UTAH JUDICIAL COUNCIL
STANDING COMMITTEE ON MODEL UTAH CRIMINAL JURY INSTRUCTIONS
MEETING AGENDA
Via WebEx
December 2, 2020 – 12:00 p.m. to 1:30 p.m.

Welcome and Approval of Minutes		Tab 1	Judge Blanch
***Pleasant Grove City v. Terry*, 2020 UT 69** - *DV in the presence of a child / predicate and compound offense instructions and special verdict forms*	Discussion	Tab 2	Committee
Public Comment Review - *Continued review of public comments received from the June 3, 2020 to July 19, 2020 public comment period*	Discussion / Action	Tab 3	Committee
CR1322 Aggravated Assault – Targeting a Law Enforcement Officer - *Continued discussion from 10/07/2020 meeting regarding "bodily injury" / "serious bodily injury," and the effect of "in furtherance of" from 76-5-210*		Tab 3B	Sandi Johnson
Felony Murder - *Continued consideration from 09/02/2020 meeting of CR1411A (Additional instruction when felony murder is charged)*		Tab 3C	Karen Klucznik Mark Field
Duty to retreat - *Continued consideration from 09/02/2020 meeting of CR531 (Defense of self or other – Imminence) and CR533 (Defense of self of other – No duty to retreat)*		Tab 3E	Karen Klucznik
Adjourn			

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

UPCOMING MEETING SCHEDULE:
Meetings are held on the first Wednesday of each month from 12:00 noon to 1:30 p.m.:

December 2, 2020	April 7, 2021	September 1, 2021	December 1, 2021
January 6, 2021	May 5, 2021	October 6, 2021	
February 3, 2021	June 2, 2021	November 3, 2021	
March 3, 2021			

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

Minutes – October 7, 2020 Meeting

NOTES:

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

Via WebEx
October 7, 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

(1) WELCOME AND APPROVAL OF MINUTES:

Judge Blanch welcomed the committee to the meeting.
The committee considered the minutes from the [month] [day], 2020 meeting.
Karen moved to approve the draft minutes; Steve Nelson seconded the motion.
The committee voted unanimously in support of the motion. The motion passed.

(2) RECOGNITION OF MR. REMINGTON JIRO JOHNSON:

Since the late-fall of 2018, Mr. Johnson has assisted the committee in preparation of meeting minutes. Due to other responsibilities, he reported to the committee that he would not be able to continue in this role. Judge Blanch recognized Mr. Johnson's contribution to the committee's work and praised his attention to detail. His involvement with the committee will be missed. The committee provided a round of applause and wished Mr. Johnson well wishes moving forward.

Judge Blanch asked committee members to consider whether they were aware of anyone who may be well-situated to fill Mr. Johnson's position assisting the committee. Because this role is not an official committee

position, there is no need for this to go through formal processes. Judge Blanch instructed the committee members that if they have an individual to recommend they should email the suggestion to staff (Michael Drechsel).

(3) BATTERED PERSON MITIGATION INSTRUCTIONS:

Ms. Klucznik explained that these materials are not in a position to reconsider for this meeting. She has recently emailed Ms. Johnson some ideas that need additional time to be developed. Therefore, the committee did not consider any materials on this agenda item at this time. The matter will be placed on the agenda for the November 4, 2020 meeting.

(4) PUBLIC COMMENT REVIEW:

Judge Blanch turned the committee members back to review of public comments from the June 3, 2020 through July 19, 2020 comment period. The committee turned to the assault instruction public comments. One of the public comments received questioned whether a person can recklessly attempt in Utah. Ms. Johnson researched the issue and determined the public comment raises an important issue because it is, in fact, not possible to recklessly attempt to assault in Utah. The current assault instructions (CR1302, CR1303, CR1304, CR1305, CR1306, CR1320, CR1321, and CR1322) do not reflect that legal limitation and instead state that "reckless attempt" is a permissible element. This needs to be corrected. To help the committee address this issue, Ms. Johnson presented to the committee some proposed revisions of the various assault instructions. The general approach is to separate "intentionally or knowingly attempting" and intentionally, knowingly, or recklessly committing an act." Ms. Johnson also proposed (in response to a separate public comment) that the instructions be revised to include a committee note regarding the use of a special verdict form if the relevant elements employed in the instruction will result in a higher level of offense.

Judge Blanch asked the committee to discuss Ms. Johnson's analysis about "reckless attempt." The committee agreed with her assessment of the situation. Judge Blanch then turned the committee's attention to the proposed changes under Tab 3B of the meeting materials (pages 29-36). The committee considered each proposed instruction in turn, starting with CR1302:[1]

CR1302 Misdemeanor Assaults

(DEFENDANT'S NAME) is charged [in Count ____] with committing Assault [against a Pregnant Person][that Caused Substantial Bodily Injury] [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);
   a) Intentionally or knowingly attempted, with unlawful force or violence, to do bodily injury to (VICTIM'S NAME); or
   b) Intentionally, knowingly, or recklessly committed an act with unlawful force or violence that
      i) caused bodily injury to (VICTIM'S NAME); or

[1] In preparing these minutes, staff incorporated the current MUJI instruction language and then incorporated the committee's proposed and approved revisions to that current language. For this reason, the assault instructions outlined in the minutes appear differently than in the meeting materials, but more accurately track the changes to existing instruction language for the record. The substance of the revisions in these minutes accurately reflects the work of the committee during the meeting.

~~i)~~ii) created a substantial risk of bodily injury to (VICTIM'S NAME).

~~1. Intentionally, knowingly, or recklessly~~

~~a. attempted, with unlawful force or violence, to do bodily injury to (VICTIM'S NAME); or~~

~~b. committed an act with unlawful force or violence that~~

~~i. caused bodily injury to (VICTIM'S NAME); or~~

~~ii. created a substantial risk of bodily injury to (VICTIM'S NAME).~~

2) [The act caused substantial bodily injury to (VICTIM'S NAME).]
3) [(VICTIM'S NAME) was pregnant, and (DEFENDANT'S NAME) had knowledge of the pregnancy.]
4) [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 § 76-5-102

Committee Notes
If the case requires instruction on elements 2 or 3, practitioners should consider using a special verdict form (SVF1301), as these elements result in different levels of offense.

In cases involving domestic violence, practitioners should include a special verdict form (SVF1331) and instructions defining cohabitant (CR1330 and CR1331).

Utah appellate courts have not decided whether the cohabitant relationship between the defendant and the alleged victim is an element of the offense requiring proof of an associated mens rea (intentional, knowing, or reckless). Practitioners should review State v. Barela, 2015 UT 22.

Ms. Klucznik made a motion to approve the revised CR1302 instruction; the motion was seconded by Mr. Nelson. The committee unanimously approved the motion on CR1302.

The committee then turned its attention to CR1303:

CR1303 Assault Against School Employees

(DEFENDANT'S NAME) is charged [in Count ____] with committing Assault Against a School Employee [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);
   a) [Intentionally or knowingly attempted, with unlawful force or violence, to do bodily injury to (VICTIM'S NAME); or]
   b) [Intentionally, knowingly, or recklessly
      i) [committed an act with unlawful force or violence that
         (1) caused bodily injury to (VICTIM'S NAME); or
         (2) created a substantial risk of bodily injury to (VICTIM'S NAME); or]

ii) [threatened to commit any offense involving bodily injury, death, or substantial property damage, and acted with intent to place (VICTIM'S NAME) in fear of imminent serious bodily injury, substantial bodily injury, or death; or]

~~i)~~iii) [made a threat, accompanied by a show of immediate force or violence, to do bodily injury to (VICTIM'S NAME);]]

2) ~~Knowing that~~ (DEFENDANT'S NAME) had knowledge that (VICTIM'S NAME) was an employee or volunteer of a public or private school;

~~3) Intentionally, knowingly, or recklessly~~

~~a) [attempted, with unlawful force or violence, to do bodily injury to (VICTIM'S NAME); or]~~

~~b) [committed an act with unlawful force or violence that~~

~~i) caused bodily injury to (VICTIM'S NAME); or~~

~~ii) created a substantial risk of bodily injury to (VICTIM'S NAME); or]~~

~~c) [threatened to commit any offense involving bodily injury, death, or substantial property damage, and acted with intent to place (VICTIM'S NAME) in fear of imminent serious bodily injury, substantial bodily injury, or death; or]~~

~~d) [made a threat, accompanied by a show of immediate force or violence, to do bodily injury to (VICTIM'S NAME);]~~

~~4)~~3) (VICTIM'S NAME) was acting within the scope of (his)(her) authority as an employee or volunteer of a public or private school; and

~~5)~~4) [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 § 76-5-102.3

Mr. Nelson made a motion to approve the revised CR1303 instruction; the motion was seconded by Mr. Phelps. The committee unanimously approved the motion on CR1303.

The committee then turned its attention to CR1304:

CR1304 Assault Against a Peace Officer

(DEFENDANT'S NAME) is charged [in Count ____] with committing Assault Against a Peace Officer [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);

a) [Intentionally or knowingly attempted, with unlawful force or violence, to do bodily injury to (VICTIM'S NAME); or]

b) [Intentionally, knowingly, or recklessly

i) [committed an act with unlawful force or violence that

(1) caused bodily injury to (VICTIM'S NAME); or

(2) created a substantial risk of bodily injury to (VICTIM'S NAME); or]

ii) [threatened to commit any offense involving bodily injury, death, or substantial property damage, and acted with intent to place (VICTIM'S NAME) in fear of imminent serious bodily injury, substantial bodily injury, or death; or]

~~i)~~iii) [made a threat, accompanied by a show of immediate force or violence, to do bodily injury to (VICTIM'S NAME);]]

2) (DEFENDANT'S NAME) had knowledge~~Knowing~~ that (VICTIM'S NAME) was a peace officer;

~~3) Intentionally, knowingly, or recklessly~~

~~a) [attempted, with unlawful force or violence, to do bodily injury to (VICTIM'S NAME); or]~~

~~b) [committed an act with unlawful force or violence that~~

~~i) caused bodily injury to (VICTIM'S NAME); or~~

~~ii) created a substantial risk of bodily injury to (VICTIM'S NAME); or]~~

~~c) [threatened to commit any offense involving bodily injury, death, or substantial property damage, and acted with intent to place (VICTIM'S NAME) in fear of imminent serious bodily injury, substantial bodily injury, or death; or]~~

~~d) [made a threat, accompanied by a show of immediate force or violence, to do bodily injury to (VICTIM'S NAME);]~~

~~4)~~3) [(DEFENDANT'S NAME):

a) [has been previously convicted of a class A misdemeanor or a felony violation of Assault Against a Peace Officer or Assault Against a Military Servicemember in Uniform;]

b) [caused substantial bodily injury;]

c) [used a dangerous weapon; or]

d) [used means or force likely to produce death or serious bodily injury]]

~~5)~~4) (VICTIM'S NAME) was acting within the scope of (his)(her) authority as a peace officer; and

~~6)~~5) [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 § 76-5-102.4(2)(a)

Committee Notes

If the case requires instruction on more than one subpart under element ~~4~~3, practitioners are advised to use separate elements instructions or a special verdict form (SVF1301), as these subparts result in different levels of offense.

Depending on the facts of the case, practitioners should carefully consider removing element 4.a. from this elements instruction and instead use a special verdict form in a bifurcated proceeding.

In making the revisions, Judge McCullagh noted that the committee note regarding presenting the factors in current element 4 (revised element 3) as part of a special verdict form need to be included in the instruction. Ms. Johnson noted that the language is already in the current instruction, even though it isn't reflected in the proposed language included in the meeting materials. She noted that the current committee note will need to be modified so that "element 4" becomes "element 3." With those changes, Mr. Nelson made a motion to approve the revised CR1304 instruction; the motion was seconded by Ms. Johnson. The committee unanimously approved the motion on CR1304.

The committee then turned its attention to CR1305:

CR1305 Assault Against a Military Servicemember in Uniform

(DEFENDANT'S NAME) is charged [in Count ____] with committing Assault Against a Military Servicemember in Uniform [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);
   a) [Intentionally or knowingly attempted, with unlawful force or violence, to do bodily injury to (VICTIM'S NAME); or]
   b) [Intentionally, knowingly, or recklessly
      i) [committed an act with unlawful force or violence that
         (1) caused bodily injury to (VICTIM'S NAME); or
         (2) created a substantial risk of bodily injury to (VICTIM'S NAME); or]
      ~~i)~~ii) [threatened to commit any offense involving bodily injury, death, or substantial property damage, and acted with intent to place (VICTIM'S NAME) in fear of imminent serious bodily injury, substantial bodily injury, or death; or]
      ~~ii)~~iii) [made a threat, accompanied by a show of immediate force or violence, to do bodily injury to (VICTIM'S NAME);]]

~~2) Intentionally, knowingly, or recklessly~~
   ~~a) [attempted, with unlawful force or violence, to do bodily injury to (VICTIM'S NAME); or]~~
   ~~b) [committed an act with unlawful force or violence that~~
      ~~i) caused bodily injury to (VICTIM'S NAME); or~~
      ~~ii) created a substantial risk of bodily injury to (VICTIM'S NAME); or]~~
   ~~c) [threatened to commit any offense involving bodily injury, death, or substantial property damage, and acted with intent to place (VICTIM'S NAME) in fear of imminent serious bodily injury, substantial bodily injury, or death; or]~~
   ~~d) [made a threat, accompanied by a show of immediate force or violence, to do bodily injury to (VICTIM'S NAME);]~~

~~3)~~2) [(DEFENDANT'S NAME):
   a) [has been previously convicted of a class A misdemeanor or a felony violation of Assault Against a Peace Officer or Assault Against a Military Servicemember in Uniform;]
   b) [caused substantial bodily injury;]
   c) [used a dangerous weapon; or]
   d) [used means or force likely to produce death or serious bodily injury]]

~~4)~~3) (VICTIM'S NAME) was on orders and acting within the scope of authority granted to the military servicemember in uniform; and

~~5)~~4) [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 § 76-5-102.4(2)(b)

Committee Notes

If the case requires instruction on more than one subpart under element ~~3~~2, practitioners are advised to use separate elements instructions or a special verdict form (SVF1301), as these subparts result in different levels of offense.

Depending on the facts of the case, practitioners should carefully consider removing element 3.a. from this elements instruction and instead use a special verdict form in a bifurcated proceeding.

Mr. Field made a motion to approve the revised CR1305 instruction; the motion was seconded by Mr. Nelson. The committee unanimously approved the motion on CR1305.

The committee then turned its attention to CR1306:

CR1306 Assault by Prisoner

(DEFENDANT'S NAME) is charged [in Count _____] with committing Assault by Prisoner [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) Intending to cause bodily injury;
   a) [Intentionally or knowingly attempted, with unlawful force or violence, to do bodily injury to (VICTIM'S NAME); or]
   b) [Intentionally, knowingly, or recklessly committed an act with unlawful force or violence that
      i) caused bodily injury to (VICTIM'S NAME); or
      ~~i)~~ii) created a substantial risk of bodily injury to (VICTIM'S NAME);] and

~~2) Intentionally, knowingly, or recklessly~~
   ~~a) attempted, with unlawful force or violence, to do bodily injury to (VICTIM'S NAME); or~~
   ~~b) committed an act with unlawful force or violence that~~
      ~~i) caused bodily injury to (VICTIM'S NAME); or~~
      ~~ii) created a substantial risk of bodily injury to (VICTIM'S NAME); and~~

3) At the time of the act (DEFENDANT'S NAME) was
   a) in the custody of a peace officer pursuant to a lawful arrest; or
   b) was confined in a [jail or other penal institution][a facility used for confinement of delinquent juveniles] regardless of whether the confinement is legal; and
4) [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 § 76-5-102.5

Mr. Nelson made a motion to approve the revised CR1306 instruction; the motion was seconded by Ms. Klucznik. The committee unanimously approved the motion on CR1306.

The committee then turned its attention to CR1320:

CR1320 Aggravated Assault

(DEFENDANT'S NAME) is charged [in Count _____] with committing Aggravated Assault [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) ~~intentionally, knowingly, or recklessly~~
   a) [Intentionally or knowingly attempted, with unlawful force or violence, to do bodily injury to (VICTIM'S NAME); or]
   b) [Intentionally, knowingly, or recklessly
      i) made a threat, accompanied by a show of immediate force or violence, to do bodily injury to (VICTIM'S NAME); or
      ii) committed an act with unlawful force or violence that
         (1) caused bodily injury to (VICTIM'S NAME); or
         (2) created a substantial risk of bodily injury to (VICTIM'S NAME);] and
2) (DEFENDANT'S NAME)'s conduct included the use of ~~intentionally, knowingly, or recklessly~~
   a) [~~used~~ a dangerous weapon; or]
   b) [~~committed~~ any act that interfered with the breathing or the circulation of blood of (VICTIM'S NAME) by use of unlawful force or violence that was likely to produce a loss of consciousness by:
      i) applying pressure to the neck or throat of (VICTIM'S NAME); or
      ii) obstructing the nose, mouth, or airway of (VICTIM'S NAME); or]
   c) [~~used~~ other means or force likely to produce death or serious bodily injury]; and
3) [(DEFENDANT'S NAME)'s actions
   a) [resulted in serious bodily injury; or]
   b) [produced a loss of consciousness by impeding the breathing or circulation of blood of (VICTIM'S NAME).]]
4) [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 § 76-5-103

Committee Notes
If the case requires instruction on element 3, practitioners should consider using a special verdict form (SVF1301), as this element can result in different levels of offense.

In cases involving domestic violence, practitioners should include a special verdict form (SVF1331) and instructions defining cohabitant (CR1330 and CR1331).

Utah appellate courts have not decided whether the cohabitant relationship between the defendant and the alleged victim is an element of the offense requiring proof of an associated mens rea (intentional, knowing, or reckless). Practitioners should review State v. Barela, 2015 UT 22.

Mr. Phelps made a motion to approve the revised CR1320 instruction; the motion was seconded by Mr. Nelson. The committee unanimously approved the motion on CR1320.

The committee then turned its attention to CR1321:

CR1321 Aggravated Assault by Prisoner

(DEFENDANT'S NAME) is charged [in Count _____] with committing Aggravated Assault By Prisoner [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) Intentionally, knowingly, or recklessly~~
   a) [Intentionally or knowingly attempted, with unlawful force or violence, to do bodily injury to (VICTIM'S NAME); or]
   b) [Intentionally, Knowingly, or recklessly
      i) made a threat, accompanied by a show of immediate force or violence, to do bodily injury to (VICTIM'S NAME); or
      ii) committed an act with unlawful force or violence that
         (1) caused bodily injury to (VICTIM'S NAME); or
         (2) created a substantial risk of bodily injury to (VICTIM'S NAME);] and
~~3)~~2) (DEFENDANT'S NAME)
   a) [used a dangerous weapon; or]
   b) [committed an act that interfered with the breathing or the circulation of blood of (VICTIM'S NAME) by use of unlawful force or violence that was likely to produce a loss of consciousness by:
      i) applying pressure to the neck or throat of (VICTIM'S NAME); or
      ii) obstructing the nose, mouth, or airway of (VICTIM'S NAME); or]
   c) [used other means or force likely to produce death or serious bodily injury]; and
~~4)~~3) [(DEFENDANT'S NAME) intentionally caused serious bodily injury];
~~5)~~4) At the time of the act (DEFENDANT'S NAME) was
   a) in the custody of a peace officer pursuant to a lawful arrest; or
   b) was confined in a [jail or other penal institution][facility used for confinement of delinquent juveniles] regardless of whether the confinement is legal; and
~~6)~~5) [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 § 76-5-103.5

Ms. Johnson made a motion to approve the revised CR1321 instruction; the motion was seconded by Mr. Field. The committee unanimously approved the motion on CR1321.

The committee then turned its attention to CR1322 (Aggravated Assault – Targeting a Law Enforcement Officer). The committee discussed the proposed instruction revisions in the meeting materials. Ms. Johnson pointed out that the proposed draft incorporates the same changes regarding reckless attempt as the previous instructions. The committee did not spend significant time discussing this proposed revision, since it was consistent with the similar changes made in numerous other instructions. Ultimately, these changes were not approved by the committee due to the following conversation (meaning CR1322 is the only remaining assault instruction where the fix for "reckless attempt" has not yet been approved by the committee).

The reason no changes were approved to CR1322 began with Ms. Johnson noting that there was additional public comment on this instruction. Those comments revolved around regarding combining "bodily injury" (element (1)(b)(ii)(1)) with "serious bodily injury" (element (3)). The public comment noted that because "serious bodily injury" is the only way that this type of aggravated assault can be committed, it was confusing and unnecessary to include "bodily injury" in the instruction.

Ms. Johnson noted that she was concerned about collapsing those into each other because in her view "bodily injury" speaks to the mental state behind a person's conduct, while "serious bodily injury" speaks to the result of the persons conduct. Judge Blanch agreed, noting that the current instruction seems to be an accurate statement of the law. Ms. Johnson stated that from her perspective the current instruction is not so confusing to a jury that it would create issues. Neither does the current instruction suggests that a person could be convicted without having caused serious bodily injury.

The committee reviewed and discussed how Utah Code § 76-5-210 ("Targeting a law enforcement officer defined") complicates the structure of this instruction. This was not something that was raised in the public comments. That statute uses the words "in furtherance of," which caused Judge McCullagh to suggest that there is a mens rea (i.e., "in furtherance of" suggests taking action for a specific reason) associated with the "serious bodily injury" element in CR1322. The committee members struggled to agree on a single interpretation of Utah Code § 76-5-210, but did agree that two possible reasonable interpretations could be read in the statute:

1) one reading is that it is the result ("serious bodily injury or death") that must be "in furtherance of" the listed objective; and
2) the other reading is that it is the conduct ("defendant's actions") that must be "in furtherance of" the listed objective.

These two readings drastically impact the way in which this instruction would be drafted. Judge McCullagh suggested that one option would be to create a committee note that indicated CR1322 was prepared with the view that it is the conduct must be in furtherance of the listed objective (i.e., the second reading listed above) AND that the conduct must result in serious bodily injury (regardless of whether that result was "in furtherance of"). Having such a committee note would highlight this distinction for parties so they can intentionally address the issue as instructions are prepared and submitted in each particular case.

Ms. Klucznik returned the committee to the topic raised in the public comment, noting that it doesn't seem possible to collapse "bodily injury" into "serious bodily injury" without changing what, in her opinion, is the clear intent of the statute. She explained that the elements of assault could be written to state that the mental state applies to the commission of the act, and that the result must be the causing of serious bodily. Currently, the instruction is not written in that way and instead combines the mental state AND the result in element 1).

The committee explored this by briefly discussing a hypothetical, including if a person intends to hit someone (and does), but does not intend serious bodily injury. Once hit, if the person falls back and hits their head on a curb and sustains serious bodily injury (as a result of being hit), should the person be convicted or acquitted of aggravated assault? Some committee members felt the person should be convicted. Does the same result follow if you layer on the "targeting a law enforcement officer" considerations? That question was not answered by the committee.

The committee also discussed whether, for purposes of CR1322, a person could "make a threat" which results in serious bodily injury (i.e., threaten to hit an officer at a protest with a sign, the officer steps back causing another officer to discharge a firearm that hits the officer who stepped back, causing the serious bodily injury . . . is that what this type of aggravated assault was intended to address?).

The structure of this instruction is contingent on how Utah Code § 76-5-201 "in furtherance of" is interpreted. Judge Blanch expressed concern about publishing an instruction that ultimately relies upon the wrong interpretation of Utah Code § 76-5-201. More than one committee member was of the opinion that the statute was not written to require proof of an intent to cause serious bodily injury. If there committee were to follow the recommendation in the public comment and replace "bodily injury" in element 1) with "serious bodily injury", it would change the current meaning of the statute. Ms. Klucznik suggested that perhaps this statute should be referred back to the legislature for clarification prior to drafting the instruction.

After significant discussion, the committee determined CR1322 needs additional careful attention before action is taken. This instruction is tabled and will be reconsidered at the next meeting after committee members have additional time ruminate on the discussion.

None of the other public comments in Tab 3 were addressed by the committee during the meeting.

(5) DUI AND RELATED TRAFFIC INSTRUCTIONS

These materials were not considered at this meeting.

(6) ADJOURN

The meeting adjourned at approximately 1:25 p.m. The next meeting will be held on November 4, 2020, starting at 12:00 noon.

TAB 2

Pleasant Grove City v. Terry, 2020 UT 69

NOTES:
In this opinion, the Utah Supreme Court addressed a case where an individual who was charged assault (DV) and DV in the presence of a child. A jury acquitted the individual of the assault (DV) charge, but convicted on the DV in the presence of a child charge. The Court determined this was a "legally impossible verdict," stating:

> ¶53 We accordingly hold today that upon an allegation of a legally impossible verdict by a jury, in which a defendant is acquitted on the predicate offense but convicted on the compound offense, the reviewing court (whether it be the trial court or on appeal) should look into the elements of the crime, the jury verdicts, and the case's instructions. And if the court finds that the conviction of the compound offense is impossible in the face of an acquittal of a predicate offense, then the verdict is legally impossible and should be overturned, because —without the underlying [offense] the [compound] charge [cannot] stand.
>
> ¶54 Our decision today is a policy pronouncement of a narrow scope. It is limited to legally impossible verdicts in which a defendant is acquitted on the predicate offense but convicted on the compound offense. We also strongly believe that our ruling will assist in eliminating further mischief of this type. Our newly established rule will likely incentivize judges and prosecutors to use more precise jury instructions and to employ special verdict forms to help avoid the possibility of such legally impossible verdicts.

The committee will discuss the impact of this decision on current MUJI instructions. Are modifications or new instructions necessary?

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Committee (no quorum) discussed this briefly (Blanch, Jones–emeritus, Andrus, Johnson, Phelps, Lockwood, Field). The consensus of this group was this appears to be a training issue and not something that can be addressed in instruction and rule within MUJI. Judge Blanch asked committee members to think about this and we will discuss this again at the next meeting when Judge McCullagh can hopefully be present (since he is the one who flagged this for the agenda today).

This opinion is subject to revision before final publication in the Pacific Reporter

2020 UT 69

IN THE

SUPREME COURT OF THE STATE OF UTAH

PLEASANT GROVE CITY,
Appellee,

v.

KEITH TERRY,
Appellant.

No. 20160092
Heard October 11, 2018
Filed October 29, 2020

On Certification from the Utah Court of Appeals

Fourth District, Provo
The Honorable Thomas Low
Case No. 141101126

Attorneys:

Christine M. Petersen, Summer D. Shelton, Michael J. Scott, Pleasant Grove, for appellee

Richard A. Roberts, Sean M. Petersen, Jacob S. Gunter, Provo, for appellant

JUSTICE HIMONAS authored the opinion of the Court in which CHIEF JUSTICE DURRANT and JUSTICE PEARCE joined.

JUSTICE PETERSEN authored a dissenting opinion in which ASSOCIATE CHIEF JUSTICE LEE joined.

JUSTICE HIMONAS, opinion of the Court:

INTRODUCTION

¶1 Our deference to the jury's decision-making does not extend to verdicts that are legally impossible. This case presents such a situation. Keith Terry's conviction on the offense of domestic violence

in the presence of a child—a legal impossibility given his acquittal on the offense predicating it, domestic violence assault—is anathema to the laws of an enlightened, civilized society. We accordingly use our constitutionally granted supervisory authority to invalidate legally impossible verdicts, such as the one the jury reached here, and vacate Terry's conviction.

BACKGROUND

¶2 Terry was picking up his children from school one afternoon in his Jeep. After his son got in the passenger seat, and while he waited for his daughter, Terry's ex-wife confronted him and argued that it was not his turn to pick up the children. The two quarreled, and at some point, Terry's ex-wife approached the passenger side of the Jeep. She claimed it was to hug her son through the Jeep's open window and calm him down because the child had been upset by the couple's fighting. Then, according to her, Terry punched her in the mouth. Terry, on the other hand, claimed that his ex-wife opened the passenger-side door, and all he did was put his arms around his son to keep him in the Jeep. Terry denied ever striking his ex-wife and said that it was she who started hitting him on his hands and arms.

¶3 Following this altercation, Terry's ex-wife began to shout repeatedly, "He hit me!" and backed away from the vehicle. At that point, Terry saw an unknown man running toward him, so he started driving. The man, whom Terry later discovered to be his ex-wife's boyfriend, chased Terry's Jeep and eventually jumped into it through the open passenger-side window. Terry drove several blocks erratically in an attempt to shake the man off the vehicle. Unsuccessful, Terry called the police and drove the vehicle to a nearby police station, all while the man was hanging halfway out the passenger-side window.

¶4 Relevant here, Pleasant Grove City charged Terry with one count of domestic violence assault and one count of commission of domestic violence in the presence of a child. After trial, the jury initially deadlocked, but reached a verdict after the judge had them further deliberate. The jury convicted Terry on the offense of commission of domestic violence in the presence of a child, but

acquitted him of the offense that predicated the conviction, domestic violence assault.[1]

¶5 The trial judge was baffled by this outcome. He explained to the parties that although he had never had to deal with such a situation, he believed that "if [the jury] had reasonable doubt as to [domestic violence assault, the predicate offense], then there [had] to be reasonable doubt as to [domestic violence in the presence of a child, the compound offense]." After further research (during a short recess), however, the trial judge was "surprised" to find that there was no case supporting his intuition and accordingly did not intervene in the verdict. Following the trial court's conclusion and before sentencing, Terry filed a motion to arrest judgment and to strike the inconsistent jury verdict, which had acquitted him on the predicate offense of domestic violence assault, but convicted him of the compound offense of domestic violence in the presence of a child. The trial court denied the motion and sentenced Terry.

¶6 Terry timely appealed the judgment and the trial court's order denying his motion. The court of appeals certified the case to this court, explaining that it "presents an important first impression question in the context of predicate and compound offenses." We exercise jurisdiction under Utah Code section 78A-3-102(3)(b).

STANDARD OF REVIEW

¶7 This is the first time we have ever addressed the appropriate standard of review for a legally impossible verdict. We hold that this is a question of law, which we review for correctness. *State v. Newton*, 2020 UT 24, ¶ 16, 466 P.3d 135.

¶8 This court has never set out the standard of review for legally impossible verdicts. We have, however, articulated a standard of review for "inconsistent verdicts." *State v. Stewart*, 729 P.2d 610, 613 (Utah 1986) (per curiam) (holding that appellate courts review inconsistent verdicts only for "insufficient evidence to support the guilty verdict"). But "the term 'inconsistent verdicts' is often used in an imprecise manner and may include a wide variety of related, but nonetheless distinct, problems." *State v. Halstead*, 791 N.W.2d 805, 807

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[1] The City also charged Terry with one count of reckless endangerment and one count of reckless driving. The jury convicted Terry of these charges, and Terry has not appealed these convictions.

(Iowa 2010); *see also State v. Stewart* (*Md. Stewart*), 211 A.3d 371, 375 n.1 (Md. 2019) (McDonald, J., concurring) (identifying several "categories of inconsistent verdicts"). Indeed, the term "inconsistent verdicts" encompasses at least two different types of verdicts: factually inconsistent verdicts and legally impossible verdicts (sometimes known as legally inconsistent verdicts). *Stewart* dealt with factually inconsistent verdicts and does not control the question of the standard of review here because here we have a legally impossible verdict.[2] And legally impossible verdicts should be treated differently than factually inconsistent verdicts for two reasons.

¶9 First, with factually inconsistent verdicts, because the question is centered on the evaluation of evidence, it may make sense not to overturn a jury's verdict "unless reasonable minds could not rationally have arrived at a verdict of guilty beyond a reasonable doubt based on the law and on the evidence presented." *State v. Gibson*, 2016 UT App 15, ¶ 16, 366 P.3d 876 (citation omitted). *Stewart* presents a classic example. There, multiple defendants were tried together for a stabbing death; some were acquitted, and some, including Stewart, were convicted. 729 P.2d at 611. As we explain in more detail below, *see infra* ¶¶ 39–40, we held that there was an evidentiary basis to conclude "that the jury believed those portions of the evidence . . . unfavorable to [Stewart] and the evidence favorable to [the] other defendants." *Id.* at 614. Indeed, "testimony showed that Stewart carried the only knife capable of causing the fatal stab wound." *Id.* at 612. But with legally impossible verdicts in which a defendant is acquitted on the predicate offense but convicted on the compound offense, this calculation is self-solving: reasonable minds cannot rationally arrive at a guilty verdict for a compound offense when the acquittal on the predicate offense negates a necessary element of such conviction. And unlike with factually inconsistent

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[2] The dissent agrees that "our decision in *Stewart* does not control" but argues that it merely "present[s] us with different considerations" than the present case. *Infra* ¶ 65. Below we explain in some length why the difference between factually inconsistent verdicts like in *Stewart* and legally impossible verdicts like in Terry's case are more than just "different considerations." *See infra* ¶¶ 36–37, 42–46. For those reasons, and the reasons we elaborate on below here, *infra* ¶¶ 9–11, there are no relevant similarities in our standard of review of these verdicts.

verdicts, a "reviewing court, distanced from a jury, is equipped to evaluate independently the legal elements of charged crimes and make a determination as to whether the verdicts are compatible with these elements." *McNeal v. State*, 44 A.3d 982, 993 (Md. 2012).

¶10 Second, one of the reasons we review factually inconsistent verdicts only for sufficiency of evidence is that the defendant "receives 'the benefit of . . . acquittal on the counts on which [the defendant] was acquitted' and 'accept[s] the burden of conviction on the count[] on which the jury convicted.'" *United States v. Petit Frere*, 334 F. App'x 231, 238 (11th Cir. 2009) (third and fourth alterations in original) (quoting *United States v. Powell*, 469 U.S. 57, 69 (1984)). This premise makes no sense when it comes to legally impossible verdicts in which a defendant is acquitted on the predicate offense but convicted on the compound offense. It would require an appellate court to pretend that the same jury, looking at the same evidence, acquitted the defendant of the predicate offense standing alone, but simultaneously found the defendant guilty of the predicate offense as part of the compound offense—essentially asking an appellate court to conclude that "the same . . . element or elements of each crime were found both to exist and not to exist." *Price v. State*, 949 A.2d 619, 636 (Md. 2008) (Harrell, J., concurring); *see also McNeal*, 44 A.3d at 984 (adopting Justice Harrell's concurrence in *Price*). We do not engage in such theatrics.

¶11 For these reasons, we do not apply *Stewart*'s sufficiency-of-the-evidence standard to legally impossible verdicts in which a defendant is acquitted on the predicate offense but convicted on the compound offense. Unlike with factually inconsistent verdicts, these legally impossible verdicts involve a question of law—"the consequence of a jury verdict that convicts the defendant of a compound [offense] yet acquits the defendant on the only predicate [offense] in the case as instructed by the court." *Halstead*, 791 N.W.2d at 807 (footnote omitted); *see also Brown v. State*, 959 So. 2d 218, 220 (Fla. 2007) ("An inconsistent verdicts claim presents a pure question of law"); *Givens v. State*, 144 A.3d 717, 725 (Md. 2016) ("An appellate court reviews without deference a trial court's ruling on a motion to strike a guilty verdict that is allegedly inconsistent with a not-guilty verdict," because it presents "a question of law." (citation omitted)). We review questions of law for correctness. *See Newton*, 2020 UT 24, ¶ 16.

ANALYSIS

¶12 Terry argues that his acquittal of the domestic-violence-assault offense precludes his conviction of the offense of domestic

violence in the presence of a child. We agree. His acquittal on one count makes his conviction on the other legally impossible. Both outcomes turn on the same offense—domestic violence assault—and the jury's different answers are irreconcilable as a matter of law. In Part I, we confront the issue of legally impossible verdicts and determine that they cannot stand. Then, in Part II, using our constitutionally granted supervisory authority, we formulate a rule requiring vacatur of legally impossible verdicts like Terry's.

I. THE PROBLEM OF LEGALLY IMPOSSIBLE VERDICTS

¶13 Legally impossible verdicts are verdicts that are inconsistent "as a matter of law because it is impossible" to reconcile the different determinations that the jury would have had make to render them. *State v. Halstead*, 791 N.W.2d 805, 807 (Iowa 2010). We begin with explaining why the jury verdict here is legally impossible. Then we show that legally impossible verdicts like Terry's cannot stand as a matter of law because they are "not merely inconsistent with justice, but [are] repugnant to it." *People v. Tucker*, 431 N.E.2d 617, 619 (N.Y. 1981). Next, we tackle the contrary position—which holds that legally impossible verdicts are valid—and explain why we are not swayed by it. Finally, we explain why our case law about factually inconsistent verdicts does not control legally impossible verdicts.

A. Terry's Verdict Is Legally Impossible

¶14 The City charged Terry with the offense of domestic violence assault, UTAH CODE § 76-5-102(1)(c) (2003),[3] and the offense of commission of domestic violence in the presence of a child, UTAH CODE § 76-5-109.1(2)(c). These two offenses are related because the latter offense is predicated on the commission of the former. Defining the latter offense, Utah Code section 76-5-109.1(1)(b) states that "'[d]omestic violence' has the same meaning as in Section 77-36-1." Utah Code section 77-36-1(4), in turn, defines "[d]omestic violence" to "include commission" of "assault, as described in Section 76-5-102," "when committed by one cohabitant against another." Thus, the offense of commission of domestic violence in the presence of a child is a compound offense that is predicated on the commission of domestic violence assault. A "compound offense" is an "offense composed of one or more separate offenses. For example, robbery is a compound offense composed of larceny and assault." *Compound*

[3] The statute was amended in 2015, after Terry's charging, and section (1)(c) became (1)(b).

Offense, BLACK'S LAW DICTIONARY (11th ed. 2019). And a "predicate offense," also known as a "lesser included offense," is a "crime that is composed of some, but not all, of the elements of a more serious crime and that is necessarily committed in carrying out the greater crime." *Lesser Included Offense*, BLACK'S LAW DICTIONARY (11th ed. 2019); *Id.*, *Predicate Offense*.[4]

¶15 "[I]t is impossible to convict a defendant of the compound [offense] without also convicting the defendant of the predicate offense." *Halstead*, 791 N.W.2d at 807 (footnote omitted); *see also Md. Stewart*, 211 A.3d 371, 384 (Md. 2019) (Opinion by Watts, J. (commanding majority for its analysis)) ("[A] guilty verdict and a not-guilty verdict are legally inconsistent where the crime of which the jury finds the defendant not guilty is a lesser-included offense of the crime of which the jury finds the defendant guilty."). Yet the jury in Terry's case did the impossible. It convicted Terry of the compound offense (domestic violence in the presence of a child), while acquitting him of the predicate offense (domestic violence assault).

¶16 Legally impossible verdicts are verdicts that include an inconsistency "as a matter of law because it is impossible" to reconcile different determinations that the jury made in them. *Halstead*, 791 N.W.2d at 807. And here, it is impossible to reconcile a conviction with an acquittal on "essential elements . . . identical and necessary" to sustain the conviction. *State v. Arroyo*, 844 A.2d 163, 171 (R.I. 2004) (citation omitted); *see also Shavers v. State*, 86 So. 3d 1218,

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[4] This case involves an exception to the general rule that a "defendant may be convicted of an offense included in the offense charged but may not be convicted of both the offense charged and the included offense." UTAH CODE § 76-1-402(3). This rule does not apply "where the Legislature has designated a statute as an enhancing statute," *State v. Bond*, 2015 UT 88, ¶ 70, 361 P.3d 104, which "single[s] out particular characteristics of criminal conduct as warranting harsher punishment," *State v. Smith*, 2005 UT 57, ¶ 10, 122 P.3d 615. Such designation requires an "explicit indication of legislative intent." *Id.* ¶ 11. Utah Code section 76-5-109.1(4) includes such indication: "A charge under this section is separate and distinct from, and is in addition to, a charge of domestic violence where the victim is the cohabitant. Either or both charges may be filed by the prosecutor." Thus, charges (and convictions) on both predicate and compound offenses are permissible in this case.

1221 (Fla. Dist. Ct. App. 2012) ("[L]egally [impossible] verdicts . . . arise when a not-guilty finding on one count negates an element on another count that is necessary for conviction."); *Price v. State*, 949 A.2d 619, 634 (Md. 2008) (Harrell, J., concurring in the judgment) ("A legal inconsistency . . . occurs when 'an acquittal on one charge is conclusive as to an element . . . [of] a charge on which a conviction has occurred.'" (citation omitted)) (adopted in *McNeal v. State*, 44 A.3d 982, 984 (Md. 2012)).

¶17 At oral argument, the City conceded the relationship between the offenses in this case and acknowledged the illogic embedded in Terry's verdict. Yet it still maintains that Terry's verdict is not legally impossible, for two reasons. First, in the City's view, there can be no legal impossibility when there is sufficient evidence, as Terry concedes is the case here. Second, according to the City and the dissent, because we evaluate every count separately, the contradicting results the jury reached are not legally impossible. *See infra* ¶¶ 57, 66, 69, 74. Both arguments do not persuade us.

¶18 First, the argument that there was sufficient evidence to support a guilty verdict on the compound offense is of no moment to our holding that the verdict is legally impossible. Given that both the compound offense and the predicate offense were based on the same evidence and the same event, the jury also had sufficient evidence to support a guilty verdict on the predicate offense. Yet they did not do so. And that acquittal was fatal to the jury's ability to convict on the compound offense, because "an acquittal of [a predicate offense] effectively holds the defendant innocent of a [compound] offense involving that same [predicate offense]," *Naumowicz v. State*, 562 So. 2d 710, 713 (Fla. Dist. Ct. App. 1990), and "negates a necessary element for conviction on" the compound offense, *State v. Kelley*, 109 So. 3d 316, 317 (Fla. Dist. Ct. App. 2013) (citation omitted).

¶19 Second, the argument that verdicts like Terry's are not legally impossible because we review claims that the State has not met its burden of proof on a particular count of conviction, on each count independently, *see infra* ¶¶ 57, 66, 69, 74; *see also State v. Stewart*, 729 P.2d 610, 613 (Utah 1986) (per curiam), is likewise unavailing. We do not deny that this our general rule, but it is not an inexorable mandate. If it yields absurd results—or in this case, legally impossible results—we should not blindly follow it.[5] *See*, *e.g.*, *A.K. &*

[5] The dissent seems to be focused on this argument as the ultimate reason for us to affirm a legally impossible judgment, *see infra* ¶¶ 57,

(continued . . .)

R. Whipple Plumb. & Heat. v. Guy, 2004 UT 47, ¶ 11, 94 P.3d 270 (describing with approval how our Court of Appeals refused to strictly apply our "net judgment rule" because it led to "absurd results"); *State v. Springer*, 121 P. 976, 979 (Utah 1911) (refusing to submit a plea of former acquittal "to the jury to be passed on by it as a question of fact" although past case law suggested "courts have no alternative," because it would "lead to an absurd result."). If the State chose to intertwine the offenses, it cannot then disentangle them at-will when it's convenient. Here, the City repeatedly discussed the predicate and compound offenses together and explicitly relied on the same evidence for the two offenses. Similarly, the jury instructions also linked the two offenses—explaining that the basis for the compound-offense charge was that Terry allegedly "committed an act of domestic violence in the presence of a child" by committing the predicate offense (assault) "while the nine year old child was less than three feet away." The City cannot have its cake and eat it too. Its prosecutorial choices show that the jury was presented with the compound offense *predicated* on the occurrence of the predicate offense. We cannot and should not review them separately in such circumstances. *See*, *e.g.*, *Streeter v. State*, 416 So. 2d 1203, 1206 n.3 (Fla. Dist. Ct. App. 1982) (noting an "exception to the proposition that separate counts must be viewed independently" when "what the jury *fails to find* in one count vitiates a guilty verdict on a separate count to the benefit of the defendant"). The dissent calls our approach "novel," *infra* ¶ 57, but this approach is practiced in every jurisdiction that refuses to accept legally impossible verdicts, *see supra* ¶¶ 15–16.

¶20 Thus, the verdict here—convicting Terry of a compound offense while acquitting him of the predicate offense—is legally impossible.

B. Legally Impossible Verdicts Like Terry's Are Anathema to Our Justice System

¶21 Having established that Terry's jury rendered a legally impossible verdict, we now explain why the verdict cannot stand. Two reasons lead us to this conclusion. First, a legally impossible verdict in which a defendant is acquitted on the predicate offense but

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66, 69, 74, but other than repeat our commitment to this rule, it does little to address the concerns we raise against a blind reliance in this case.

convicted on the compound offense doesn't just undermine our confidence in the trial's outcome, it eviscerates it. Second, upholding such legally impossible verdicts casts a cold shadow on the criminal justice system, and this shadow is far more worrisome than the inability to retry the defendant due to constitutional constrains. We then reject the argument that invalidating legally impossible verdicts of this kind somehow disrupts the jury verdict's finality or invades the jury process.

¶22 Legally impossible verdicts—in which a defendant is acquitted on the predicate offense but convicted on the compound offense—cannot stand for two reasons. First, they undermine "our confidence in the outcome of the trial," *Halstead*, 791 N.W.2d at 815, because for a defendant to "be convicted for a crime on which the jury has actually found that the defendant did not commit an essential element, whether it be one element or all[,] . . . is not merely inconsistent with justice, but is repugnant to it," *Tucker*, 431 N.E.2d at 619. The legally impossible verdict means that the jury necessarily overstepped its "historic role" as "fact-finder," *McNeal*, 44 A.3d at 986, and has "taken the law into its own hands," *Md. Stewart*, 211 A.3d at 376 (Opinion by McDonald, J.), by presumably "engag[ing] in some . . . process that is inconsistent with the notion of guilt beyond a reasonable doubt," *Halstead*, 791 N.W.2d at 815. The requirement that guilt must be proven beyond a reasonable doubt is part and parcel of constitutional due process. *State v. Maestas*, 2012 UT 46, ¶ 167, 299 P.3d 892 ("In the criminal justice system, a defendant is presumed innocent and the prosecution must prove guilt beyond a reasonable doubt."); *State v. Swenson*, 838 P.2d 1136, 1138 (Utah 1992) ("Both the United States Constitution and the Utah Constitution require that the burden of proving all elements of a crime is on the prosecution." (citing *In re Winship*, 397 U.S. 358, 364 (1970)). Such a constitutional insult cannot stand.

¶23 Second, we are deeply concerned about the perceptions of a criminal justice system that upholds such legally impossible verdicts.

> When liberty is at stake, we do not think a shrug of the judicial shoulders is a sufficient response to an irrational conclusion. We are not playing legal horseshoes where close enough is sufficient. It is difficult to understand why we have a detailed trial procedure, where the forum is elaborate and carefully regulated, and then simply give up when the jury confounds us.

Halstead, 791 N.W.2d at 815. "[T]he possibility of a wrongful conviction in such cases outweighs the rationale for allowing verdicts to stand." *State v. Powell*, 674 So. 2d 731, 733 (Fla. 1996). Terry's case may only present misdemeanors, but affirming such a legally impossible verdict extends beyond it, and applies equally to grave offenses, such as felony murder. *See, e.g.*, *Mahaun v. State*, 377 So. 2d 1158, 1161 (Fla. 1979). If we affirm the ability of a jury to render such a legally impossible verdict, we sanction the lengthy (perhaps lifelong) incarceration of a defendant for a murder although the jury acquitted him from the underlying felony that allowed the felony murder charge. We cannot stand by legally impossible verdicts and call our system a justice system.[6]

¶24 We acknowledge the implications of our decision on the future prosecution of defendants who receive legally impossible verdicts in which the defendant is acquitted on the predicate offense but convicted on the compound offense. "The double jeopardy provisions in both the United States and Utah Constitutions generally prohibit the State from making repeated attempts to convict an individual for the same offense after jeopardy has attached, which in jury trials occurs after a jury has been selected and sworn." *State v. Harris*, 2004 UT 103, ¶ 22, 104 P.3d 1250 (footnotes omitted). And so, with legally impossible verdicts like the one here, the double jeopardy provisions may effectively preclude a retrial of the acquittal on the predicate offense. The same might be true for retrying the compound offense, the argument being that a defendant with a legally impossible verdict cannot be retried on the compound offense if "there was insufficient evidence to support [that] conviction[]."

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[6] The dissent says that "neither the United States Constitution, [nor] the Utah Constitution, . . . have been read to require" the invalidation of legally impossible verdicts. *See infra* ¶ 59. As for the U.S. Constitution, it is true that the U.S. Supreme Court remarked in *United States v. Powell*, 469 U.S. 57, 65 (1984) that "nothing in the Constitution would require such a protection," but no such statement was conclusively made as to the Utah Constitution. We also stress that the decision of the U.S. Supreme Court to adjudicate the issue "under [its] supervisory powers over the federal criminal process," *id.*, allows for independent treatment by state courts, also in accordance to their constitutions, where appropriate. Therefore, as for the Utah Constitution, the fact that no such reading has been offered in the past should not signal that it is not possible.

Bravo-Fernandez v. United States, 137 S. Ct. 352, 364 (2016). Under this assumption, it seems that the prosecution would be estopped from a retrial on the compound offense.[7]

¶25 But the inability to retry a defendant is far preferable to defendants being convicted of and punished for crimes that—according to the jury's acquittal on the predicate offense—they never could have committed. After all, Blackstone's ratio—the basis for our presumption of innocence and the core principle of our criminal justice system—tells us that "[i]t is better that ten guilty persons escape than one innocent suffer." 4 WILLIAM BLACKSTONE, COMMENTARIES *352; *see also State v. Reyes*, 2005 UT 33, ¶ 11, 116 P.3d 305 ("Blackstone set an enduring benchmark for the measure of certainty required to convict in a civilized society . . . ."). If we succumb to the opposite rationale, we would be "presum[ing] unlawful acquittal" "rather than guard[ing] against unlawful conviction."[8] Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 213 (1989).

¶26 For these reasons, we hold that legally impossible verdicts—in which a defendant is acquitted on the predicate offense but convicted on the compound offense—cannot stand. In doing so, we do not ignore our usual deep reluctance to disturb the finality of a jury verdict, as the dissent suggests, or inquire into the jury's intent. *See infra* ¶ 71. These principles are simply not at play here. We confront other legal errors made at trial, and legally impossible verdicts should not fare differently. And legally impossible verdicts do not require inquiry into the jury's intent.

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[7] We note that the City has not indicated that it intends to prosecute Terry again, and the parties have not briefed this issue. Recognizing that it is a question of first impression, we leave the ultimate disposition of this question for an appropriate future case.

[8] The dissent claims "that is not so." *Infra* ¶ 69. In its view, our approach leads courts to "discard[]" jury verdicts that determined "guilt beyond a reasonable doubt." *Infra* ¶ 69. This claim crystalizes our different approaches to this question. To us, no such verdict has been discarded, because there is no logical way for a jury to acquit a person on a predicate offense and then finding them guilty on the compound offense beyond a reasonable doubt.

¶27 We routinely overturn trial courts' decisions for legal errors. We should do the same when a jury makes a legal error. In fact, we must, because adjudicating matters of law is our duty as an appellate court. We review questions of law for correctness, and even under one of our more deferential standards of review—abuse of discretion—we have long held that a "legal error is an abuse of discretion that undercuts the deference we would otherwise afford" a trial court. *Rocky Ford Irrigation Co. v. Kents Lake Reservoir Co.*, 2020 UT 47, ¶ 78, 469 P.3d 1003. In fact, other courts have refused to accept legally inconsistent verdicts rendered by a judge. *See United States v. Maybury*, 274 F.2d 899, 903 (2d Cir. 1960); *State v. Williams*, 916 A.2d 294, 305 (Md. 2007); *Akers v. Commonwealth*, 525 S.E.2d 13, 17 (Va. Ct. App. 2000). We see no reason why a legal error made by one fact finder—a jury—should be treated differently than one made by another—a judge. Any reluctance we might have to disturb the jury's verdict is a byproduct of judicial restraint—not an inexorable mandate. For example, we overturn a jury verdict—even a verdict that isn't impossible on its face—when the evidence, viewed in the light most favorable to the jury, "is sufficiently inconclusive or inherently improbable [so] that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he or she was convicted." *State v. Nielsen*, 2014 UT 10, ¶ 30, 326 P.3d 645. (citation omitted). Importantly, our restraint is connected to the jury's "historical role" as "the sole fact-finder in criminal jury trials." *McNeal*, 44 A.3d at 986. But the jury does not act as a fact-finder when it misapplies the law—taking it "into its own hands," *Md. Stewart*, 211 A.3d at 376 (Opinion by McDonald, J.), and ignoring its "duty . . . to decide a criminal case according to established rules of law," *Price*, 949 A.2d at 627 (citation omitted)—as it does when it reaches a legally impossible verdict.[9]

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[9] The dissent worries that we have created a "mandate[e] that such [legally impossible] jury verdicts be overturned" and suggests that our decision "weakens our longstanding and deep reluctance to disturb the finality of a jury verdict," *infra* ¶ 71, because "verdicts can be legally inconsistent in various ways and to different degrees." *Infra* ¶ 72. It cites from Justice Butler's dissenting opinion in *Dunn v. United States*, 284 U.S. 390, 399–407 (1932) (Butler, J., dissenting) for examples of varied types of inconsistent verdicts that Justice Butler saw as repugnant and therefore invalid. *See infra* ¶ 73.

The dissent worries in vain. We are not Justice Butler, and his view of repugnancy should not be confounded with ours. Our rule,

(continued . . .)

¶28 And in a case of a legally impossible verdict we have no need to inquire into the jury's intent. Quite the opposite. Discerning whether a verdict is legally impossible "does not require the court to engage in highly speculative inquiry into the nature of the jury deliberations." *Halstead*, 791 N.W.2d at 815. Instead, it "focuses solely on the legal impossibility of convicting a defendant of a compound crime while at the same time acquitting the defendant of predicate crimes." *Id.* The court must simply determine whether the conviction on the compound offense is possible in the face of an acquittal on a predicate offense. If it is not, then the verdict is legally impossible and should be overturned.

C. The Opposite Approach Is Unpersuasive

¶29 But we are not an island. Other courts have addressed whether legally impossible verdicts—in which a defendant is acquitted on the predicate offense but convicted on the compound offense—are valid. We recognize that a majority of courts, led by the United States Supreme Court,[10] have gone the other way. *See, e.g.*,

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as the dissent itself acknowledges, is "a narrow one." *infra* ¶ 72. It addresses one concrete type of legally impossible verdicts, which we repeatedly define with high specificity. *See supra* ¶¶ 9, 10, 11, 21, 22, 24, 26, *infra* ¶¶ 29, 32, 33, 35, 42, 48, 53, 54. We recognize that inconsistent verdicts (and within them legally impossible verdicts) come in many shapes and sizes. And we accordingly task our advisory committee with studying the matter in depth. *See infra* ¶ 55. Yet, as we explain below, "against the backdrop of a live controversy," *see infra* ¶ 52, we cannot let legally impossible verdicts, in which a defendant is acquitted on the predicate offense but convicted on the compound offense, stand.

[10] The U.S. Supreme Court implicitly decided *Dunn v. United States*, 284 U.S. 390 (1932) and explicitly decided *United States v. Powell*, 469 U.S. 57 (1984) merely on its "supervisory powers over the federal criminal process" and not on any constitutional basis. *Powell*, 469 U.S. at 65. Those decisions, therefore, have no direct application in this court, and we treat them merely as persuasive authority. *See* Eric L. Muller, *The Hobgoblin of Little Minds? Our Foolish Law of Inconsistent Verdicts*, 111 HARV. L. REV. 771, 774 (1998) ("Because the Court has seen no constitutional violation in inconsistent verdicts, state courts have been free to develop their own responses to inconsistent verdicts." (citation omitted)).

(continued . . .)

United States v. Powell, 469 U.S. 57 (1984); *Dunn v. United States*, 284 U.S. 390 (1932); *People v. Jones*, 797 N.E.2d 640, 645–48 (Ill. 2003); *Beattie v. State*, 924 N.E.2d 643, 649 (Ind. 2010). But "the persuasiveness of authority is not determined by the pound, but by the quality of the analysis."[11] *Halstead*, 791 N.W.2d at 811. And we find that the higher quality analysis in this arena resides with the minority of state courts; we join them today in holding that legally impossible verdicts in which a defendant is acquitted on the predicate offense but convicted on the compound offense are invalid. *See, e.g.*, *id.*; *Brown v. State*, 959 So. 2d 218, 220–23 (Fla. 2007); *McNeal*, 44 A.3d at 984; *Commonwealth v. Gonzalez*, 892 N.E.2d 255, 262 n.8 (Mass. 2008).

¶30 In discussing the majority view, we begin and end with the U.S. Supreme Court case law because state courts holding the majority view, "generally break no new ground but restate the rule and reasoning" proffered in the Supreme Court's two relevant decisions—*Dunn* and *Powell*. *Halstead*, 791 N.W.2d at 810–11; *see also*

The dissent notes that the U.S. Supreme Court's rule "has now stood for eighty-eight years." *Infra* ¶ 61. But that does not change that it has no direct application in this court.

[11] We have departed from majority rules on other issues before without much fuss. *See, e.g.*, *Nixon v. Clay*, 2019 UT 32, ¶ 22, 449 P.3d 11 (rejecting the majority rule for an exception to tort liability for injuries arising out of sports and adopting a different framework); *McArthur v. State Farm Mut. Auto. Ins. Co.*, 2012 UT 22, ¶¶ 11–12, 274 P.3d 981 (rejecting what seemed to be the majority approach regarding exhaustion clauses in insurance contracts because it was premised on common-law authority, and insurance law in Utah is governed by statute); *Murphy v. Crosland*, 915 P.2d 491, 493–94 (Utah 1996) (rejecting a majority rule regarding the interpretation of a rule of appellate procedure because it "relie[d] on an outdated advisory committee note"); *State v. Chapman*, 655 P.2d 1119, 1122–23 (Utah 1982) (rejecting the majority rule regarding the steps the State must undertake before it is allowed to present an out-of-state unavailable witness, because of its "inflexib[ility]"); *W. Land Equities, Inc. v. City of Logan*, 617 P.2d 388, 391 (Utah 1980) (rejecting the majority rule regarding retroactive application of zoning laws because it "fail[ed] to strike a proper balance between public and private interests and opens the area to so many variables as to result in unnecessary litigation").

Eric L. Muller, *The Hobgoblin of Little Minds? Our Foolish Law of Inconsistent Verdicts*, 111 HARV. L. REV. 771, 792 n.111 (1998) (noting that most state courts "rely on one or both of *Dunn* and *Powell* in affirming inconsistent verdicts").[12] In those two cases, the U.S. Supreme Court held that legally impossible verdicts are valid. *Powell*, 469 U.S. at 62; *Dunn*, 284 U.S. at 393. The specific facts of *Powell* and *Dunn* are immaterial to this discussion. It suffices to say that in both cases the defendants, like Terry, were acquitted of the predicate offense and convicted of the compound offense. Cumulatively, the Court's *Dunn* and *Powell* opinions present three reasons for upholding legally impossible verdicts.[13] They are all unpersuasive.

¶31 First, the Court held that legally impossible verdicts are "no more than [the jury's] assumption of a power which they had no right to exercise, but to which they were disposed through lenity." *Dunn*, 284 U.S. at 393 (citation omitted). The Court recognized that it was "equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the [predicate] offense." *Powell*, 469 U.S. at 65; *see also Dunn*, 284 U.S. at 394 (holding that a legally impossible verdict "may have been the result of compromise, or of a mistake on the part of the jury"). But it held that all those possibilities merely emphasize that it is "unclear whose ox has been gored" when there has been a legally impossible verdict. *Powell*, 469 U.S. at 65.[14]

¶32 This rationale paves a one-way street: The Court will always construe a legally impossible verdict as an unworthy windfall for the

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[12] We reviewed the cases referred to in Professor Muller's article that did not rely on *Dunn* or *Powell*, 111 HARV. L. REV. at 792 n.111, and uncovered no arguments that we have not otherwise addressed in this opinion.

[13] The *Dunn* Court also relied in part on a *res judicata* analysis, 284 U.S. at 393, which is no longer good law. But the Court later explained in *Powell* that "the *Dunn* rule rests on a sound rationale that is independent of its theories of res judicata, and [] it therefore survives an attack based upon its presently erroneous reliance on such theories." 469 U.S. at 64.

[14] We note that the dissent's position seems to rely primarily on this justification, *infra* ¶¶ 59–61, but does not offer any rebuttal to our rejection of it below, *infra* ¶ 32. *See also supra* ¶ 19 n.5.

defendant, and never as an injustice. Thus, by this rationale, the Court endorses a de facto "irrebuttable presumption that the jury . . . engage[s] in an act of lenity when it acquit[s] the defendant" of a predicate offense but convicts the defendant of the compound one. *Halstead*, 791 N.W.2d at 809. But "it is equally possible that [such a legally impossible] verdict is the product of animus toward the defendant rather than lenity."[15] *Id.* at 814. Certainly, "[t]he presumption of lenity seems particularly doubtful" in cases such as this one in which "the jury convicts a defendant of the more serious [compound] offense but acquits the defendant on [the] predicate [offense]." *Id.* If every legally impossible verdict were a result of lenity, then perhaps the approach adopted in *Dunn* and *Powell* would make sense. However, nothing in fact, law, or logic suggests that this story is accurate. We therefore reject the "lenity presumption" that *Dunn* and *Powell* adopted.

¶33 Second, and relatedly, the Court held that legally impossible verdicts "cannot be upset by speculation or inquiry into" why the jury rendered them, *Dunn*, 284 U.S. at 394, because, in its view, any such inquiry would be "imprudent" and "unworkable," *Powell*, 469 U.S. at 66. This reason carries no weight at all in our determination. As we explain above, once a jury has reached a legally impossible verdict, its reasons for doing so matter not. We do not peer into the jury's black box. Instead, much like we view an error of law as an automatic abuse of discretion, *see, e.g.*, *Rocky Ford*, 2020 UT 47, ¶ 78, so too we should view legally impossible verdicts—in which a defendant is acquitted on the predicate offense but convicted on the compound offense—as an automatically invalid legal error. Additionally, overturning legally impossible verdicts does not even require an inquiry into the jury deliberations, let alone speculation. *See Halstead*, 791 N.W.2d at 815 ("Making such legal determination does not require the court to engage in highly speculative inquiry into the nature of the jury deliberations."); *McNeal*, 44 A.3d at 992 (explaining that factually inconsistent verdicts require invasion to the "province of the jury" but that legally impossible verdicts do not). To the contrary—the analysis here "focuses solely on the legal

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[15] The reader may wonder how an acquittal can mean animus. Jurors may think that a defendant is not guilty on all counts, but nevertheless find the defendant's behavior reprehensible for some reason and decide to "punish" them by convicting them of one of the offenses.

impossibility of convicting a defendant of a compound crime while at the same time acquitting the defendant of predicate crimes." *Halstead*, 791 N.W.2d at 815. The court must simply determine whether the conviction on the compound offense is possible in the face of an acquittal on a predicate offense. If it is not, then the verdict is legally impossible and should be overturned. Such an inquiry would not require us to peer into the jurors' minds even one bit.

¶34 Finally, in *Powell* the Court also concluded that the protection that a defendant receives provides sufficient "safeguards" against "jury irrationality or error" through "the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts." 469 U.S. at 67. We disagree. Our main concern with legally impossible verdicts is that they are contradictory. An acquittal of the predicate offense clashes emphatically with the conviction of the compound offense. But a review for sufficiency of the evidence does not address that irrationality. It simply ignores it, instead asking us to rely only on the conviction. As we explain above, the mere fact that the evidence was sufficient for conviction on the compound offense does not somehow make the legally impossible verdict logical.

¶35 In conclusion, there is no good reason to let legally impossible verdicts, in which a defendant is acquitted on the predicate offense but convicted on the compound offense, stand. We, therefore, reject the majority view and hold that such legally impossible verdicts must be overturned.

D. Our Case Law on Factually Inconsistent Verdicts Does Not Control

¶36 Before turning to how we should go about invalidating legally impossible verdicts, we need to address Utah precedent about another member of the "inconsistent verdicts" family: factually inconsistent verdicts. That precedent does not concern this case because jury verdicts can be erroneous in different ways. Legal impossibility is just one of them, as we explain above. *See supra* ¶ 8. Much like different strains of the same virus, these various "inconsistent verdicts" present "distinct[] problems," *Halstead*, 791 N.W.2d at 807; *see also McNeal*, 44 A.3d at 993; *Gonzalez*, 892 N.E.2d at 262 n.8, that are more than just "different considerations," as the dissent suggests. *See infra* ¶ 65. And so, we are not talking about two strains of the common flu, but of the difference between the common flu and COVID-19. These two types of ills merit different treatment.

¶37 Traditionally, courts refer to legally impossible verdicts under the umbrella term of "inconsistent verdicts." *See*, *e.g.*, *Powell*, 469 U.S. at 65. But the term "inconsistent verdicts" "include[s] a wide

variety of related, but nonetheless distinct, problems" in jury verdicts. *Halstead*, 791 N.W.2d at 807; *see also Md. Stewart*, 211 A.3d at 375 n.1 (Opinion by McDonald, J.) (listing various categorizations of inconsistent verdicts as designated by different courts). Inconsistency in verdicts may stem from errors in fact or in law. The difference matters. *See*, *e.g.*, *id.* at 383 (Opinion by Watts, J.) ("[F]actually inconsistent verdicts are permissible, while legally inconsistent verdicts are not."); *Commonwealth v. Elliffe*, 714 N.E.2d 835, 838 (Mass. App. Ct. 1999) ("[A] defendant is not entitled to relief where a jury returns factually inconsistent verdicts; problems arise only where verdicts are legally inconsistent—i.e., where, removed from the factual context of the particular case, the government could not possibly have proved the elements of both crimes with respect to the defendant."). In general, we scrutinize questions of law far more closely than questions of fact. The most obvious example for this distinction is our standards of review for questions of fact and questions of law. We review the former for clear error, and the latter for correctness—a much stricter review. *See, e.g.*, *Taylor v. Univ. of Utah*, 2020 UT 21, ¶ 13, 466 P.3d 124. The same distinction should apply when we review errors in verdicts.

¶38 *State v. Stewart*, our only precedent about inconsistent verdicts, dealt with a factual inconsistency—namely an acquittal of some defendants, but not all, for the same crime. 729 P.2d 610 (Utah 1986) (per curiam). It held that the inconsistent factual verdicts could stand. But, as we and the dissent agree,[16] *infra* ¶ 65, its holding and its reliance on *Dunn* and *Powell* do not control our decision today.[17]

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[16] Despite its agreement with us that *Stewart* does not control this case, the dissent "find[s] the reasoning of *Stewart* to offer persuasive insight that we should not easily dismiss," *infra* ¶ 65. We respectfully disagree with this point. As we explain below, *Stewart* did nothing more than quote and cite cursorily to *Powell* and *Dunn* in a context wholly distinct from ours, *see infra* ¶¶ 39–40. We detailed in length our rejection of *Powell* and *Dunn* above, *supra* ¶¶ 31–34, and *Stewart*'s adoption of these cases in another context has no significance or insight here.

[17] Neither party seems to think that *Stewart* is relevant to this case. The parties have not briefed it at all (except for a footnote citation reference Terry makes in his opening brief) and only addressed *Stewart* at oral argument. The parties instead discussed case law from our court of appeals that adopted *Stewart* or *Powell*. *See, e.g.*, *State v.*

(continued . . .)

¶39 In *Stewart*, four inmates were charged with second-degree homicide for the death of another inmate. Two inmates were acquitted, and the other two—the appellants—were found guilty. 729 P.2d at 611. The appellants claimed that because the evidence about all four charged inmates was the same, they should have been acquitted too. *Id.* In a per curiam decision, this court rejected that argument based on the different evidence that connected the appellants to the murder, compared to the acquitted defendants. In fact, this court rejected the argument that the verdicts were "so obviously inconsistent." *Id.* This court's treatment of *Dunn* and *Powell* was cursory. *See id.* at 611 n.1 (citing *Powell* for the proposition that "[t]he inquiry then is whether the verdicts against [the appellants] are supported by substantial evidence"); *id.* at 612 (quoting *Dunn*'s language about the reasons for a jury's verdict to support the proposition that "[t]he acquittal of [other defendants] does not necessarily require appellants' acquittal").

¶40 A procedural lapse on this court's part—issuing a decision before one of the appellants filed his reply brief—led to a rehearing,

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Gibson, 2016 UT App 15, 366 P.3d 876; *State v. LoPrinzi*, 2014 UT App 256, 338 P.3d 253; *State v. Sjoberg*, 2005 UT App 81U; *State v. Hancock*, 874 P.2d 132 (Utah Ct. App. 1994), *superseded on other grounds by statute*, UTAH CODE § 77-32-304.5 (1997) (repealed), *as recognized in State v. Carreno*, 2006 UT 59, ¶ 16, 144 P.3d 1152. A database research yielded several more court of appeals cases of this progeny that the parties have not discussed. *See, e.g.*, *State v. Atencio*, 2005 UT App 417U (per curiam); *State v. Olive*, 2005 UT App 120U.

None of these court of appeals cases are relevant here. Like *Stewart*, all but two of these cases address claims for factual inconsistency and do not inform our understanding of legally impossible verdicts in which a defendant is acquitted on the predicate offense but convicted on the compound offense. Although two court of appeals cases do discuss alleged legally impossible verdicts (*Hancock* and *Atencio*), and cite *Stewart* in doing so, they both ultimately held that the verdicts examined were not legally impossible verdict. *Hancock*, 874 P.2d at 134; *Atencio*, 2005 UT App 417U, para. 5. Therefore, any reliance on *Stewart* in those cases is not relevant to our discussion here. In this context we also find telling that our court of appeals certified the case to us by the "vote of four judges of the court," noting that it "presents an important first impression question."

which we also decided per curiam. We explained that the appellant simply "reiterate[d] the same arguments as in his original brief on appeal, which arguments were disposed of in our prior decision" and affirmed the conviction. *Id.* at 613. Then we quoted *Powell* for the proposition that "the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts" is sufficient "protection against jury irrationality," *id.* (quoting *Powell*, 469 U.S. at 67), and stated (acknowledging that *Powell* treated a different problem) that "[w]e believe that this same reasoning equally applies in this case when the sufficiency of evidence against different defendants is questioned." *Stewart*, 729 P.2d at 613. We also cited to *Dunn* (among other cases) for the proposition that "it is generally accepted that the inconsistency of verdicts is not, by itself, sufficient ground to set the verdicts aside," *id.*, and again for the proposition that a "jury's acquittal of a defendant, whether tried separately or jointly with others, may also result from some compromise, mistake, or lenity on the jury's part." *Id.* at 614.

¶41 Applying our principles of *stare decisis*, we hold that *Stewart* does not control this case. *Stare decisis* is "a cornerstone of Anglo–American jurisprudence that is crucial to the predictability of the law and the fairness of adjudication." *State v. Thurman*, 846 P.2d 1256, 1269 (Utah 1993). It requires us to "extend a precedent to the conclusion mandated by its rationale." Richard L. Hasen, *Anticipatory Overrulings, Invitations, Time Bombs, and Inadvertence: How Supreme Court Justices Move the Law*, 61 EMORY L.J. 779, 780 (2012) (quoting Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to* Miranda v. Arizona), 99 GEO. L.J. 1, 12 (2010)). But the "doctrine of stare decisis . . . is neither mechanical nor rigid as it relates to courts of last resort." *State v. Guard*, 2015 UT 96, ¶ 33, 371 P.3d 1 (citation omitted).

¶42 With these principles in mind, our respect for precedent means we value and implement the *text* of our past opinions as far as it can logically go. The question here is whether the rationale behind the "inconsistent verdicts" terminology in *Stewart* encompasses the jury verdict here—namely, legally impossible verdicts in which a defendant is acquitted of the predicate offense but convicted of the compound offense—and therefore controls the question of their validity. We hold that *Stewart* does not control and should be viewed as binding us only as to the fate of factually inconsistent verdicts. *Stewart* recognized that it borrowed from *Powell*—a case that dealt with a different issue. 729 P.2d at 613 ("We believe that this same reasoning equally applies in this case when the sufficiency of evidence against different defendants is questioned."). Our *Stewart*

opinion, therefore, cannot be construed to mean that it decided an issue that even it recognized was not at play in that case.

¶43 Our allegiance to the text also compels us to refuse to creatively read that text. *See, e.g.*, *State v. Argueta*, 2020 UT 41, ¶ 54 n.12, 469 P.3d 938 (explaining that we cannot subscribe to the concurrence's view that our past opinion was a "square holding" in the case before us because the key words in this debate, "'supplemental,' 'different,' or 'reconcilable' do not appear in [the past opinion] in any form"); *Ipsen v. Diamond Tree Experts, Inc.*, 2020 UT 30, ¶¶ 14–15, 466 P.3d 190 (rejecting the idea that negligence could be read to include gross negligence given the material legal differences between the two standards in the context of our case law).

¶44 The alleged connection between *Stewart* and this case resembles our recent discussions in other opinions. *See Argueta*, 2020 UT 41, ¶¶ 50–54 (analyzing and refusing to apply as precedent *State v. Velarde*, 675 P.2d 1194 (Utah 1984)); *Ipsen*, 2020 UT 30, ¶¶ 1–2, 12–13 (holding that a previous case, *Fordham v. Oldroyd*, 2007 UT 74, 171 P.3d 411, which held that "a person does not owe a duty of care to a professional rescuer for injury that was sustained by the very *negligence* that occasioned the rescuer's presence," did not apply to injuries caused by gross negligence or intentional torts). As we were in *Argueta*, here we are confronted with the breadth of the term "inconsistent." And we refuse to engage with this term inconsistently. In *Argueta*, we held that we could not extend the term beyond what it meant in *Velarde*. In *Velarde*, the term "inconsistent" was used by this court to describe a defendant that presented two contradictory versions to what happened in that case. *Argueta*, 2020 UT 41, ¶ 51; *Velarde*, 675 P.2d at 1195. In *Argueta*, we refused to apply that language when the versions that the defendant told were "reconcilable." *Argueta*, 2020 UT 41, ¶ 53. Similarly, in *Ipsen* we refused to extend an exception that we created in *Fordham* for when one owes a duty in negligence cases beyond its original scope. That was because the "concerns" that required the exception in ordinary negligence cases did "not apply when it [came] to gross negligence and intentional torts." *Ipsen*, 2020 UT 30, ¶ 13. We accordingly rejected the dissent's idea there that our use of the term "negligence," "sweep[s] more broadly—in a manner that covers . . . gross negligence." *Id.* ¶ 33 (Lee, A.C.J., dissenting). *See also McNeal*, 44 A.3d at 992 (holding that a decision that discussed "inconsistent verdicts"—*Price*, 949 A.2d at 622—did not apply to factually inconsistent verdicts because its rationale extended only to legally inconsistent verdicts).

¶45 In *Argueta* and *Ipsen*, we examined whether our past precedents could be logically applied to the circumstances before us, given their *rationale*. Although it may seem that our refusal to apply the past precedents turned on the facts of those past precedents, that was not the case, and, under principles of *stare decisis*, we reject such a fact-based basis for not applying past precedents. *See, e.g., Neese v. Utah Bd. of Pardons and Parole*, 2017 UT 89, ¶ 58, 416 P.3d 663 ("In short, respect for stare decisis requires us to 'extend a precedent to the conclusion mandated by its rationale.'" (citation omitted)). We continue applying this approach consistently here. *Stewart*, like *Velarde* and *Fordham* used a general "umbrella" term that could linguistically encompass the situation before us. But whether we apply past opinions turns on the rationale of those opinions—not merely on their use of less-than-clear terms. And so, our use of the general term "inconsistent verdicts" in *Stewart*, and our unfortunate use of case law about *legally impossible* verdicts in a case about a *factually inconsistent* verdict should not be weaponized to thwart the simple truth: *Stewart* said nothing about our treatment of legally impossible verdicts.

¶46 To summarize, our case law about factually inconsistent verdicts says nothing about legally impossible verdicts and is thus beside the point.

II. THE REMEDY: USING OUR SUPERVISORY AUTHORITY TO VACATE LEGALLY IMPOSSIBLE VERDICTS

¶47 Holding that legally impossible verdicts cannot stand, we turn now to how we implement our holding. We do so through our constitutionally granted supervisory authority. We first explain that there is currently no procedure that allows a court to vacate a legally impossible verdict. We next explain our prerogative to use our supervisory authority and why it is prudent to do so in this case. Finally, we set out a rule that requires the vacatur of legally impossible verdicts like Terry's.

¶48 There is currently no procedural rule that specifically allows a trial or an appellate court to vacate a verdict because it is legally impossible. True, Utah Rule of Criminal Procedure 23 allows a trial court to "arrest judgment" for "good cause." This rule could arguably be used to vacate legally impossible verdicts. But there's one problem with that logic. The invalidity of legally impossible verdicts in which a defendant is acquitted on the predicate offense but convicted on the compound offense is based on them being erroneous as a matter of law. In contrast, our cases on rule 23 motions to arrest judgment have repeatedly held that a "court may only

reverse a jury verdict when 'the evidence is sufficiently inconclusive or inherently improbable such that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime for which he or she was convicted.'" *State v. Robbins*, 2009 UT 23, ¶ 14, 210 P.3d 388 (quoting *State v. Bluff*, 2002 UT 66, ¶ 63, 52 P.3d 1210). This dissonance means that rule 23 is not an adequate route for the invalidation of legally impossible verdicts in which a defendant is acquitted on the predicate offense but convicted on the compound offense.

¶49 Because of the lack of any existing procedural avenue, we turn to our constitutionally sanctioned supervisory authority over criminal and civil trials. *See* UTAH. CONST. art. VIII, § 4 ("The Supreme Court shall adopt rules of procedure and evidence to be used in the courts of the state and shall by rule manage the appellate process."); *State v. Thurman*, 846 P.2d 1256, 1266 (Utah 1993) ("In Utah, the supreme court has [an] . . . inherent supervisory authority over all courts of this state.").

¶50 We can use our constitutionally granted supervisory authority through our appellate procedure. We have done so many times, with the purpose of "get[ting] the law right." *McDonald v. Fid. & Deposit Co. of Md.*, 2020 UT 11, ¶ 33, 462 P.3d 343. After all, "[i]t is our *province* and *duty* to say what the law is." *Id.* (emphasis added); *see also, e.g.*, *State v. Argueta*, 2020 UT 41, ¶¶ 33–34, 469 P.3d 938 (clarifying our doctrine-of-chances analysis although we "recently charged our advisory committee on the Utah Rules of Evidence to propose recommendations to address this issue" because it was necessary in that case and because it is our role to "clarify[] the doctrine's application in our case law, as relevant issues come up"); *State v. Guard*, 2015 UT 96, ¶¶ 1, 4, 371 P.3d 1 (describing the change that we announced regarding the reliability of eyewitness expert testimony (moving from a "de facto presumption against their admission" to holding them "reliable and helpful") in *State v. Clopten*, 2009 UT 84, ¶¶ 30, 49, 223 P.3d 1103, as a "new rule[] of criminal procedure announced in [a] judicial opinion[]"); *Manning v. State*, 2005 UT 61, ¶¶ 29, 31, 122 P.3d 628 (formulating a rule—which later became rule 4(f) of the Utah Rules of Appellate Procedure—that allowed defendants to file motions to "reinstate the time frame for filing a direct appeal"); *State v. Brown*, 853 P.2d 851, 856–57 (Utah 1992) (holding that "as a matter of public policy and pursuant to our inherent supervisory power over the courts, as well as our express power to govern the practice of law, counsel with concurrent prosecutorial obligations may not be appointed to defend indigent persons," and as a result "revers[ing] [the] conviction and order[ing]

a new trial"); *State v. James*, 767 P.2d 549, 557 (Utah 1989) (invoking this court's "inherent supervisory power over trial courts" to order the bifurcation of hearings when evidence of prior convictions is introduced at first-degree murder trials and to remand the case to "proceed in accordance with" that holding); *see also State v. Bennett*, 2000 UT 34, ¶ 13, 999 P.2d 1 (Durham, A.C.J., concurring in the result) (listing cases recognizing and applying our "supervisory power" on appeal to articulate new criminal procedural rules).

¶51 It is true that, at times, referring the drafting of rules to our advisory committees is the prudent path to take in rulemaking. *See Cougar Canyon Loan, LLC v. Cypress Fund, LLC*, 2020 UT 28, ¶ 15, 466 P.3d 171. But it is not a mandatory path. *Compare State v. Perea*, 2013 UT 68, ¶¶ 137–38, 322 P.3d 624 (Lee, J., concurring) (advocating against this court's rulemaking during an appellate case), *with Manning*, 2005 UT 61, ¶ 31 (unanimously doing exactly what Justice Lee argued in *Perea* that we should not). And our abundant case law proves clearly that exercising our supervisory authority in the appellate process is well within our wheelhouse. *See supra* ¶ 50; *see also In re K.T.B.*, 2020 UT 51, ¶ 115 n.200 (Petersen, J., concurring in the result); *id.* ¶ 123 n.201 (Lee, A.C.J., dissenting) (recognizing that "[t]his court may well have the authority to prescribe a procedural default rule that could govern in a case like this one" without any need to refer the matter to our advisory rule committee).

¶52 But exercising our supervisory authority on appeal is "especially appropriate" when we "require certain procedures" to protect "fundamental values" which would be "threatened by other modes of proceeding." *State v. Bishop*, 753 P.2d 439, 499 (Utah 1988) (Zimmerman, J., concurring in the result)*, overruled in part on other grounds by State v. Menzies*, 889 P.2d 393, 398 (Utah 1994); *see also James*, 767 P.2d at 557 (quoting Justice Zimmerman's concurrence in *Bishop*). Here, the use of our supervisory authority is needed to prevent a legally impossible verdict—an outcome "truly repugnant" to the fundamental values of our judicial system. *People v. Bullis*, 30 A.D.2d 470, 472 (N.Y. App. Div. 1968). This case neatly fits the *Bishop* articulation. What is more, we are having this conversation against the backdrop of a live controversy, in a criminal matter in which a defendant's interests are directly implicated. And "new rules of criminal procedure announced in judicial decisions apply retroactively to all cases pending on direct review," *Guard*, 2015 UT 96, ¶ 61, including the case in which the court announces them. *See, e.g.*, *Clopten*, 2009 UT 84, ¶¶ 30, 49 (reversing a "de facto presumption against the admission of eyewitness expert testimony" because such testimony is "reliable and helpful" and "vacat[ing] [the defendant's]

conviction and remand[ing] for a new trial in accordance with our decision"); *Manning*, 2005 UT 61, ¶ 32 (implementing a procedural rule that this court announced in that case). In this posture, a reference to our advisory committee in this case is akin to "a shrug of the judicial shoulders," *State v. Halstead*, 791 N.W.2d 805, 815 (Iowa 2010), and would be unconscionable.

¶53 We accordingly hold today that upon an allegation of a legally impossible verdict by a jury, in which a defendant is acquitted on the predicate offense but convicted on the compound offense, the reviewing court (whether it be the trial court or on appeal) should look into the elements of the crime, the jury verdicts, and the case's instructions. *See id.*; *People v. Tucker*, 431 N.E.2d 617, 619–21 (N.Y. 1981). And if the court finds that the conviction of the compound offense is impossible in the face of an acquittal of a predicate offense, then the verdict is legally impossible and should be overturned, because "without the underlying [offense] the [compound] charge [cannot] stand." *Eaton v. State*, 438 So. 2d 822, 823 (Fla. 1983); *see also*, *e.g.*, *Cochran v. State*, 220 S.E.2d 477, 478 (Ga. Ct. App. 1975) (holding that because "the elements of the offenses of aggravated assault and criminal damage to property are different, a finding of not guilty as to one and guilty as to the other is neither inconsistent nor repugnant"); *Halstead*, 791 N.W.2d at 816 (reversing a conviction of a compound offense because the "jury simply could not convict [the defendant] of the compound crime of assault while participating in a felony without finding him also guilty of the predicate felony offense of theft in the first degree" (footnote omitted)); *People v. Delee*, 108 A.D.3d 1145, 1148 (N.Y. App. Div. 2013) ("[B]ased on our review of the elements of the offenses as charged to the jury, we conclude that the verdict is inconsistent, i.e., 'legally impossible.'").

¶54 Our decision today is a policy pronouncement of a narrow scope. It is limited to legally impossible verdicts in which a defendant is acquitted on the predicate offense but convicted on the compound offense. We also strongly believe that our ruling will assist in eliminating further mischief of this type. Our newly established rule will likely incentivize judges and prosecutors to use more precise jury instructions and to employ special verdict forms to help avoid the possibility of such legally impossible verdicts.

¶55 We also, however, task our advisory committee to establish a rule that reflects our decision today. We have done this before. *See Manning*, 2005 UT 61, ¶ 31 (After our decision in *Manning*, which established a new rule that allows defendants to move to reinstate their right to appeal, our advisory committee formulated a rule—rule 4(f) of the Utah Rules of Appellate Procedure—reflecting our

¶56 appellate-driven rulemaking. *See* UTAH R. APP. P. 4(f) advisory committee's note ("Paragraph [4](f) was adopted to implement the holding and procedure outlined in *Manning v. State*."); s*ee also* UTAH R. CIV. P. 7 advisory committee's note (explaining that a "major objective of the 2015 amendments [was] to continue the policy of clear expectations of the parties established in" a line of this court's cases). In this vein, we recognize that our reasoning today may extend to some other types of inconsistent verdicts—not covered by this case or *Stewart*. If it truly is the case that persuasive arguments can be made against other forms of inconsistent verdicts, we should not be opposed to hearing them. Our advisory committee should therefore consider other forms of inconsistencies in its deliberations. In any case, our self-imposed procedure—unlike a constitutional or statutory limit—should not prevent us from delivering justice today.

CONCLUSION

¶57 A jury simply could not both convict Terry of the compound offense of domestic violence in the presence of a child and acquit him of the predicate offense of domestic violence assault. Such a verdict cannot stand as a matter of law. We use our constitutionally granted supervisory authority to establish a rule by which such verdicts must be overturned, and we refer the issue of inconsistent verdicts to our advisory committee for consideration in accordance with this opinion. Given this resolution, we reverse and vacate Terry's conviction of the compound offense.

JUSTICE PETERSEN, dissenting:

¶58 The majority holds that Utah courts must overturn a conviction if the jury's verdict is "legally impossible," meaning that the jury acquitted the defendant of a predicate offense but convicted on a related compound offense. As an appellate court, we must ensure that a trial court's jury instructions and rulings were not infected with legal error when a defendant raises such a challenge. Likewise, when the issue is raised, we must ensure that a conviction was supported by sufficient evidence. We make these assessments on each challenged count independently. But the majority's holding requires Utah courts to conduct a novel kind of review—assessing the validity of one count based on the jury's verdict on another count. Deriving meaning from an internal contradiction in a jury verdict is guesswork. To open the door to this practice is to replace the jury's collective judgment with a speculative judicial presumption and diminish the finality of jury verdicts. We should resist this temptation

and continue to review challenged counts independently based upon the trial record.

¶59 I agree that the verdict here is confounding. We have no idea why the jury found beyond a reasonable doubt that Terry committed domestic violence in front of his child but acquitted him of domestic violence based on the same facts. What we do know is that Terry does not challenge the relevant jury instructions or complain of any other legal error at trial. And we know that Terry does not dispute that Pleasant Grove put on sufficient evidence in support of the conviction. Accordingly, viewed independently, Terry's conviction is undisputedly valid. But Terry argues, and the majority agrees, that his conviction for committing domestic violence in front of a child should be overturned because it is in legal conflict with the jury's acquittal on a separate count of domestic violence.

¶60 Importantly, neither the United States Constitution, the Utah Constitution, nor the Utah Code have been read to require that an inconsistent but otherwise valid conviction be overturned. *See, e.g.*, *United States v. Powell*, 469 U.S. 57, 65 (1984) ("Inconsistent verdicts therefore present a situation where 'error,' in the sense that the jury has not followed the court's instructions, most certainly has occurred, but it is unclear whose ox has been gored. Given this uncertainty, and the fact that the Government is precluded from challenging the acquittal, it is hardly satisfactory to allow the defendant to receive a new trial on the conviction as a matter of course. . . . [N]othing in the Constitution would require such a protection, and we therefore address the problem only under our supervisory powers over the federal criminal process."). The majority acknowledges this but determines that we should prohibit a "legally impossible" verdict pursuant to our power to supervise the courts.

¶61 The United States Supreme Court has rejected such an approach because it is based on speculation and departs from the foundational principle that courts should review each count of conviction independently. In *Dunn v. United States*, the defendant was convicted of "maintaining a common nuisance by keeping for sale at a specified place intoxicating liquor," but was acquitted of possessing or selling such liquor. 284 U.S. 390, 391–92 (1932). In affirming the conviction, the Court explained, "Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment." *Id.* at 393. And the Court reasoned, "The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt." *Id.* (citation omitted).

¶62 The Court reaffirmed this holding in *Powell*, in which the defendant was convicted of using the telephone to commit, cause, and facilitate a conspiracy to possess with intent to distribute cocaine, but was acquitted of conspiring to possess with intent to distribute such cocaine. 469 U.S. at 59–60. In *Powell*, the Court rejected the argument that the majority embraces today:

> [T]he argument necessarily assumes that the acquittal on the predicate offense was proper—the one the jury "really meant." This, of course, is not necessarily correct; all we know is that the verdicts are inconsistent. The Government could just as easily—and erroneously—argue that since the jury convicted on the compound offense the evidence on the predicate offense must have been sufficient.

Id. at 68. The Court stated emphatically that "[t]he rule established in *Dunn v. United States* has stood without exception in this Court for 53 years. If it is to remain that way, and we think it should, the judgment of the Court of Appeals must be *[r]eversed*." *Id.* at 69. The rule has now stood for eighty-eight years.

¶63 We have adopted the Supreme Court's reasoning in the context of factually inconsistent verdicts. *See State v. Stewart*, 729 P.2d 610, 612-14 (Utah 1986) (per curiam). In *Stewart*, four co-defendants were tried for the stabbing death of a fellow prison inmate based on similar evidence, but two were convicted and two were acquitted. *Id.* at 611. The two convicted defendants appealed, arguing that the verdicts were so "obviously inconsistent that they demonstrate an insufficiency of the evidence." *Id.*

¶64 We rejected that argument. *Id.* In doing so, we employed the rationale of *Dunn* and *Powell*. We determined that the evidence in support of the convictions was sufficient and observed that our review of one count of conviction "should be independent of the jury's determination that evidence on another count was insufficient." *Id.* at 613 (quoting *Powell*, 469 U.S. at 67). Further, we explained that once the prosecution has "convince[d] the jury with its proof, and . . . satisf[ied] the courts that given this proof the jury could rationally have reached a verdict of guilt beyond a reasonable doubt[,] [w]e do not believe that further safeguards against jury irrationality are necessary," *id.* (quoting *Powell*, 469 U.S. at 67).

¶65 And we rejected the premise that we should accept the jury's acquittals over its guilty verdicts. We stated:

> Appellant argues that because the evidence must have been insufficient as to the acquitted defendants, it was

> just as insufficient as to the convicted defendants. Therefore, appellant concludes, the jury's verdict as to all the defendants must really be interpreted as an acquittal. However, the prosecution could just as logically and erroneously reason that because the evidence is "in effect the same," the guilty verdicts indicate the jury's true intentions and the verdicts of acquittal should be reversed.

Id. at 613 n.1 (quoting *Powell*, 469 U.S. at 68).

¶66 I agree with the majority that our decision in *Stewart* does not control our decision today. A legally contradictory verdict may present us with different considerations than a factually inconsistent verdict, and it is fair to analyze whether the rationale of *Stewart* should extend to the facts here. But I find the reasoning of *Stewart* to offer persuasive insight that we should not easily dismiss.

¶67 Specifically, there is a sound basis for our practice of reviewing each challenged count of conviction independently. It properly confines us to the trial record. And it prevents us from basing legal conclusions on speculative presumptions about the jury's intentions. As the Tenth Circuit has explained, "We cannot properly draw from the acquittal on Count II any inference regarding the basis of the jury's conviction on Count I." *United States v. Espinoza*, 338 F.3d 1140, 1148 (10th Cir. 2003).

¶68 We simply do not know which side was harmed in the event of an inconsistent verdict because we do not know why the jury made the decisions it did. Such verdicts "should not necessarily be interpreted as a windfall to the Government at the defendant's expense. It is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense." [18] *Powell*, 469 U.S. at 65.

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[18] The *Powell* Court discussed further the possibility that inconsistent verdicts may generally favor criminal defendants, observing "*Dunn's* alternative rationale" that "such inconsistencies often are a product of jury lenity." *United States v. Powell*, 469 U.S. 57, 65 (1984). The Court noted that "*Dunn* has been explained by both courts and commentators as a recognition of the jury's historic function, in criminal trials, as a check against arbitrary or oppressive exercises of power by the Executive Branch." *Id.* (citations omitted).

(continued . . .)

¶69 Although we can only guess why the jury here returned the verdicts it did, the majority's solution is to effectively presume that the jury "really meant" the acquittal and to therefore overturn the conviction. The majority concludes this is preferable because it furthers the principle that "[i]t is better that ten guilty persons escape than one innocent suffer." *Supra* ¶ 25 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *352). The majority argues that to let the conviction stand is to presume "unlawful acquittal," *supra* ¶ 25, and that the jury "'engage[s] in an act of lenity when it acquit[s] the defendant' of a predicate offense but convicts the defendant of the compound one." *Supra* ¶ 32 (citation omitted).

¶70 But that is not so. Analyzing separate counts independently makes no presumption in either direction. It simply allows the jury's verdict to stand on each count as-is, as long as it is otherwise valid. So here, Terry "is given the benefit of [the] acquittal on the counts on which [he] was acquitted," and "accept[s] the burden of conviction on the counts on which the jury convicted." *Powell*, 469 U.S. at 69. In contrast, the majority's approach requires a portion of the jury's verdict to be discarded—replaced by a reviewing court's presumption that the jury's determination of guilt beyond a reasonable doubt on one count is invalid because the jury spoke its true intentions with respect to the count of acquittal.

¶71 And it is important to remember that here, as would be the case with any conviction that is "otherwise valid," there is no legal or evidentiary challenge to the conviction on its own. The "repugnancy" that the majority speaks of is inconsistency itself. But we can only speculate as to what the inconsistency actually means.

¶72 By mandating that such jury verdicts be overturned by reviewing courts, the majority weakens our longstanding and deep reluctance to disturb the finality of a jury verdict. "[O]nce the jury has heard the evidence and the case has been submitted, the litigants must accept the jury's collective judgment. . . . [T]hrough this deference the jury brings to the criminal process, in addition to the

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Here, it is possible that the jury felt the City's decision to charge Terry with both domestic violence and domestic violence in the presence of a child was overkill, and therefore chose to convict him of only one. This seems a more likely explanation than animus. *See supra* ¶ 32 n.15. But my primary point is that we simply do not know.

collective judgment of the community, an element of needed finality." *Id.* at 67 (citations omitted).

¶73 The rule the majority announces today is admittedly a narrow one. But the majority also says, "We routinely overturn trial courts' decisions for legal errors. We should do the same when a jury makes a legal error." *Supra* ¶ 27. And it invites our advisory committee to "consider other forms of inconsistencies in its deliberations." *Supra* ¶ 55. This foreshadows a willingness to expand the practice of appellate courts (or trial courts faced with a motion for a new trial) comparing counts against one another and applying groundless presumptions about what the jury must have meant. The potential for this is high, as verdicts can be legally and factually inconsistent in various ways and to different degrees.

¶74 For example, in his dissent in *Dunn*, Justice Butler criticized the "repugnancy" of all manner of inconsistent verdicts. 284 U.S. at 399–407 (Butler, J., dissenting). He argued that "[i]n criminal cases no form of verdict will be good which creates a repugnancy or absurdity in the conviction." *Id.* at 400. He explained that for an offense requiring the participation of two or more, if one person were convicted and the others acquitted, the verdict would be "deemed wholly repugnant and invalid." *Id.* at 402 (citation omitted). In another example he argued, "On indictment of riot against three," a verdict finding less than three defendants guilty is void, "for more than two must riot." *Id.*

¶75 But if we set out to correct inconsistencies by comparing separate counts and making a presumption about "Count II" based on the jury's decision on "Count I," we replace the jury's collective judgment with judicial speculation. The majority disagrees, asserting that no speculation or inquiry into the jury's deliberations is required because a reviewing court will be able to spot a legal impossibility on the face of the verdict. *Supra* ¶ 33. But this does not resolve my critique. While the reviewing court may not be piercing jury deliberations to find the jury's true intent, it goes a step further and presumes it knows the answer.

¶76 We should not draw from a jury's decision to acquit on one count an inference regarding its decision to convict on a separate count. Assessing Terry's conviction for domestic violence in the presence of a child independently, there is no dispute that it is valid. I would affirm.

TAB 3

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 3A – DUI Instructions (1000 series):** Judge McCullagh
  Elements Instructions (CR1003, CR1004, CR1005) – one comment

- **Tab 3B – Assault Instructions (1300 series):** Sandi Johnson
  CR1301 – four comments
  CR1302 – two comments
  CR1320 – two comment
  CR1322 – two comments

- **Tab 3C – Homicide Instructions (1400 series):** Karen Klucznik, Mark Field
  CR1411 – two comments
  CR1451, CR1452, SVF1450 – three comments

- **Tab 3D – Sexual Offenses Instructions (1600 series):** Sandi Johnson
  CR1601 – three comments
  CR1613, SVF1613 – two comments
  CR1616A – four comments

- **Tab 3E – Defense of Habitation / Self / Others (500 series):** Karen Klucznik
  CR520 through CR523 – two comments
  CR530 through CR533 – four comments

- **Tab 3F – Miscellaneous Instructions:** by committee at future meeting
  CR411 – two comments
  In General – one comment

TAB 3A

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 3B

Public Comment:
Assault Instructions (1300 series)

NOTES:

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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:

Addressed at 10/07/2020 meeting (other than for CR1322, which is under consideration at the 11/04/2020 meeting)

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:

SANDI: I don't think it matters either way — "act" means a voluntary bodily movement and includes speech.

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.*

SANDI: Although I would agree, I think that adding the actual definitions would get too unwieldy. For example, there are a lot of ways that a peace officer can be defined; an SFO has fifteen different examples. Instead, perhaps the better approach would be to insert brackets, as listed above. I also think we could remove these definitions in their entirety, as they are statutorily based and rarely used.

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).*

SANDI: I also think we could remove these definitions in their entirety, as they are statutorily based and rarely used.

"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.*

SANDI: I think that a special verdict form is the better approach on these (see materials at the end of Tab 3B)

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.

Addressed at the September 7, 2020 meeting, where the committee decided it had previously considered this specific recommendation and intentionally adopted the approach reflected in the current instructions.

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Structure of CR1302 and CR1320 – Assault Enhancements

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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.*

SANDI: I agree with Mr. Hemingway's analysis, which is why I believe we wrote all of the instructions without a mental state. However, there is no clear case law or statute, so arguably this is still an open question. State v. Vigil is addressing the "attempt" statute in the context of murder. I would note that Casey held attempts could only be for intentional crimes, not reckless or knowing. Casey was then overruled by the statutory change, which includes knowing. See footnote 4 from the Vigil decision in materials at end of Tab 3B.

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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.

==========

See materials at the end of Tab 3B

CR1322 – Eliminate duplicative element re: bodily injury?

==========

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

NEW MATERIALS UNDER TAB 3B

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INSTRUCTION
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CR1322 Aggravated Assault – Targeting Law Enforcement Officer.

(DEFENDANT'S NAME) is charged [in Count ____] with committing Aggravated Assault – Targeting a Law Enforcement Officer [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) intentionally, knowingly, or recklessly
   a. committed an act with unlawful force or violence ~~that~~by
   ~~b. caused bodily injury to (VICTIM'S NAME) by:~~
      i. [use of a dangerous weapon; or]
      ii. [interfering with the breathing or the circulation of blood of (VICTIM'S NAME) by use of unlawful force or violence that was likely to produce a loss of consciousness by:
         A. applying pressure to the neck or throat of (VICTIM'S NAME); or
         B. obstructing the nose, mouth, or airway of (VICTIM'S NAME); or]
      iii. [other means or force likely to produce death or serious bodily injury]; and
2. (DEFENDANT'S NAME)'s actions caused serious bodily injury; and
3. (DEFENDANT'S NAME) intentionally, knowingly, or recklessly committed the offense against a law enforcement officer; and
4. (DEFENDANT'S NAME) intentionally or knowingly acted in furtherance of political or social objectives in order to intimidate or coerce a civilian population or to influence or affect the conduct of a government or a unit of government; [and]
5. [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 § 76-5-103

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SPECIAL VERDICT FORM INSTRUCTION
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CR ____ Targeting a Law Enforcement Officer – Special Verdict Instructions

If you find (DEFENDANT'S NAME) guilty of Aggravated Assault, you must determine whether (DEFENDANT'S NAME) Targeted a Law Enforcement Officer and caused Serious Bodily Injury at the time of this offense. To find (DEFENDANT'S NAME) Targeted a Law Enforcement Officer and caused Serious Bodily Injury, you must find beyond a reasonable doubt

1) The aggravated assault resulted in serious bodily injury;
2) The defendant knowingly used force against a law enforcement officer; and
3) The defendant's use of force was in furtherance of political or social objectives in order to intimidate or coerce a civilian population or to influence or affect the conduct of a government or a unit of government.

The State must prove beyond a reasonable doubt that (DEFENDANT'S NAME) Targeted a Law Enforcement Officer and caused Serious Bodily Injury. Your decision must be unanimous and should be reflected on the special verdict form.

==========
SPECIAL VERDICT FORM
==========

We, the jury, have found the defendant, (DEFENDANT'S NAME), guilty of Aggravated Assault, as charged in Count(s) [#,#,#]. We also unanimously find the State:

- ☐ has
- ☐ has not

proven beyond a reasonable doubt (DEFENDANT'S NAME) Targeted a Law Enforcement Officer and caused Serious Bodily Injury at the time of [this][these] offense(s).

==========
PUBLIC COMMENTS
==========

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*
SANDI: I would agree with these comments

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FOOTNOTE 4 FROM *VIGIL*
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"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. See Criminal Law § 34, at 237, 240-41. In general, HN16 mens rea means "guilty mind," that attribute which, along with physical conduct, was required for criminal liability under common law, see id. § 27, at 191-92, and is now required by statute except for strict liability offenses. See Utah Code Ann. § 76-2-101(1) ("No person is guilty of an offense unless his [or her] conduct is prohibited by law and . . . he [or she] acts intentionally, knowingly, recklessly, with criminal negligence, or with a mental state otherwise specified. . . ."). HN17 The mens rea is the mental state required in all homicide offenses for criminal liability. See id. § 76-2-102 ("Every offense not involving strict liability shall require a culpable mental state. . . ."); id. § 76-5-201 ("A person commits criminal homicide if he [or she] intentionally, knowingly, recklessly, with criminal negligence, or acting with a mental state otherwise specified in the statute defining the offense, causes the death of another human being, including an unborn child.").

Occasionally, an offense may require a certain mental state for an attendant circumstance. For example, under section 76-5-202(1)(k) of the current Code, a person is guilty of aggravated murder ("first degree murder" under the 1990 statute) if he or she intentionally or knowingly causes the death of a police officer acting in an official capacity and the person knew or "reasonably should have known" that the decedent was a police officer. Id. § 76-5-202(1)(k). The mens rea element for this offense is intent or knowledge, whereas the attendant circumstance that the decedent was a police officer requires at least a negligent mental state. Some offenses do not have attendant circumstances, such as the intentional or knowing formulation of murder ("second degree murder" under the 1990 statute), which requires only conduct that intentionally or knowingly causes the death of another. Id. § 76-5-203(1)(a). Other offenses that do have attendant circumstances may not require a mental state for one or all of those circumstances. An example of the latter type of offense is the depraved indifference formulation of murder, which requires that the defendant act "under circumstances evidencing a depraved indifference to human life." Id. § 76-5-203(1)(c). The defendant's mental state under this provision is irrelevant to the determination of this attendant circumstance; it refers solely to objective circumstances. Fontana, 680 P.2d at 1045, 1047. See generally Criminal Law § 27, at 194-95.

State v. Vigil, 842 P.2d 843, 845 (Utah 1992)

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DEFINITION OF “PEACE OFFICER
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[“Peace officer” means:

1) a law enforcement officer, ~~certified~~ defined as [insert appropriate definition applicable under Section 53-13-103];
2) a correctional officer, defined as [insert appropriate definition applicable under Section 53-13-104];
3) a special function officer, defined as [insert appropriate definition applicable under Section 53-13-105]; or
4) a federal officer, defined as [insert appropriate definition applicable under Section 53-13-106.]]

Reference: Utah Code § 76-5-102.4(1)(c)

TAB 3C

Public Comment:
Homicide Instructions (1400 series)

NOTES:

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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.~~

This was addressed and resolved at the 09/02/2020 meeting.

~~***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

==========

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

==========

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*

NEW MATERIALS UNDER TAB 3C

CR1411A - Additional instruction when felony murder is charged

To convict (DEFENDANT'S NAME) of murder based on [a predicate offense(s)], you must find that (DEFENDANT'S NAME) acted with the intent required to commit [the predicate offense(s)].

A person acts with the intent to commit [the first predicate offense] if [he/she] [set out statutory intent required to commit the predicate offense].

A person acts with the intent to commit [the ~~first~~ second predicate offense] if [he/she] [set out statutory intent required to commit the predicate offense].

COMMITTEE NOTE

Example 1:

To convict (DEFENDANT'S NAME) of murder based on robbery, you must find that (DEFENDANT'S NAME) acted with the intent required to commit robbery.

A person acts with the intent to commit robbery if he

a. intentionally takes or attempts to take personal property in the possession of another from his person, or immediate presence, against his will, by means of force or fear, and with a purpose or intent to deprive the person permanently or temporarily of the personal property; or

b. intentionally or knowingly uses force or fear of immediate force against another in the course of committing a theft or wrongful appropriation.

Example 2:

To convict (DEFENDANT'S NAME) of murder based on a predicate offense, you must find that (DEFENDANT'S NAME) acted with the intent required to commit the predicate offense.

Here, the predicate offenses alleged are rape and forcible sexual abuse.

A person acts with the intent to commit rape if he intentionally, knowingly, or recklessly has sexual intercourse with another person without that person's consent and he acts intentionally, knowingly, or recklessly with respect to that person's lack of consent.

A person acts with the intent required to commit forcible sexual abuse if he

a. Intentionally, knowingly, or recklessly:
   i. touched the skin of ([VICTIM'S NAME] [MINOR'S INITIALS])'s anus, buttocks, or genitals; or
   ii. touched the skin of ([FEMALE VICTIM'S NAME] [FEMALE MINOR'S INITIALS])'s breast; or
   iii. took indecent liberties with ([VICTIM'S NAME] [MINOR'S INITIALS]); or caused a person to take indecent liberties with (DEFENDANT'S NAME) or another; AND
b. acted with intent, knowledge or recklessness that (VICTIM'S NAME) did not consent; AND
c. acted with the intent to
   i. cause substantial emotional or bodily pain to any person, or
   ii. arouse or gratify the sexual desire of any person

TAB 3D

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.~~*

This was addressed and resolved at the 09/02/2020 meeting.

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

==========

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.

==========-

CR1616A "Sexual Intercourse" for certain offenses

==========

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.*

NEW MATERIALS UNDER TAB 3D

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CR1601 – Definitions: "indecent liberties"

==========

~~***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.*~~ *Addressed at 9/2/20 Meeting*
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.

I do not believe we should include the definition of "penetration" or "touching" as each crime has a different "definition" depending upon whether it is an adult or child, and only certain child crimes. Also, I believe that we incorporated the differences (touching, even through clothing, penetration = touching, etc.) into the actual elements instructions so that we did not need a different definition.

==========

CR1601 – Definitions / CR1613: use of "victim"

==========

I do not believe that the definition needs to be changed. This is a definition jury instruction. In State v. Vallejo, the police officer specifically referred to the witnesses as "victims". The Court's concern was primarily having someone "opine" that a witness was in fact a "victim." I do not see that to be an issue in how we have constructed the instruction or the committee note. I suppose if practitioners were really concerned, they could substitute the victim initials for "victim" but that should be left up to them.

As for the committee note, I would simply delete "impermissibly"

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."

CR1601

["Dangerous weapon" means:

1. any item capable of causing death or serious bodily injury; or
2. a facsimile or representation of the item, if:

a. the actor's use or apparent intended use of the item leads the victim to reasonably believe the item is likely to cause death or serious bodily injury;

b. or the actor represents to the victim verbally or in any other manner that he is in control of such an item.]

Reference: Utah Code § 76-1-601

Committee Note: In regard to in subpart 2.a. and 2.b. of the definition of "dangerous weapon," the committee considered the use of the word "victim" in light of *State v. Vallejo*, 2019 UT 38, ¶¶ 99-102, but chose to preserve the language set forth in the statute. Any 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.

CR1613

5.f. [(DEFENDANT'S NAME) committed a similar sexual act upon two or more victims at the same time or during the same course of conduct];

Committee Note: In regard to subpart 5.f., the committee considered the use of the word "victims" in light of *State v. Vallejo*, 2019 UT 38, ¶¶ 99-102, but chose to preserve the language set forth in the statute. Any attempt to alter the instruction in an effort to avoid the use of the word "victims" appears to ~~impermissibly~~ change the meaning of the statute.

==========

CR1613 / SVF1613 – Aggravated Sexual Abuse of Child

==========

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.

So we had two ways that someone could get to Aggravated Sexual Abuse of a Child. They could find the defendant guilty of Sexual Abuse of a Child under CR1612 and then use the SVF1613; or they could use the elements instruction for Aggravated Sexual Abuse of a Child under CR1613 and then for clarity sake if there is more than one aggravating factor, use SVF1613. I don't know that we need to change anything.

We could add a committee note to CR1612 that reads: Practitioners may choose to use either CR1612 or CR1613 in combination with SVF1613 when the offense is Aggravated Sexual Assault, depending upon the circumstances of the case.

==========-

CR1616A "Sexual Intercourse" for certain offenses

==========

CR1616A Conduct Sufficient to Constitute Sexual Intercourse for Unlawful Sexual Activity with a Minor, Unlawful Sexual Conduct with a 16 or 17 year old, or Rape.

You are instructed that any sexual penetration of the penis between the outer folds of the labia, however slight, is sufficient to constitute "sexual intercourse" for purposes of the offense of [Unlawful Sexual Activity with a Minor] [Unlawful Sexual Conduct with a 16 or 17 Year Old] [Rape].

In any prosecution for:

(a) the following offenses, any sexual penetration, however slight, is sufficient to constitute the relevant element of the offense:

(i) unlawful sexual activity with a minor, a violation of Section 76-5-401, involving sexual intercourse;

(ii) unlawful sexual conduct with a 16 or 17 year old, a violation of Section 76-5-401.2, involving sexual intercourse; or

(iii) rape, a violation of Section 76-5-402; or

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…?*

I am not sure I understand this comment. There is no part (c) for any of these crimes

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*

The case law specifically states that under Section 407, which this is, that the definition is outer folds of the labia. No changes necessary I believe.

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.*

The case law specifically states that under Section 407, which this is, that the definition is outer folds of the labia. No changes necessary I believe. Although generally he is right, that we should not use sufficiency cases, in these cases it wasn't the "sufficiency" part that the committee relied upon. Instead it was the specific definition that the court noted.

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.*

I do not know that I am comfortable changing the language in 1613 and 1601 to reflect this. The case law specifically states that under Section 407, Object rape, or rape, that the definition of "penetration" is outer folds of the labia. 1613 is Aggravated Sexual Abuse of a Child, and the aggravating factor of whether the defendant caused the penetration of the "genital or anal opening". Although I do not believe that the courts would find the definition

of "penetration" to be any different in that statute, there is no specific case that states it, so I would not change the other definitions. I think we discussed this at the time and decided not to and I see no reason to change that decision.

"Penetration" was first defined by our case law in *State v. Simmons*, 759 P.2d 1152 (Utah 1988), in the context of rape of a child. *Id.* at 1153-54. The definition was then extended to object rape in *State v. Patterson*, 2017 UT App 194, 407 P.3d 1002. *Id.* ¶ 3. These cases hold that "penetration" in both the rape and object rape context means "entry between the outer folds of the labia." *Id.* (cleaned up).

State v. Heath, 2019 UT App 186, P61, 453 P.3d 955, 971, 2019 Utah App. LEXIS 191, *33

The first question is the definition of "penetration." If that term requires entry into the vaginal canal of the victim, there is no question that the evidence here is insufficient. This Court has never expressly addressed the question of whether "penetration" requires proof that the penis of the defendant or, in the case of object rape, the object being used to commit the rape, entered the vaginal canal of the victim or whether it is sufficient if it is merely inserted between the outer folds of the victim's labia. However, the generally accepted rule is that ***HN2*** entry between the outer folds of the labia is sufficient to constitute "penetration" as that term is commonly used in defining the crime of rape. *See* 65 Am. Jur. 2d *Rape* § 3 (1972). Our prior decisions are entirely consistent with this proposition. *See State v. Warner,* 79 Utah 500, 505-06, 291 P. 307, 309 (1930), *vacated on other [**3] grounds,* 79 Utah 510, 13 P.2d 317 (1932) (citing *Reg. v. Lines,* 1 Car. & K. 393 (O.S.C. 1844)). We therefore declare it to be the definition of penetration under section 76-5-407.

State v. Simmons, 759 P.2d 1152, 1154, 1988 Utah LEXIS 67, *2-3, 86 Utah Adv. Rep. 12

TAB 3E

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

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

CR520-CR523 – Defense of Habitation

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This was addressed and resolved at the 09/02/2020 meeting.

~~***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.

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CR530-CR533 – Defense of Self or Others

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This was addressed and resolved at the 09/02/2020 meeting.

~~***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*~~

This was addressed and resolved at the 09/02/2020 meeting.

~~*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.*

NEW MATERIALS UNDER TAB 3E

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
6. any other relevant factor.

References
Utah Code § 76-2-402(1) and (5)
Amended Dates:
Approved: 03/07/2018

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

A persondefendant 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 persondefendant 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

CR533A Defense of Self or Others - No Duty to Retreat (con't)

A person 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 person is in a place where [he/she] has lawfully entered or remained.

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

OR

CR533A Defense of Self or Others - No Duty to Retreat (con't)

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

TAB 3F

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.*

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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.