimity on whether the State had failed to disprove imperfect self-defense. So the Division*

agrees that the imperfect self-defense instruction should be separate from the elements instruction.

But the proposed MUJI procedure arguably conflicts with the rules. As relevant here, Utah R. Crim. P. 21(a) requires the jury to enter a verdict of "guilty" or "not guilty of the crime charged but guilty of a lesser included offense." The proposed MUJI procedure, however, results in there being no verdict on the lesser crime.

As proposed, and as relevant here, the jury verdict is either guilty of the greater offense or guilty of the lesser offense for reasons other than imperfect self-defense. The jury is then instructed only to make a finding on imperfect self-defense. But it is not asked to enter a verdict on the lesser crime if it finds in favor of the defendant on imperfect self-defense. So contrary to rule 21's requirement, there is no verdict on the lesser offense.

The parties sometimes agree to bifurcate proceedings so that the jury enters a verdict on a particular crime and the judge decides whether aggravating circumstances that enhance the crime—usually prior convictions—exist. But in that case, the defendant has agreed to waive a jury verdict on the second step. Here, the defendant has not expressly waived the jury verdict on the lesser offense. Rather than entering a verdict on the lesser offense, the jury enters a verdict on the greater offense and only enters a finding that results in a lesser offense.

It may be that the disconnect between the rule and the proposed MUJI won't make a difference. But a fix would eliminate the problem.

A related concern is that the proposed instructions speak in terms of the jury finding the defendant guilty of the greater offense before considering imperfect self-defense. For example, CR 1451 states, "You must consider imperfect self-defense only if you find the defendant guilty of [Aggravated Murder][Attempted Aggravated Murder][Murder][Attempted Murder]." But if the jury ultimately finds that the State has not disproven imperfect self-defense beyond a reasonable doubt, then the defendant is not guilty of the greater crime. We therefore recommend that when describing the jury's finding on the greater offense the instructions should speak in terms of the jury having found that the State proved all the elements of the greater offense, or some similar phrasing, not that the jury has found the defendant guilty of the greater offense. This change would need to be incorporated into CR 1450, 1451, 1452, and the Special Verdict Form.

Sean Brian: *[For SVF1450] "Having found the defendant, (DEFENDANT'S NAME), guilty of [Aggravated Murder][Attempted Aggravated Murder][Murder][Attempted Murder], as charged in Count [#], Check ONLY ONE of the following boxes:*
[ ] We unanimously find that the State has proved beyond a reasonable doubt that the defense of imperfect self-defense DOES NOT apply.
OR
[ ] We do not unanimously find that the State has ***NOT (ADD THIS "NOT")*** *proved beyond a reasonable doubt that the defense of imperfect self-defense DOES NOT apply* ***(ADD THIS:) and therefore the level of offense should be reduced****."*
Notes/ Explanation:
The phrasing could be misinterpreted to negate the unanimity requirement, so the "not" is moved so that it clearly modifies "proved."
The emphasis should be placed on the difference between the two options. It may also be helpful to the jury to clarify the consequence of their selection. The verdict form appears to successfully avoid the issue raised in State v. Campos , 2013 UT App 213, 309 P. 3d 1160, where the instruction failed to place the burden of proof on the State.

Fred Burmester: *The proposal to make imperfect self-defense subject to a special verdict has some logic to it in my opinion, but the defense results in a lesser included manslaughter. The supporting practitioners' notes only refer to a court of appeals case Lee and in the end Drej. State v. Lee does not take on the issue straight ahead. It has dicta that the method of the instruction misplaced the burden which is a pitfall I think the MUJI drafters were trying to avoid. Drej does not apply (it is a mitigation case and not an affirmative defense case). The problem is that State v. Shumway, a Supreme Court case, says that you cannot instruct the jury on a specific order of deliberation with a lesser included manslaughter. However, the proposed instruction tells the jury they can only consider the affirmative defense (lesser included manslaughter) if they first find the defendant guilty of murder, a thing I think Shumway prohibits. I have attached the citations for the relevant cases at the bottom of this note. SHUMWAY, 63 P.3d 94; LEE, 318 P.3d 1164; LOW, 192 P.3d 867*

TAB 5D

Public Comments:
Sexual Offenses Instructions (1600 series)

NOTES:

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CR1601 – Definitions: "indecent liberties"

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Blake Hills: *~~Indecent liberties is specifically defined by 76-5-416.~~*

Donna Kelly: *~~Regarding "indecent liberties," where it says "any conduct" I think that should say "any sexual conduct." To leave it as it is would mean that any act with equal seriousness would be a sex crime – so a punch or a slap could be a sex crime.~~*
Also, Could we include a definition of "penetration" and of "touching" here? That way, we could make clear the differences between those terms for the elements of adult crimes and child crimes.

==========

CR1601 – Definitions / CR1613: use of "victim"

==========

Blake Hills: *As to the new committee note, I suppose the definition could use the term "alleged victim." I don't see how else it could be phrased without approaching ridiculousness.*

Robert Denny: *The committee notes for CR1601 and CR1613 state that the committee considered the use of the word "victim" in light of State v. Vallejo, 2019 UT 38, ¶¶99-103, but that it chose to preserve the language used in the statutes. It then opines that "[a]ny attempt to alter the instruction in an effort to avoid the use of the word 'victim' appears to impermissibly change the meaning of the statute."*
Rather than commenting on whether replacing the word "victim" would impermissibly change the meaning of the statute, the committee notes should simply mention State v. Vallejo, and the Supreme Court's concern with the word "victim." I suggest that the comment should read as follows, "In Vallejo, the Supreme Court 'recognize[d] the gravity of referring to witnesses as victims during a trial.' Attorneys should consider Vallejo's concerns in determining how to word this instruction."

==========

CR1613 / SVF1613 – Aggravated Sexual Abuse of Child

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Clint Heiner: *The language should delete the Aggravated Sexual Abuse of a Child from the […] area because they found the person guilty of Sexual Abuse of a Child, it is by checking one of the following boxes that makes it aggravated.*

In reviewing this comment, staff supposes that the commenter was suggesting that the "[Aggravated Sexual Abuse of a Child]" option in the introductory paragraph for SVF1613 be removed. All of the options that follow that introductory paragraph are the ways in which Sexual Abuse of a Child would be aggravated. The assumption is that the defendant would not be guilty of Aggravated Sexual Abuse of a Child until **after** the findings in that SVF were made.

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CR1616A "Sexual Intercourse" for certain offenses

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Clint Heiner: *Why are we saying "sexual penetration" of the penis. Doesn't sexual penetration limit that definition? For example part (c) can be not only for sexual purpose but also, to cause substantial emotional or bodily pain…. Of course there is the issue of power and control as well…?*

Donna Kelly: *Where it says "between the outer folds of the labia" I would change that to say simply "genitals" to be consistent with all the other statutes*

Robert Denny: *The revised jury instruction seems to add more confusion and strays from the statutory language. The phrase "sexual penetration of the penis" could be interpreted several different ways. Moreover, adding language to jury instructions from cases addressing the sufficiency of the evidence, such as State v. Heath, has previously been recognized as problematic. The instruction should track the language of the statute, and only state that "any sexual penetration, however slight, is sufficient to constitute sexual intercourse." This is how the instruction was previously written.*

Tony Graf: *I echo Donna's comments with the exception of "between the outer folds of the labia". I believe that this definition is important and should be included as it is the same language being requested for Object Rape. In addition, I believe that this same language should be included in the special verdict form for SVF1613, CR1601 and CR613 to be consistent with the other proposed changes.*

TAB 5E

Public Comments:
Defense Habitation/Self/Others (500 series)

NOTES: ==========

CR520-CR523 – Defense of Habitation

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James Vilos: *The last paragraph of CR522 may confuse the burden as stated in CR523 (beyond a reasonable doubt). Therefore, the last paragraph of CR522 should use "prove beyond a reasonable doubt" instead of "showing" and "proving" without reference to "reasonable doubt."*

Tom Brunker: *The instructions track the statutory language, but we noted that some of the language seemed antiquated, and the Committee may want to consider referring the statute to the Criminal Code Evaluation Task Force.*
For example, the defense applies when the defendant reasonably believes that the victim has entered the habitation "for the purpose of assaulting or offering personal violence to any person, dwelling, or being in the habitation." The MUJI does substitute "threatens" for "offer[s]" personal violence. But it's unclear what kind of "being" is anticipated other than a "person."
Also, I assume that the statute intends to provide a defense when the victim damages or threatens to damage the habitation, but typically that kind of damage or threat would not be called an assault or threat of violence.
Further, the definition of habitation comes from case law; there is no statutory definition. And it applies to a place that the defendant inhabits "peacefully." There is, however, no requirement that the victim inhabit the place "lawfully." So someone who is squatting in an abandoned building "peacefully" may have this defense available to them when they use force against another squatter, even though both are trespassers.
On the presumption of reasonableness (CR522), the list under #2 has three sub-points stated in the disjunctive, but some of the sub-points include more than one item also stated in the disjunctive. We recognize that those group related items, but we think it would be a little clearer to break each one out into a sub-point.

==========

CR530-CR533 – Defense of Self or Others

==========

James Vilos: *CR530 does not incorporate all the language of the self-defense statute 76-2-402(3)(ii) beginning w/ "unless" in cases where the felony committed by the defendant may not have anything to do with the act of self-defense.*

Tom Brunker: *[On CR530] Sometimes the instruction uses "another" alone; and sometimes it uses "another person." "Another person" is clearer.*
Also, the statute makes the defense available to someone committing or fleeing from committing a

felony if the use of force is "a reasonable response to factors" unrelated to the felony. The instruction does not include this contingency. Instead, it relegates the issue to the committee note, and suggests that the parties "should consider" modifying the statutory language when that is at issue. We think this should not be relegated to a committee note. Rather, the instruction should include optional language to cover that contingency when it arises. And when it applies, we think that it's something that the jury should be instructed on, not something that the parties should just consider.

Tom Brunker: *[On CR533] The statute includes a component that is missing from the instruction—a failure to retreat cannot be considered in deciding reasonableness. 76-2-402(4)(b). That should either be added here or in CR531 (the factors for determining imminence and reasonableness).*

David Ferguson: *The proposed rules related to Defense of Self or Others bring up "combat by agreement" several times without a definition. And the term pops up in places where it assumes that people understand what it means, e.g. CR530. Maybe there's not an easy fix based on what I assume is a lack of clarity in either statute or caselaw on the topic. That said, I don't really see that it fits where it's at, either.*

TAB 5F

Public Comments:
Miscellaneous Instructions

NOTES: ==========

In General

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Brent Huff: *Why has the term "person" been replaced with the term "Defendant?" This seems intentionally prejudicial.*

==========

CR411 – 404(b) Evidence

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Tom Brunker: *The language in the brackets would be clearer if it were reworded to be "practitioners must specify a proper non-character purpose such as motive, intent, etc., whether the evidence is to prove or disprove that purpose, and the issues to which that purpose applies." Ambiguity issues have arisen when the jury is not instructed how to use the 404(b) evidence. For example, in a self-defense case, instructing the jury that the 404(b) evidence is to be used "for the limited purpose of self-defense" is ambiguous when it's being offered "for the limited purpose of rebutting a claim of self-defense." Or if the defendant argues mistake or accident, the instruction should say "for the limited purpose of rebutting a claim of mistake or accident." And if the evidence is to prove motive, it should say "for the limited purpose of proving motive."*

David Ferguson: *The proposed rule substitute's Rule 404's "a person's character or character trait" with just "character trait." It also omits the Rule's language of "on a particular occasion."*

I think there's something different between "a person's character" and a "character trait." The former speaks to the quality of the person, the latter speaks to an aspect of that person. To illustrate the difference, improper 404(b) evidence may include a statement like, "the defendant is a drunk." Assuming that the statement is inadmissible, it appears to me to be inadmissible because it says something about the character of the person as a drunk, not the trait of drunkenness. I worry that a jury might not appreciate the scope of "character trait" to be as broad as to include "a person's character." Both terms should be included.

Secondly, I can see how, in cases that involve multiple counts over a period of time, the words "on a particular occasion" (which are found in 404) might not fit. But the proposed wording loses some clarity without that phrase. The idea behind the rule is that you can't hold someone's past against them in this instance. And the words "on a particular occasion" help to anchor that the concern is biasing jurors towards convicting on propensity of action, not just pattern of who the defendant is. There may be other solutions here, but omitting "on a particular occasion" loses some meaning without any obvious benefit of clarity.

Materials from Karen Klucznik re: Tab 5C and Tab 5E

CR1411 Murder

(DEFENDANT'S NAME) is charged [in Count __] with committing Murder [on or about DATE]. You cannot convict (him)(her) of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. (DEFENDANT'S NAME)
2.
    a. [intentionally or knowingly caused the death of (VICTIM'S NAME); or]
    b. [intending to cause serious bodily injury to another, (DEFENDANT'S NAME) committed an act clearly dangerous to human life that caused the death of (VICTIM'S NAME); or]
    c. [acting under circumstances evidencing a depraved indifference to human life, (DEFENDANT'S NAME) knowingly engaged in conduct which created a grave risk of death to another and thereby caused the death of (VICTIM'S NAME); or]
    d. [while engaging in the commission, attempted commission, or immediate flight from the commission or attempted commission of [the predicate offense(s)], or as a party to [the predicate offense(s)],
        i. (VICTIM'S NAME) was killed;
        ii. (VICTIM'S NAME)~~, who was not a party to [the predicate offense(s)], was killed~~; and
        iii. (DEFENDANT'S NAME) acted with the intent required as an element of [the predicate offense(s)]; or]
    e. [recklessly caused the death of (VICTIM'S NAME), a peace officer or military service member in uniform while in the commission of
        i. an assault against a peace officer;
        ii. interference with a peace officer making a lawful arrest, if (DEFENDANT'S NAME) used force against a peace officer; or
        iii. an assault against a military service member in uniform.]
3. [The defense of _____ does not apply.]

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

References

Utah Code § 76-5-203

Committee Notes

Whenever imperfect self-defense is submitted to the jury:

- In addition to other applicable imperfect self-defense instructions, use CR1451 (amended as appropriate);
- Use the "Special Verdict Imperfect Self-Defense" special verdict form;
- Do not include "imperfect self-defense" as a defense in element #3 above;
- Do not use an "imperfect self-defense manslaughter" elements instruction;
- Always distinguish between "perfect self-defense" and "imperfect self-defense" throughout the instructions; and
- Add the following paragraph at the bottom of this elements instruction:

"If you find Defendant GUILTY beyond a reasonable doubt of murder, you must decide whether the defense of imperfect self-defense applies and complete the special verdict form concerning that defense. Imperfect self-defense is addressed in Instructions _____."

Last Revised – 04/03/2019

Proposed new / additional instruction:

CR1411A - Additional instruction when felony murder is charged

As Instruction ___ provides, you may find (DEFENDANT'S NAME) guilty of murder if:

while engaging in the commission, attempted commission, or immediate flight from the commission or attempted commission of [the predicate offense(s)], or as a party to [the predicate offense(s)],
i. (VICTIM'S NAME), who was not a party to the predicate offense, was killed; and
ii. (DEFENDANT'S NAME) acted with the intent required as an element of the predicate offense.

The relevant predicate offenses here are [name offenses].

The elements of [name predicate offense] are contained in Instruction ___. As that instruction states, the intent element for [name predicate offense] is _____.

[The elements of [name predicate offense] are contained in Instruction ___ As that instruction states, the intent element for [name predicate offense] is _____.]

CR520 Definition of Habitation.

The defense of Defense of Habitation is not limited to a habitation the defendant owns. The defense may apply to whatever place the defendant may be occupying peacefully as a substitute home or habitation, including but not limited to a hotel, motel, or where the defendant is a guest in another person's home.

References
Utah Code § 76-2-405
State v. Mitcheson, 560 P.2d 1120 (Utah 1977)
Committee Notes
This instruction should be used with CR521, CR522, CR523, and CR510.

Amended Dates:
02/07/2018

CR521 Defense of Habitation.
You must decide whether the defense of Defense of Habitation applies in this case.

Under that defense, the defendant is justified in using force against another when and to the extent the defendant reasonably believes that force is necessary to:

1. Prevent the other person's unlawful entry into the habitation; or
2. Terminate the other person's unlawful entry into the habitation; or
3. Prevent the other person's attack upon the habitation; or
4. Terminate the other person's attack upon the habitation.

The defendant is justified in the use of force which is intended or likely to cause death or serious bodily injury only if:

1. The other person's entry is made or attempted in a violent and tumultuous manner, surreptitiously, or by stealth, and the defendant reasonably believes:
   a. that the other person's entry is attempted or made for the purpose of assaulting or threatening personal violence to any person, dwelling, or being in the habitation; and
   b. that the force is necessary to prevent an assault or threat of personal violence;

OR

2. The defendant reasonably believes:
   a. that the other person's entry is made or attempted for the purpose of committing a felony in the habitation; and
   b. that the force is necessary to prevent the commission of the felony.

References
Utah Code § 76-2-405
State v. Karr, 364 P.3d 49 (Utah App. 2015)
State v. Walker, 391 P.3d 380 (Utah App. 2017)
State v. Mitcheson, 560 P.2d 1120 (Utah 1977)
State v. Moritzsky, 771 P.2d 688 (Utah App. 1989)
State v. Patrick, 217 P.3d 1150 (Utah App. 2009)

Committee Notes
This instruction should be used with CR520, CR522, CR523, and CR510.

Amended Dates:
02/07/2018

CR522 Defense of Habitation – Presumption.

The person using force or deadly force in defense of habitation is presumed to have acted reasonably and had a reasonable fear of imminent peril of death or serious bodily injury if the entry or attempted entry:

1. is unlawful; and
2. is made or attempted:
    a. by use of force~~,~~ or in a violent and tumultuous manner; or
    b. surreptitiously or by stealth; or
    c, for the purpose of committing a felony.

The prosecution may defeat the presumption by proving beyond a reasonable doubt ~~showing~~ that the entry was 1) lawful or 2) not made or attempted by use of force, or in a violent and tumultuous manner; or surreptitiously or by stealth; or for the purpose of committing a felony. The prosecution may also rebut the presumption by proving beyond a reasonable doubt that in fact the defendant's beliefs and actions were not reasonable.

References
Utah Code § 76-2-405
State v. Karr, 364 P.3d 49 (Utah App. 2015)
State v. Walker, 391 P.3d 380 (Utah App. 2017)
State v. Mitcheson, 560 P.2d 1120 (Utah 1977)
State v. Moritzsky, 771 P.2d 688 (Utah App. 1989)
State v. Patrick, 217 P.3d 1150 (Utah App. 2009)
Committee Notes
This instruction should be used with CR520, CR521, CR523, and CR510.

Amended Dates:
02/07/2018

CR523 Defense of Habitation – Prosecutor's Burden.

The defendant carries no burden to prove the defense of Defense of Habitation. In other words, the defendant is not required to prove [he/she] was justified in using force or force likely to cause death or serious bodily injury. Rather, the prosecution must prove beyond a reasonable doubt that the defendant was not justified in using force or force likely to cause death or serious bodily injury. The prosecution carries the burden of proof beyond a reasonable doubt. If the prosecution has not carried this burden, then you must find the defendant not guilty.

References
Utah Code § 76-2-405
State v. Karr, 364 P.3d 49 (Utah App. 2015)
State v. Walker, 391 P.3d 380 (Utah App. 2017)
State v. Mitcheson, 560 P.2d 1120 (Utah 1977)
State v. Moritzsky, 771 P.2d 688 (Utah App. 1989)
State v. Patrick, 217 P.3d 1150 (Utah App. 2009)
Committee Notes
This instruction should be used with CR520, CR521, CR522, and CR510.

Amended Dates:
02/07/2018

CR530 Defense of Self or Other.

You must decide whether the defense of Defense of Self or Other applies in this case. Under that defense, the defendant is justified in using force against another person when and to the extent that the defendant reasonably believes that force is necessary to defend [himself] [herself], or a third party, against another person's imminent use of unlawful force.

The defendant is justified in using force intended or likely to cause death or serious bodily injury only if the defendant reasonably believes that:

1. Force is necessary to prevent death or serious bodily injury to the defendant or a third person as a result of another person's imminent use of unlawful force; or
2. To prevent the commission of [Forcible Felony], the elements of which can be found under jury instruction [_____].

The defendant is not justified in using force if the defendant:

1. Initially provokes the use of force against another person with the intent to use force as an excuse to inflict bodily harm upon the assailant;
2. Is attempting to commit, committing, or fleeing after the commission or attempted commission of [Felony], the elements of which can be found under jury instruction [_____]; or
3. Was the aggressor or was engaged in a combat by agreement, unless the defendant withdraws from the encounter and effectively communicates to the other person the defendant's intent to do so and, notwithstanding, the other person continues or threatens to continue the use of unlawful force.

The following do not, by themselves, constitute "combat by agreement":

1. Voluntarily entering into or remaining in an ongoing relationship; or
2. Entering or remaining in a place where one has a legal right to be.

References
Utah Code § 76-2-402(1) and (5)

Committee Notes
Under circumstances where the use of force is a reasonable response to factors unrelated to the commission, attempted commission, or fleeing after the commission of that felony, the parties should consider modifying the language in subsection 2 regarding when the defendant is "not justified" in using force, to reflect Utah Code §76-2-402(2)(a)(ii).

Amended Dates:
Instruction approved: 03/07/2018
Committee note approved: 12/05/2018

CR531 Defense of Self or Other – Imminence.

In determining imminence or reasonableness you may consider any of the following factors:

1. the nature of the danger;
2. the immediacy of the danger;
3. the probability that the unlawful force would result in death or serious bodily injury;
4. the other's prior violent acts or violent propensities;
5. any patterns of abuse or violence in the parties' relationship; or
5.6. whether any person involved had a duty to retreat;.
6.7. any other relevant factor.

If a person (including the defendant) has no duty to retreat, you may not consider their failure to retreat in determining whether the defendant acted reasonably in using or threatening to use force.

CR532 Defense of Self or Other – Prosecution's Burden.

A defendant carries no burden to prove the defense of Defense of Self or Others. In other words, a defendant is not required to prove [he/she] was justified in using [force] [or] [force likely to cause death or serious bodily injury]. Rather, the prosecution must prove beyond a reasonable doubt that the defendant was not justified in using [force] [or] [force likely to cause death or serious bodily injury]. If the prosecution has not met this burden, then you must find the defendant not guilty.

References
Utah Code § 76-2-402
Amended Dates:
Approved: 04/04/2018

CR533 Defense of Self or Other – No Duty to Retreat.

A defendant does not have a duty to retreat from another person's use or threatened use of unlawful force before using force to defend [himself/herself] or a third party as long as the defendant is in a place where [he/she] has lawfully entered or remained.

However, if the defendant was the aggressor or was engaged in combat by agreement, the defendant must withdraw from the encounter and effectively communicate to the other person [his/her] intent to do so. If the other person nevertheless continues or threatens to continue the use of unlawful force, the defendant no longer has the duty to retreat.

References
Utah Code § 76-2-402(4)
Amended Dates:
Approved: 04/04/2018

CR411 404(b) Instruction.

You (are about to hear) (have heard) evidence that the defendant [insert 404(b) evidence] (before) (after) the act(s) charged in this case. This evidence (is) (was) not admitted to prove a character trait of the defendant or to show that (he) (she) acted in a manner consistent with that trait. You may consider this evidence, if at all, for the limited purpose of [practitioners must specify proper non-character purpose such as motive, intent, etc. and to which issue(s) it applies]. Keep in mind that the defendant is on trial for the crime(s) charged in this case, and for (that) (those) crime(s) only. You may not convict the defendant simply because you believe (he) (she) may have committed some other act(s) at another time.

References
Utah R. Evid. 105
Utah R. Evid. 404(b)
State v. Lane, 2019 UT App 86
State v. Bell, 770 P.2d 100 (1988)
Huddleston v. United States, 485 U.S. 681, 691-92 (1988)
State v. Forsyth, 641 P.2d 1172, 1175-76 (Utah 1982)
29 Am. Jur.2d Evidence § 461

Committee Notes
When used, this instruction must be modified in accordance with State v. Lane and State v. Bell. Further, this instruction, if given, should be given at the time the 404(b) evidence is presented to the jury and, upon request, again in the closing instructions. Under Rule 105, the court must give a limiting instruction upon request of the defendant. The committee recognizes, however, that there may be times when a defendant, for strategic purposes, does not want a 404(b) instruction to be given at the time the evidence is introduced. In those instances, a record should be made outside the presence of the jury that the defendant affirmatively waives the giving of a limiting instruction.

404(b) allows evidence when relevant to prove any material fact, except criminal disposition as the basis for an inference that the defendant committed the crime charged. See State v. Forsyth. In the rare instance where, after the jury has been instructed, a party identifies another proper non-character purpose, the court may give additional instruction.

If the 404(b) evidence was a prior conviction admitted also to impeach under Rule 609, see instruction CR409.

If the instruction relates to a witness other than a defendant, it should be modified.

Amended Dates:
Last Revised - 08/07/2019

Revisions to imperfect self-defense MUJI instructions (Karen, 6/22/2020, 7/13/2020,8/31/20)

Karen's notes

- We shouldn't use "GUILTY" in connection with the greater crime until and unless the jury finds the State has disproved imperfect self-defense beyond a reasonable doubt. It sounds too much like a verdict. *See* Utah R. Crim. P. 21(a)(1).

- We have not addressed how the instructions should apply if the defendant is charged with both Agg Murder and the lesser offense of Murder, for example, and he/she claims imperfect self-defense as to both.

CR1411B??? MURDER with IMPERFECT SELF-DEFENSE

(DEFENDANT'S NAME) is charged [in Count __] with committing Murder [on or about DATE]. You cannot convict [him][her] of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. (DEFENDANT'S NAME);
2. [a. Intentionally or knowingly caused the death of another][;]
   [b. Intending to cause serious bodily injury to another, (DEFENDANT'S NAME) committed an act clearly dangerous to human life that causes the death of another][;]
   [c. Acting under circumstances evidencing a depraved indifference to human life, (DEFENDANT'S NAME) knowingly engaged in conduct which created a grave risk of death to another and thereby caused the death of another][;]
   [d. While engaging in the commission, attempted commission, or immediate flight from the commission or attempted commission of [the predicate offense(s)], or as a party to [the predicate offense(s)],
      i. (VICTIM'S NAME) was killed; and
      ii. (DEFENDANT'S NAME) acted with the intent required as an element of the predicate offense][;]
   [e. recklessly caused the death of a peace officer or military service member in uniform while in the commission of
      i. an assault against a peace officer;
      ii. interference with a peace officer making a lawful arrest, if (DEFENDANT'S NAME) used force against a peace officer; or
      iii. an assault against a military service member in uniform.]
[3. The defense of self-defense, defense-of-others, defense-of-habitation does not apply.]

After you carefully consider all the evidence in this case, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY of this crime.

On the other hand, if you are convinced that each and every element has been proven beyond a reasonable doubt, ~~On the other hand, if you find Defendant GUILTY beyond a reasonable doubt,~~ then you must decide whether the defense of imperfect self-defense applies and complete the special verdict form concerning that defense. Imperfect self-defense is addressed in Instructions _____.

CR1450 Practitioner's Note: Explanation Concerning Imperfect Self-Defense

Imperfect self-defense is an affirmative defense that can reduce aggravated murder to murder, attempted aggravated murder to attempted murder, murder to manslaughter, and attempted murder to attempted manslaughter. See Utah Code Ann. § 76-5-202(4) (aggravated murder); Utah Code Ann. § 76-5-203(4) (murder).

When the defense is asserted, the State must disprove the defense beyond a reasonable doubt before the defendant can be convicted of the greater crime. If the State cannot disprove the defense beyond a reasonable doubt, the defendant can be convicted only of the lesser crime.

Instructing the jury on imperfect self-defense has proved to be problematic because many practitioners have tried to include the defense as an element of either or both of the greater crime and the reduced crime. The inevitable result is that the elements instruction on the reduced crime misstates the burden of proof on the defense as it applies to that reduced crime. See, e.g., State v. Lee, 2014 UT App 4, 318 P.3d 1164.

To avoid these problems, these instructions direct the jury to decide the defense exclusively through a special verdict form. Under this approach, the jury is given a standard elements instruction on the greater offense, with no element addressing imperfect self-defense. If the jury finds that the State has proved the elements of the greater offense beyond a reasonable doubt, the elements instruction on the greater offense directs the jury ~~enters a guilty verdict on that offense. The jury is directed to~~ to the imperfect self-defense instructions and instruct~~sed~~ the jury that it must complete the imperfect self-defense special verdict form. On the special verdict form, the jury must indicate whether it has unanimously found that the State disproved the defense beyond a reasonable doubt. If the jury indicates the State has disproved the defense and that the defendant is thus guilty of the greater crime, the trial court enters a conviction for the greater crime. If the jury indicates the State has not disproved the defense and that the defendant is thus guilty of the lesser crime, the trial court enters a conviction for the lesser crime.

~~The committee considered State v. Drej, 2010 UT 35, 233 P.3d 476, and concluded that it does not preclude this approach.~~

CR1451 Explanation of Perfect and Imperfect Self-Defense as Defenses

Perfect self-defense is a complete defense to [Aggravated Murder][Attempted Aggravated Murder][Murder][Attempted Murder][Manslaughter]. The defendant is not required to prove that perfect self-defense applies. Rather, the State must prove beyond a reasonable doubt that perfect self-defense does not apply. The State has the burden of proof at all times. As Instruction _____ provides, for you to find the defendant guilty of [Aggravated Murder][Attempted Aggravated Murder][Murder][Attempted Murder][Manslaughter], the State must prove beyond a reasonable doubt that perfect self-defense does not apply. Consequently, your decision regarding perfect self-defense will be reflected in the "Verdict" form for Count [#].

You do not have to ~~must~~ consider imperfect self-defense unless~~only if~~ OR You must consider imperfect self-defense if you find that the State has proved all the elements ~~the defendant guilty~~ of [Aggravated Murder][Attempted Aggravated Murder][Murder][Attempted Murder]~~.~~ beyond a reasonable doubt. Imperfect self-defense is a partial defense to [Aggravated Murder][Attempted Aggravated Murder][Murder][Attempted Murder]. It applies when the defendant caused the death of another while incorrectly, but reasonably, believing that (his)(her) conduct was legally justified or excused. The effect of the defense is to reduce the level of the offense. The defendant is not required to prove that imperfect self-defense applies. Rather, before you can find the defendant guilty of [Aggravated Murder][Attempted Aggravated Murder][Murder][Attempted Murder], the State must prove beyond a reasonable doubt that imperfect self-defense does not apply. The State has the burden of proof at all times. Your decision will be reflected in the special verdict form titled "Special Verdict Imperfect Self-Defense."

References

Utah Code § 76-5-202(4)
Utah Code § 76-5-203(4)
Utah Code § 76-5-205
Utah Code § 76-2-402
Utah Code § 76-2-404
Utah Code § 76-2-405
Utah Code § 76-2-407

Committee Notes

Whenever imperfect self-defense is submitted to the jury:

- In addition to other applicable imperfect self-defense instructions, use CR1451 (amended as appropriate);
- Use the "Special Verdict Imperfect Self-Defense" special verdict form;
- Do not include "imperfect self-defense" as a defense in the aggravated murder/murder/attempted aggravated murder/attempted murder elements instruction ~~#3 above~~;
- Do not use an "imperfect self-defense manslaughter" elements instruction;
- Always distinguish between "perfect self-defense" and "imperfect self-defense" throughout the instructions; and

- Make sure that last paragraph of the aggravated murder/murder/attempted aggravated murder/attempted murder elements instruction contains the following language~~Add the following paragraph at the bottom of this elements instruction~~:

  "If you are convinced that each and every element has been proven beyond a reasonable doubt, ~~If you find Defendant GUILTY beyond a reasonable doubt of murder~~you must decide whether the defense of imperfect self-defense applies and complete the special verdict form concerning that defense. Imperfect self-defense is addressed in Instructions _____."

CR1452 Special Verdict Form - Imperfect Self-Defense

If you find that the State has proved all the elements of [Aggravated Murder][Attempted Aggravated Murder][Murder][Attempted Murder] beyond a reasonable doubt~~, If you determine beyond a reasonable doubt that (DEFENDANT'S NAME) committed [Aggravated Murder][Attempted Aggravated Murder][Murder][Attempted Murder],~~ you must complete the special verdict form titled "Special Verdict Imperfect Self-Defense."

- Check ONLY ONE box on the form.
- The foreperson MUST sign the special verdict form.

References
State v. Lee, 2014 UT App 4
State v. Ramos, 2018 UT App 161
State v. Navarro, 2019 UT App 2

Committee Notes
Whenever imperfect self-defense is submitted to the jury:

In addition to other applicable imperfect self-defense instructions, use CR1451 (amended as appropriate);

- Use the "Special Verdict Imperfect Self-Defense" special verdict form;
- Do not include "imperfect self-defense" as a defense in the aggravated murder/murder/attempted aggravated murder/attempted murder elements instruction~~element #3 above~~;
- Do not use an "imperfect self-defense manslaughter" elements instruction;
- Always distinguish between "perfect self-defense" and "imperfect self-defense" throughout the instructions; and
- Make sure that last paragraph of the aggravated murder/murder/attempted aggravated murder/attempted murder elements instruction contains the following language~~Add the following paragraph at the bottom of this elements instruction~~:

  "If you are convinced that each and every element has been proven beyond a reasonable doubt,~~If you find Defendant GUILTY beyond a reasonable doubt of murder~~, you must decide whether the defense of imperfect self-defense applies and complete the special verdict form concerning that defense. Imperfect self-defense is addressed in Instructions _____."

Use Special Verdict Form SVF1450 in connection with this instruction.

SVF 1450. Imperfect Self-Defense.

(LOCATION) JUDICIAL DISTRICT COURT, [_____ DEPARTMENT,]
IN AND FOR (COUNTY) COUNTY, STATE OF UTAH

THE STATE OF UTAH,	:	
	:	**SPECIAL VERDICT**
Plaintiff,	:	**IMPERFECT SELF-DEFENSE**
	:	
-vs-	:	Count (#)
(DEFENDANT'S NAME),		
Defendant.		Case No. (**)

Having found the State has proved all the elements of [Aggravated Murder][Attempted Aggravated Murder][Murder][Attempted Murder] beyond a reasonable doubt~~,the defendant, (DEFENDANT'S NAME), guilty of [Aggravated Murder][Attempted Aggravated Murder][Murder][Attempted Murder]~~, as charged in Count [#],

Check ONLY ONE of the following boxes:

☐ We unanimously find that the State has proved beyond a reasonable doubt that the defense of imperfect self-defense DOES NOT apply, and thus we unanimously find that (DEFENDANT'S NAME) is guilty of [Aggravated Murder][Attempted Aggravated Murder][Murder][Attempted Murder].

OR

☐ We do not unanimously find that the State has proved beyond a reasonable doubt that the defense of imperfect self-defense DOES NOT apply, and thus we unanimously find that (DEFENDANT'S NAME) is guilty of [Attempted Aggravated Murder][Murder][Attempted Murder][Manslaughter].

DATED this _____ day of (Month), 20(**).

_____
Foreperson

References
State v. Lee, 2014 UT App 4
State v. Ramos, 2018 UT App 161
State v. Navarro, 2019 UT App 2

Committee Notes
Whenever imperfect self-defense is submitted to the jury:

- In addition to other applicable imperfect self-defense instructions, use CR1451 (amended as appropriate);
- Use the "Special Verdict Imperfect Self-Defense" special verdict form;

- Do not include "imperfect self-defense" as a defense in the aggravated murder/murder/attempted aggravated murder/attempted murder elements instruction~~element #3 above~~;
- Do not use an "imperfect self-defense manslaughter" elements instruction;
- Always distinguish between "perfect self-defense" and "imperfect self-defense" throughout the instructions; and
- Make sure that last paragraph of the aggravated murder/murder/attempted aggravated murder/attempted murder elements instruction contains the following language~~Add the following paragraph at the bottom of this elements instruction~~:

  "If you are convinced that each and every element has been proven beyond a reasonable doubt,~~If you find Defendant GUILTY beyond a reasonable doubt of murder,~~ you must decide whether the defense of imperfect self-defense applies and complete the special verdict form concerning that defense. Imperfect self-defense is addressed in Instructions _____."