

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

Via Webex  
February 10, 2021 – 12:00 p.m. to 1:30 p.m.

| <b>MEMBERS:</b>                    | <b>PRESENT</b> | <b>EXCUSED</b> | <b>GUESTS:</b>   |
|------------------------------------|----------------|----------------|------------------|
| Judge James Blanch, <i>Chair</i>   | •              |                | None             |
| Jennifer Andrus                    |                | •              |                  |
| Melinda Bowen                      | •              |                | <b>STAFF:</b>    |
| Mark Field                         | •              |                | Michael Drechsel |
| Sandi Johnson                      |                | •              |                  |
| Judge Linda Jones, <i>Emeritus</i> | •              |                |                  |
| Karen Klucznik                     | •              |                |                  |
| Elise Lockwood                     |                | •              |                  |
| Judge Brendan McCullagh            |                | •              |                  |
| Debra Nelson                       | •              |                |                  |
| Stephen Nelson                     | •              |                |                  |
| Nathan Phelps                      | •              |                |                  |
| Judge Michael Westfall             | •              |                |                  |
| Scott Young                        |                | •              |                  |

**(1) WELCOME AND APPROVAL OF MINUTES:**

Judge Blanch welcomed the committee to the meeting.  
The committee considered the minutes from the December 2, 2020 meeting.  
Ms. Klucznik moved to approve the draft minutes; Mr. Nelson seconded the motion.  
The committee voted unanimously in support of the motion. The motion passed.

**(2) UPCOMING MEETINGS SCHEDULE:**

The committee discussed the schedule for upcoming meetings. After discussion, Judge Blanch determined that the March meeting will be held on March 10 and the April meeting will be held on April 14. Staff was instructed to inform committee members via email. Staff will update the calendar invitations for those meetings.

**(3) PLEASANT GROVE CITY V. TERRY, 2020 UT 69:**

Because certain key members of the committee were not able to attend due to the short-notice rescheduling of this meeting (specifically Sandi Johnson and Elise Lockwood), it was decided that this agenda item would be moved to the next committee meeting agenda. The committee will discuss whether an instruction that reflects

the holding in this case is necessary. The committee will look to Ms. Johnson and Ms. Lockwood for their recommendation on that issue.

#### **(4) BATTERED PERSON MITIGATION (AND OTHER PARTIAL DEFENSE) INSTRUCTIONS:**

Judge Blanch turned the committee's attention to this agenda item.

##### *PARTIAL DEFENSE INSTRUCTIONS GENERALLY*

He thanked Ms. Klucznik for her memo that she distributed to the committee members via email regarding "Partial defenses / mitigation for discussion." That memo outlined the three types of defense that the committee has most recently been considering: imperfect self-defense (ISD); extreme emotional distress / mental illness mitigation (EED); and battered person mitigation (BPM). The memo identified seven questions for the committee's consideration, as well as a single-page summary dedicated to each type of defense / mitigation.

Ms. Klucznik explained her view of the issues the committee might need to address. She explained that one issue is figuring out what type of verdict needs to be entered by the jury in these types of cases. For instance, if a defendant is charged with aggravated murder, and the state fails to disprove ISD, should the jury enter a verdict for the aggravated murder AND a special verdict for the ISD? Or do they only enter a verdict for murder by applying the ISD (but without specifically mentioning that in the verdict)? Or do they enter a verdict of guilty of murder based upon the ISD (and specifically mention that in the verdict)?

On a related note, Ms. Klucznik reported that in discussing BPM with Ms. Johnson, they identified different methods of handling verdicts and verdict forms / special verdict forms. One options would be to have a verdict form for the underlying offense (if proven by the State), accompanied by a special verdict form that applies BPM (if proven by the defendant, for EED or BPM, or if disproven by the state, for ISD). One concern with that approach is Rule 21 of the Utah Rules of Criminal Procedure, which outlines verdicts.

Ms. Klucznik pointed the committee members to the two draft BPM special verdict forms in the agenda packet (pages 20 and 21). Ms. Klucznik noted that it would be strange, in the context of these partial defenses, for the special verdict forms to begin with the phrase "Having found the defendant guilty..." For that reason, these two draft forms start with "Having found the State has proved all the elements of..." Looking at the first draft form (page 20), it simply identifies whether the jury found that the defense (in this case BPM) applies. Ms. Klucznik expressed concern about whether such a formulation complies with Rule 21, since it does not actually arrive at a verdict. Instead, it simply supplies the necessary findings for a verdict to be entered without actually doing that directly. The second draft form (page 21) includes the same finding regarding whether the defense applies, but also includes a conclusion regarding the ultimate guilty verdict (to the higher or lower offense). This version of the form shows exactly what the jury intended without any guess work. In particular, in the context of aggravated murder / murder, the verdict / special verdict forms should be designed to make clear, without ambiguity, the jury's decision. As an example of the clarity Ms. Klucznik feels is necessary, she pointed to the verdict form on page 27 of the meeting materials.

Ms. Klucznik pointed out that this endeavor is complicated by the fact that the statutory language for ISD, EED, and BPM is all different. These differences are highlighted in the memo that she emailed to the committee members. She described those differences to the committee. Judge Blanch noted that the committee has previously adopted a verdict / special verdict form approach for ISD (those materials are previously published as instructions CR1450, CR1451, CR1452, and SVF1450). His recollection is that the approach espoused in those materials has been citing approvingly in appellate case law. The committee briefly discussed the appellate case law, what may have been endorsed, and what issues were actually part of the cases. Judge Blanch redirected the committee's discussion to the second draft special verdict form in the meeting materials (page 21). Judge Blanch suggested that there would need to be a verdict form regarding the charged (greater) offense. Then there

would be a second verdict form that described the jury’s findings related to any applicable partial defense(s) and the impact of those findings on the initial verdict form. Ms. Klucznik suggested that this sounds to her like the verdict form in the meeting materials (on page 27). While this verdict form is not simple, it does appear to address all of the various permutations. Ms. Klucznik noted that the one limitation of this sort of verdict form is that it doesn’t contain a separate finding as to the defense (though that may not matter so long as there is adequate explanation of the defense elsewhere in the instructions.

Mr. Phelps indicated he wasn’t convinced that Rule 21 necessarily requires a verdict form like the one found on page 21 of the meeting materials. But such a verdict form would seem to address any concerns if Rule 21 does in fact apply. Ms. Klucznik asked if Mr. Phelps had any ideas on how that particular form might handle lesser included offenses (which is one of the primary differences between the verdict forms on page 21 and page 27). Judge Blanch noted that he prefers the draft form on page 21 over the draft form on page 27, noting that there will always be complicating issues in every case, and the form on page 21 is a less complicated place from which to start addressing those unique, case-specific issues. Ms. Klucznik noted that her experience with aggravated murder / murder cases is that lesser included offenses — i.e., manslaughter — are involved more often than not.

Mr. Field pointed out that one issue with the draft form on page 27 is that it starts with one “not guilty” item, which is then followed by five “guilty” options. That may be of concern to defense attorneys simply based upon the use of “guilty” so many times in a single list. He also pointed out that some of the verdict form approaches will need some sort of roadmap instruction. If this issue is this complicated for the committee members to grapple with, the jury will like experience similar confusion. One benefit to the verdict form on page 27 is that all options are presented in a single list. Judge Blanch noted that, at least for ISD, the approach previously adopted by the committee in instructions CR1450, CR1451, CR1452, and SVF1450, is that it steers 100 miles away from allocating any burden of proof to the defendant. Ms. Klucznik explained that she would like to see the instructions for ISD, EED, and BPM use a uniform approach, if possible. Many cases will involve instructions that have to address these various partial defenses in the same instruction set. It could lead to confusion for the jury if the approach for each defense is too different.

After this discussion, the committee decided to table further consideration of this broad topic until a future meeting so that additional members of the committee could be present and share their views.

*BATTERED PERSON MITIGATION INSTRUCTIONS*

The committee then turned its attention to some of the specific proposed battered person mitigation instructions in the meeting materials, starting with “CR\_\_\_ Explanation of Battered Person Mitigation Defense” (page 16 of the meeting materials).

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**CR\_\_\_ Explanation of Battered Person Mitigation Defense**

You do not have to consider the battered person mitigation defense unless ~~if~~ you find the defendant guilty of [name applicable crime]. The battered person mitigation defense is a partial defense to [name applicable crime]. The effect of the defense is to reduce the level of the offense. Your decision will be reflected in the special verdict form titled “Special Verdict Battered Person Mitigation Defense.”

**Committee Note**

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

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

“If you find Defendant GUILTY beyond a reasonable doubt of [name applicable crime], you must decide whether the battered person mitigation defense applies and complete the special verdict form concerning that defense. The battered person mitigation defense is addressed in Instructions \_\_\_\_\_.”

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After discussion, Ms. Bowen made motion to provisionally approve the foregoing revised language (with the “Committee Note” language subject to a future decision on the more general verdict form / special verdict form issues discussed earlier in the meeting). Mr. Phelps seconded that motion. The motion passed unanimously.

The committee next turned its attention to “CR\_\_\_\_ Definition of Battered Person Mitigation Defense” (page 17 of the meeting materials). Ms. Klucznik pointed out that the definition of “clear and convincing evidence” was pulled from the model Utah civil jury instructions. The committee discussed the language and proposed changes, as follows:

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### **CR\_\_\_\_ Definition of Battered Person Mitigation Defense**

The battered person mitigation defense applies to any offense for which if you unanimously find [DEFENDANT’S NAME]the defendant has proved by clear and convincing evidence that:

1. [VICTIM’S NAME] was a cohabitant of [DEFENDANT’S NAME]The defendant committed the defense against a cohabitant;
2. [VICTIM’S NAME] The cohabitant had demonstrated engaged in a pattern of abuse against [DEFENDANT’S NAME] the defendant or another cohabitant; and
3. [DEFENDANT’S NAME] The defendant reasonably believed the offense was necessary to end the pattern of abuse.

To prove something by clear and convincing evidence, [DEFENDANT’S NAME] the defendant must present sufficient evidence to persuade you to the point that there remains no serious or substantial doubt as to the truth of the fact. Proof by clear and convincing evidence thus requires a greater degree of persuasion than proof by a preponderance of the evidence but less than proof beyond a reasonable doubt.

### **Committee Note**

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

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

“If you find Defendant GUILTY beyond a reasonable doubt of [name applicable crime], you must decide whether the battered person mitigation defense applies and complete the special verdict form concerning that defense. The battered person mitigation defense is addressed in Instructions \_\_\_\_\_.”

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After discussion, Mr. Phelps made motion to provisionally approve the foregoing revised language (with the “Committee Note” language subject to a future decision on the more general verdict form / special verdict form issues discussed earlier in the meeting). Mr. Field seconded that motion. The motion passed unanimously.

The committee next turned its attention to “CR\_\_\_\_ Definitions applicable to Battered Persons Mitigation Defense” (pages 18-19 of the meeting materials). After discussing a number of minor stylistic and punctuation issues, the committee explored the definition of cohabitant, including the use of the terms “consanguinity” and “affinity,” which could be confusing to jurors. Mr. Field also asked whether the use of the term “other party” could be replaced by “[DEFENDANT’S NAME]”. Judge Blanch wondered if that was advisable, since this is just a general definition of “cohabitant” and not an instruction that would typically be customized to the case. Judge Blanch expressed concern that by substituting names into definitions, the instruction would suggest that the definition is actually an already proved fact rather than something the jury would have to find after hearing the evidence in the case. Ultimately, the committee was unable to come to terms with any specific modifications to the proposed definition of cohabitant. The committee decided that it would probably be best to break this particular definition into even smaller units, bracket all of them, and let practitioners decide which options apply in any particular case. Ms. Klucznik offered to work with the language and the committee can revisit this instruction at the next meeting.

#### **(5) ADJOURN**

The meeting adjourned at approximately 1:30 p.m. The next meeting will be held on March 10, 2021, starting at 12:00 noon via Webex.