

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

Via WebEx  
August 4, 2021 – 12:00 p.m. to 1:30 p.m.

|       |  |  |       |              |
|-------|--|--|-------|--------------|
| 12:00 | Welcome and approval of minutes  |  | Tab 1 | Judge Blanch |
|       | Partial defense instructions (continued):<br>- <i>Imperfect self-defense</i><br>- <i>Battered person mitigation</i><br>- <i>Extreme emotional distress</i> |  | Tab 2 | Committee    |
|       | Public comment review:<br>- <i>Homicide instructions</i>   |  | Tab 3 | Committee    |
| 1:30  | Adjourn  |  |       |              |

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

**UPCOMING MEETING SCHEDULE:**

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

September 1, 2021  
October 6, 2021

November 3, 2021  
December 1, 2021

# **TAB 1**

## **Minutes – May 5, 2021 Meeting**

**NOTES:**

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

Via WebEx  
May 5, 2021 – 12:00 p.m. to 1:30 p.m.

**DRAFT**

| <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> | •              |                |                  |
| 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 March 10, 2021 meeting. Mr. Field moved to approve the draft minutes; Mr. Phelps seconded the motion. The committee voted unanimously in support of the motion. The motion passed.

**(2) ADVERSE INSTRUCTION RE: BODY-WORN CAMERAS:**

Judge Blanch turned the committee’s attention to agenda item #4 and invited Mr. Nelson to introduce the proposed instruction to the committee members. Mr. Nelson walked the committee through the proposed instruction on page 44 of the meeting materials. After introducing the proposed instruction, the committee turned its attention to the proposed language. Mr. Phelps identified that the inference in the proposed instruction (that the recording would have been favorable to the defendant) is different than the inference identified in statute (against the officer). The committee discussed this observation, including the difference between intentional and unintentional violations of a body-worn camera and the effect of that failure on officer credibility. The committee discussed the specific requirements outlined in the statutory language and determined that the proposed instruction must reflect the inference against the officer. After discussion, Judge McCullagh made a motion to approve the following language:

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**CR\_\_\_\_\_416 Adverse inference for law enforcement failure to comply with activation or use of body-worn camera.**

Evidence was introduced at trial that [Officer Name] may have intentionally ~~failed to comply with~~ or recklessly disregarded the requirement that

[an officer shall activate the body-worn camera prior to any law enforcement encounter, or as soon as reasonably possible]

[an officer shall record in an uninterrupted manner until after the conclusion of a law enforcement encounter, and there was not an exception allowed by law]

[an officer may not deactivate the body-worn camera until the officer's direct participation in the law enforcement encounter is complete]

[~~any~~ other requirement].

~~You may infer that if the recording had been made, it would have been favorable to the defendant. Based upon that evidence, you may make an inference against the officer.~~ It is up to you to decide how much weight to give that evidence.

**REFERENCES**

Utah Code § 77-7a-104  
Utah Code § 77-7a-104.1  
*State v. DeJesus*, 2017 UT 22

**COMMITTEE NOTES**

Prior to giving this instruction, the court presiding over a jury trial must determine that the defendant has established by a preponderance of the evidence that the officer intentionally or with reckless disregard of the requirements, failed to comply with a requirement of section 77-7a-104 AND the officers' failure to comply with that requirement is reasonably likely to affect the outcome of the defendant's trial.

05/05/2021

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Ms. Andrus seconded the motion. The committee voted unanimously in support of the motion. The motion passed. Staff will complete the work of numbering and publishing the approved instruction.

**(3) SEXUAL OFFENSE INSTRUCTION UPDATES – HB0270-2019 “THROUGH CLOTHING” AMENDMENTS:**

Judge Blanch then turned the committee's attention to agenda item #3. Staff provided a brief overview of the materials related to this agenda item. The proposed changes are the result of HB0270-2019. The committee had not considered this change at the time that legislation was originally passed. The committee considered the proposed changes to CR1602, CR1604, and CR1611. After consideration of the proposed changes, Judge McCullagh made motion to approve changes to CR1602, CR1604, and CR1611, as follows:

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**CR1602 SEXUAL ABUSE OF A MINOR.**

(DEFENDANT’S NAME) is charged [in Count \_\_\_] with committing Sexual Abuse of a Minor [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. [touched ~~the skin of~~(MINOR’S INITIALS)’s anus, buttocks, or any part of (his)(her) genitals], even if accomplished through clothing; or
  - b. [touched ~~the skin of~~(FEMALE MINOR’S INITIALS)’s breast], even if accomplished through clothing; or
  - c. [otherwise took indecent liberties with (MINOR’S INITIALS)]; or
  - d. [caused (MINOR’S INITIALS) to take indecent liberties with any person];
3. With the intent [to arouse or gratify the sexual desire of any person] [to cause substantial emotional or bodily pain to any person];
4. (MINOR’S INITIALS) was 14 or 15 years old at the time of the conduct; and
5. (DEFENDANT’S NAME) was seven or more years older than (MINOR’S INITIALS).

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 § 76-5-401.1  
Utah Code § 76-5-407

**COMMITTEE NOTES**

This instruction contains bracketed language which suggests optional language. Please review and edit before finalizing the instruction.

~~September 2015~~ Last amended: 05/05/2021

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**CR1604 UNLAWFUL SEXUAL CONDUCT WITH A 16 OR 17 YEAR OLD.**

(DEFENDANT’S NAME) is charged [in Count \_\_\_\_] with committing Unlawful Sexual Conduct with a 16 or 17 year old [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. had sexual intercourse with (MINOR’S INITIALS)]; or
  - b. [engaged in any sexual act with (MINOR’S INITIALS) involving

- ~~i. the touching, however slight, of the genitals of one person with the mouth or anus of another, even if accomplished through clothing; and~~
- ~~\* the touching of (MINOR'S INITIALS)'s genitals, mouth or anus involved (MINOR'S INITIALS)'s skin;] or~~
- c. [caused the penetration, however slight, of the genital or anal opening of (MINOR'S INITIALS) by any foreign object, substance, instrument, or device, including a part of the human body;]
  - i. [with the intent to arouse or gratify the sexual desire of any person]; or
  - ii. [with the intent to cause substantial emotional or bodily pain to any person]; or
- d. [touched ~~the skin of~~(MINOR'S INITIALS)'s anus, buttocks, or any part of (his)(her) genitals, even if accomplished through clothing, or touched ~~the skin of~~(FEMALE MINOR'S INITIALS)'s breast, even if accomplished through clothing, or otherwise took indecent liberties with (MINOR'S INITIALS), or caused (MINOR'S INITIALS) to take indecent liberties with the defendant or another person;]
  - i. [with the intent to arouse or gratify the sexual desire of any person]; or
  - ii. [with the intent to cause substantial emotional or bodily pain to any person]].
- 3. At the time of the conduct, (MINOR'S INITIALS) was 16 or 17 years old; and
- 4. At the time of the conduct, (DEFENDANT'S NAME) was:
  - a. [seven or more but less than ten years older than (MINOR'S INITIALS), and (DEFENDANT'S NAME) knew or reasonably should have known (MINOR'S INITIALS)'s age]; or
  - b. [ten or more years older than (MINOR'S INITIALS)].

After you carefully consider all the evidence in this case, if you are convinced that each and every element [of one or more of the above variations] 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 [of at least one of the above variations] has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

**REFERENCES**

Utah Code § 76-5-401.2  
 Utah Code § 76-5-407

**COMMITTEE NOTES**

This instruction contains bracketed language which suggests optional language. Please review and edit before finalizing the instruction.

If the State intends to rely on subsection 2d in combination with 2a, 2b, or 2c, use SVF 1604, Unlawful Sexual Conduct with a 16 or 17 year old special verdict form.

Subsection 2a should be used with 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.

Last amended: 05/05/2021 September 2015

**CR1611 FORCIBLE SEXUAL ABUSE.**

(DEFENDANT'S NAME) is charged [in Count\_\_] with committing Forcible Sexual Abuse [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. touched ~~the skin of~~ ([VICTIM'S NAME] [MINOR'S INITIALS])'s anus, buttocks, or genitals, even if accomplished through clothing; or
  - b. touched ~~the skin of~~ ([FEMALE VICTIM'S NAME] [FEMALE MINOR'S INITIALS])'s breast, even if accomplished through clothing; or
  - c. took indecent liberties with ([VICTIM'S NAME] [MINOR'S INITIALS]); or
  - d. caused a person to take indecent liberties with (DEFENDANT'S NAME) or another;
3. Without (VICTIM'S NAME)'s consent;
4. (DEFENDANT'S NAME) acted with intent, knowledge or recklessness that (VICTIM'S NAME) did not consent;
5. Did so with the intent to:
  - a. cause substantial emotional or bodily pain to any person, or
  - b. arouse or gratify the sexual desire of any person; and
6. ([VICTIM'S NAME] [MINOR'S INITIALS]) was 14 years of age or older at the time of the conduct.

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 § 76-5-404
- Utah Code § 76-5-406
- Utah Code § 76-5-407
- State v. Barela*, 2015 UT 22
- State v. Jacobs*, 2006 UT App 356

**COMMITTEE NOTES**

This instruction contains bracketed language which suggests optional language. Please review and edit before finalizing the instruction.

If there was a prior conviction or serious bodily injury, a special verdict form may be necessary. See SVF 1617, Sexual Offense Prior Conviction or SVF 1618, Serious Bodily Injury

Last amended: 05/10/2021

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Mr. Nelson seconded the motion to approve the changes to CR1602, CR1604, and CR1611. The committee voted unanimously in support of the motion. The motion passed. Staff will make the necessary changes to the published instructions.

**(4) PARTIAL DEFENSE INSTRUCTIONS – IMPERFECT SELF-DEFENSE, BATTERED PERSON MITIGATION, AND EXTREME EMOTIONAL DISTRESS:**

Judge Blanch then turned the committee’s attention to agenda item #2 for continued discussion of this topic from previous meetings. He explained that the materials under Tab 2 in the agenda packet were prepared in response to the direction the committee agreed to take at the March 10 meeting. Mr. Field then provided the committee with an overview of the meeting materials, explaining that the materials are the result of a collaboration between Ms. Klucznik, Ms. Johnson, and Mr. Field. He described the various proposed instructions

and the reasons why those were included in the packet. He suggested that the committee should begin its discussion with the imperfect self-defense materials.

The committee considered the proposed changes to CR1450 (meeting materials, page seven). Before considering the language, Judge Blanch sought clarification of what in the proposed instruction was new, stating he was under the impression that the pink text was the new language. The committee agreed that was the new language. [It was later discovered by staff that there were additional revisions to the current language contained in the two paragraphs immediately preceding the pink paragraph in the meeting materials (in purple below); as a result, the proposed changes to CR1450 should be reviewed again at the next committee meeting.] The committee reviewed the new final paragraph of that current instruction, making the following minor corrections (in red below):

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

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

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

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

To avoid these problems, these instructions direct the jury to decide the defense separately from the charged offense. Under this approach, the jury is given a standard elements instruction on the greater offense, with no element addressing imperfect self-defense. The final paragraphs of the elements instruction then explain how the jury should proceed based on whether it has found the defendant guilty of the charged offense:

- If the jury finds that the State *has not* proved the elements of the greater offense beyond a reasonable doubt, the elements instruction on the greater offense directs the jury to find the defendant NOT GUILTY of the charged offense. The instruction then directs the jury that it may consider any lesser offenses included in the instructions.
- If the jury finds the State *has* proved the elements of the greater offense beyond a reasonable doubt, the elements instruction on ~~the~~that greater offense directs the jury to the imperfect self-defense instructions to determine whether the State has disproved ~~the~~imperfect self-defense beyond a reasonable doubt. In a separate roadmap instruction, the jury is instructed to record its finding on the defense on a special verdict form attached to the jury's specific guilty verdict.

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After review of the purple language above (but not making any consideration of any of the other language in the proposed instruction), Ms. Nelson made a motion to approve the proposed changes. Ms. Andrus seconded the



motion. The committee voted unanimously in support of the motion. The motion passed. Staff will wait to publish the approved instruction until the remaining proposed instructions are reviewed and approved by the committee.

The committee then turned its attention to proposed CR505A (meeting materials, page eight), an entirely new roadmap instruction for cases involving mitigation defenses. After discussion, the committee made a single revision, moving the final sentence of the first paragraph to be the first sentence of the third paragraph. The committee agreed that the format of this instruction will be helpful to the jury. Judge Blanch expressed that the primary risk is that one of the page number blanks won't get filled in or will be filled in with the wrong instruction number. He noted that judges and parties will have to pay careful attention to the numbering process as instructions are finalized. Mr. Field solicited specific committee feedback regarding the committee note. The committee did not have any concerns regarding the committee note. The proposed instruction was then finalized, as follows:

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**CR505A Road map for mitigation defenses.**

If you find the defendant guilty of (CHARGED CRIME) or (LESSER INCLUDED CRIME) on Count [#], you will then need to decide whether the mitigation defense of [imperfect self-defense] [extreme emotional distress special mitigation] [mental illness special mitigation] [or] [battered person mitigation] applies to that crime. ~~Because each mitigation defense has its own elements and burden of proof, make sure to read their instructions carefully.~~

[The elements for imperfect self-defense are set forth in Instruction [#].]

[The elements for extreme emotion distress special mitigation are set forth in Instruction [#].]

[The elements for mental illness special mitigation are set forth in Instruction [#].]

[The elements for battered person mitigation are set forth in Instruction [#].]

Because each mitigation defense has its own elements and burden of proof, make sure to read the instructions carefully. For each mitigation defense listed, you must complete a special verdict form. You will find the special verdict form[s] for Count [#] immediately behind "General Verdict Form: Count (#)."

**Committee Notes**

A roadmap instruction such as this one should be prepared for each count that involves one or more lesser offenses and one or more mitigation defenses.

General verdict forms and special verdict forms should then be prepared as explained in the instruction.

Imperfect self-defense mitigation is only applicable to homicide or attempted homicide charges.

Extreme Emotional Distress mitigation is only applicable to homicide or attempted homicide charges.

Battered Person Mitigation is applicable to any offense between cohabitants.

Mental Illness can be both a defense and mitigation:

- Under Utah Code 76-2-305 it is a complete defense if it negates the mental state, except for homicide or attempted homicide
- Under Utah Code 76-5-205.5 it is a special mitigation for homicide or attempted homicide, and will reduce the level of the offense
- Under Utah Code 77-16a-102 it can be the basis for a finding of guilty with a mental illness at the time of the offense, which does not reduce the offense but changes sentencing requirements and is a necessary finding by the trier of fact.

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After making that single revision, and after further consideration of the entire instruction, Mr. Nelson made a motion to approve CR505A. Judge McCullagh seconded that motion. The committee voted unanimously in support of the motion. The motion passed. Staff will wait to publish the approved instruction until the remaining proposed instructions are reviewed and approved by the committee.

Because the committee was going to lose a quorum at 1:00 p.m., it was decided to end the meeting at this point in time. The committee will resume its consideration of the remaining materials at the next meeting.

**(5) ADJOURN**

The meeting adjourned at approximately 1:00 p.m. The next meeting will be held on June 2, 2021, starting at 12:00 noon via Webex. At the June meeting, the committee will discuss the summer meeting schedule.

# TAB 2

## Partial defense instructions

**NOTES:** The committee began reviewing the following materials at the May 5 meeting. The committee approved the proposed changes to CR1450 and CR505A.

After the meeting, staff discovered that there were additional changes in CR1450 that were not considered by the committee. As a result, the committee should make a new review of CR1450 so that all proposed changes receive committee consideration prior to approval.

CR505A does not need any additional review; it was approved at the May 5 meeting.

All materials *after* CR505A are new and have not yet been reviewed by the committee.

## Mitigation Defenses

- Imperfect self-defense
- Battered person
- Mental Illness
- Extreme emotional distress

### For the mitigation defenses we have done the following:

- For aggravated murder and murder, we anticipate two elements instructions as templates: 1) elements instruction with no mitigation defenses; 2) elements instruction with mitigation defenses. The reason for this is that imperfect self-defense always gets inserted erroneously into the “defenses” element, so we are trying to make sure practitioners do not include it in the elements instruction.
- For all other crimes, we will have a generic template for when practitioners will have a mitigation defense
- There will be a roadmap instruction for when a mitigation defense is raised
- For each mitigation defense, we will have
  - definition/elements instructions
  - special verdict form

### In Summary:

- Modify CR1450 to add a note (page 13)
- Create new instruction CR505A for roadmap with mitigation defenses (page 14)
- Create new CR numbers for Aggravated Murder without mitigation defenses – 1402A, 1403A (pages 15 and 19)
- Create new elements instructions for Aggravated Murder with mitigation defenses – 1402B, 1403B (pages 17 and 21)
- Create new CR number for Murder without mitigation defenses -- 1411A (page 24)
- Create new elements instruction for Murder with mitigation defenses – 1411B (page 26)
- Delete Murder with Extreme Emotional Distress in the elements 1404 (page 23)
- Add elements template for any other crime involving mitigation defenses of Battered Person or a finding of Guilty but Mentally Ill (page 28)
- Modify current Imperfect Self-Defense instructions (pages 30-33)
- Need to add more imperfect self-defense instructions (???)
- Added Mental Illness Special Mitigation Definitions/instructions (pages 40-42)
- Added Mental Illness Special Mitigation Special Verdict Form (page 43)
- Added Battered Person Mitigation definitions/instructions (page 35-37)
- Added Battered Person Special Verdict Form (page 38)
- Need to add Extreme Emotional Distress Special Mitigation Definitions/instructions (???)
- Need to add Extreme Emotional Distress Special Mitigation Special Verdict Form (???)

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

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

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

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

To avoid these problems, these instructions direct the jury to decide the defense separately from the charged offense exclusively through a special verdict form. Under this approach, the jury is given a standard elements instruction on the greater offense, with no element addressing imperfect self-defense. The final paragraphs of the elements instruction then explain how the jury should proceed based on whether it has found the defendant guilty of the charged offense:

- If the jury finds that the State *has not* proved the elements of the greater offense beyond a reasonable doubt, the elements instruction on the greater offense directs the jury to find the defendant NOT GUILTY of the charged offense. The instruction then directs the jury that it may consider any lesser offenses included in the instructions.
- If the jury finds the State *has* proved the elements of the greater offense beyond a reasonable doubt, the elements instruction on that greater offense directs the jury to the imperfect self-defense instructions to determine whether the State has disproved imperfect self-defense beyond a reasonable doubt. In a separate roadmap instruction, the jury is instructed to record its finding on the defense on a special verdict form attached to the jury's specific guilty verdict.

If the jury finds that the State has proved the elements of the greater offense beyond a reasonable doubt, the jury enters a guilty verdict on that offense. The jury is directed to the imperfect self-defense instructions and instructed that it must complete the imperfect self-defense special verdict form. On the special verdict form, the jury must indicate whether it has unanimously found that the State disproved the defense beyond a reasonable doubt. If the jury indicates the State has disproved the defense, the trial court enters a conviction for the greater crime. If the jury indicates the State has not disproved the defense, the trial court enters a conviction for the lesser crime.

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

### Committee Notes

Last revised – 05/01/2019

### CR505A Road map for mitigation defenses.

If you find the defendant guilty of (CHARGED CRIME) or (LESSER INCLUDED CRIME) on Count [#], you will then need to decide whether the mitigation defense of [imperfect self-defense] [extreme emotional distress special mitigation] [mental illness special mitigation] [or] [battered person mitigation] applies to that crime. Because each mitigation defense has its own elements and burden of proof, make sure to read their instructions carefully.

[The elements for imperfect self-defense are set forth in Instruction [#].]

[The elements for extreme emotion distress special mitigation are set forth in Instruction [#].]

[The elements for mental illness special mitigation are set forth in Instruction [#].]

[The elements for battered person mitigation are set forth in Instruction [#].]

Because each mitigation defense has its own elements and burden of proof, make sure to read the instructions carefully. For each mitigation defense listed, you must complete a special verdict form. You will find the special verdict form[s] for Count [#] immediately behind “General Verdict Form: Count (#).”

### Committee Notes

A roadmap instruction such as this one should be prepared for each count that involves one or more lesser offenses and one or more mitigation defenses.

General verdict forms and special verdict forms should then be prepared as explained in the instruction.

Imperfect self-defense mitigation is only applicable to homicide or attempted homicide charges.

Extreme Emotional Distress mitigation is only applicable to homicide or attempted homicide charges.

Battered Person Mitigation is applicable to any offense between cohabitants.

Mental Illness can be both a defense and mitigation:

- Under Utah Code 76-2-305 it is a complete defense if it negates the mental state, except for homicide or attempted homicide
- Under Utah Code 76-5-205.5 it is a special mitigation for homicide or attempted homicide, and will reduce the level of the offense
- Under Utah Code 77-16a-102 it can be the basis for a finding of guilty with a mental illness at the time of the offense, which does not reduce the offense but changes sentencing requirements and is a necessary finding by the trier of fact. [MD1]

## CR1402A Aggravated Murder Elements – Utah Code § 76-5-202(1).

The defendant, (DEFENDANT'S NAME), is charged with Aggravated Murder. You cannot convict (him)(her) of this offense unless you find beyond a reasonable doubt, based on the evidence, each of the following elements:

1. That the defendant, (DEFENDANT'S NAME);
2. Intentionally or knowingly;
3. Caused the death of (VICTIM'S NAME);
4. Under one or more of the following circumstances: [insert all applicable aggravating circumstances][;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 of Aggravated Murder. On the other hand, if you are not convinced that all of these elements have been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY of Aggravated Murder.

### Committee Notes

If the date and/or location of a crime is an element of the offense, those can be included within the list of elements. In some circumstances, identifying the specific counts might assist the jury in sorting through offenses with overlapping elements. In those circumstances, the specific count to which the instruction applies should be identified in the first paragraph.

\*See explanatory note at the beginning of the homicide section. The committee recommends that practitioners consider replacing this phrase with more specific language relating to the legal justification or excuse at issue in the case. For example, if the issue is self-defense, this element could be tailored to: "That the defendant did not act in self-defense."

Whenever imperfect self-defense is submitted to the jury:

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

• Add the following paragraph at the bottom of this elements instruction:

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

Imperfect self-defense mitigation is only applicable to homicide or attempted homicide charges

Extreme Emotional Distress mitigation is only applicable to homicide or attempted homicide charges

Battered Person Mitigation is applicable to any offense between cohabitants

Mental Illness can be both a defense and mitigation:

- Under Utah Code 76-2-305 it is a complete defense if it negates the mental state, except for homicide or attempted homicide

- Under Utah Code 76-5-205.5 it is a special mitigation for homicide or attempted homicide, and will reduce the level of the offense
- Under Utah Code 77-16a-102 it can be the basis for a finding of guilty with a mental illness at the time of the offense, which does not reduce the offense but changes sentencing requirements and is a necessary finding by the trier of fact.



## **CR1402B Aggravated Murder Elements – Utah Code § 76-5-202(1) with Mitigation Defenses.**

The defendant, (DEFENDANT'S NAME), is charged with Aggravated Murder. You cannot convict (him)(her) of this offense unless you find beyond a reasonable doubt, based on the evidence, each of the following elements:

1. That the defendant, (DEFENDANT'S NAME);
2. Intentionally or knowingly;
3. Caused the death of (VICTIM'S NAME);
4. Under one or more of the following circumstances: [Insert All Applicable Aggravating Circumstances];and]
5. The defense of [perfect self-defense][defense-of-others][defense-of-habitation][mental illness (76-2-305)] does not apply.\*

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

On the other hand, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY of Aggravated Murder. If you find the defendant guilty, you must then decide whether the mitigation defense[s] of [imperfect self-defense][extreme emotional distress special mitigation][mental illness special mitigation][battered person mitigation] applies.

Imperfect self-defense is defined in Instruction [#].]

Extreme emotional distress special mitigation is defined in Instruction [#].]

Mental illness special mitigation is defined in Instruction [#].]

Battered person mitigation is defined in Instruction [#].]

### **Committee Notes**

If the date and/or location of a crime is an element of the offense, those can be included within the list of elements. In some circumstances, identifying the specific counts might assist the jury in sorting through offenses with overlapping elements. In those circumstances, the specific count to which the instruction applies should be identified in the first paragraph.

\*See explanatory note at the beginning of the homicide section. The committee recommends that practitioners consider replacing this phrase with more specific language relating to the legal justification or excuse at issue in the case. For example, if the issue is self-defense, this element could be tailored to: "That the defendant did not act in self-defense."

Whenever imperfect self-defense is submitted to the jury:

- In addition to other applicable imperfect self-defense instructions, use CR1451 (amended as appropriate);
- Use the “Special Verdict Imperfect Self-Defense” special verdict form;
- Do not include “imperfect self-defense” or any mitigation defenses as a defense in element #3 above;
- Do not use an “imperfect self-defense manslaughter” elements instruction; and
- Always distinguish between “perfect self-defense” and “imperfect self-defense” throughout the instructions.

Imperfect self-defense mitigation is only applicable to homicide or attempted homicide charges

Extreme Emotional Distress mitigation is only applicable to homicide or attempted homicide charges

Battered Person Mitigation is applicable to any offense between cohabitants

Mental Illness can be both a defense and mitigation:

- Under Utah Code 76-2-305 it is a complete defense if it negates the mental state, except for homicide or attempted homicide
- Under Utah Code 76-5-205.5 it is a special mitigation for homicide or attempted homicide, and will reduce the level of the offense
- Under Utah Code 77-16a-102 it can be the basis for a finding of guilty with a mental illness at the time of the offense, which does not reduce the offense but changes sentencing requirements and is a necessary finding by the trier of fact.

### CR1403A Aggravated Murder Elements – Utah Code § 76-5-202(2).

The defendant, (DEFENDANT’S NAME), is charged with Aggravated Murder. You cannot convict (him)(her) of this offense unless you find beyond a reasonable doubt, based on the evidence, each of the following elements:

1. That the defendant, (DEFENDANT'S NAME);
2. With reckless indifference to human life;
3. Caused the death of (VICTIM'S NAME); and
4. That the defendant did so incident to an act, scheme, course of conduct, or criminal episode during which (he)(she) was a major participant in the commission or attempted commission of: [Insert All Applicable Predicate Felonies][;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 of Aggravated Murder. On the other hand, if you are not convinced that all of these elements have been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY of Aggravated Murder.

#### Committee Notes

If the date and/or location of a crime is an element of the offense, those can be included within the list of elements. In some circumstances, identifying the specific counts might assist the jury in sorting through offenses with overlapping elements. In those circumstances, the specific count to which the instruction applies should be identified in the first paragraph.

\*See explanatory note at the beginning of the homicide section. The committee recommends that practitioners consider replacing this phrase with more specific language relating to the legal justification or excuse at issue in the case. For example, if the issue is self-defense, this element could be tailored to: "That the defendant did not act in self-defense."

Whenever imperfect self-defense is submitted to the jury:

- In addition to other applicable imperfect self-defense instructions, use CR1451 (amended as appropriate);
- Use the “Special Verdict Imperfect Self-Defense” special verdict form;
- Do not include “imperfect self-defense” or any mitigation defenses as a defense in element #3 above;
- Do not use an “imperfect self-defense manslaughter” elements instruction; and
- Always distinguish between “perfect self-defense” and “imperfect self-defense” throughout the instructions; ~~and~~
- ~~Add the following paragraph at the bottom of this elements instruction:  
“If you find Defendant GUILTY beyond a reasonable doubt of murder, you must decide whether the defense of imperfect self-defense applies and complete the special verdict form concerning that defense. Imperfect self-defense is addressed in Instructions \_\_\_\_\_.”~~

Imperfect self-defense mitigation is only applicable to homicide or attempted homicide charges

Extreme Emotional Distress mitigation is only applicable to homicide or attempted homicide charges

Battered Person Mitigation is applicable to any offense between cohabitants

Mental Illness can be both a defense and mitigation:

- Under Utah Code 76-2-305 it is a complete defense if it negates the mental state, except for homicide or attempted homicide
- Under Utah Code 76-5-205.5 it is a special mitigation for homicide or attempted homicide, and will reduce the level of the offense
- Under Utah Code 77-16a-102 it can be the basis for a finding of guilty with a mental illness at the time of the offense, which does not reduce the offense but changes sentencing requirements and is a necessary finding by the trier of fact.

### **CR1403B Aggravated Murder Elements – Utah Code § 76-5-202(2) with Mitigation Defenses.**

The defendant, (DEFENDANT'S NAME), is charged with Aggravated Murder. You cannot convict (him)(her) of this offense unless you find beyond a reasonable doubt, based on the evidence, each of the following elements:

1. That the defendant, (DEFENDANT'S NAME);
2. With reckless indifference to human life;
3. Caused the death of (VICTIM'S NAME); and
4. That the defendant did so incident to an act, scheme, course of conduct, or criminal episode during which (he)(she) was a major participant in the commission or attempted commission of: [Insert All Applicable Predicate Felonies];and]
5. The defense of [perfect self-defense][defense-of-others][defense-of-habitation][mental illness (76-2-305)] does not apply.\*

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

On the other hand, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY of Aggravated Murder. If you find the defendant guilty, you must then decide whether the mitigation defense[s] of [imperfect self-defense][extreme emotional distress special mitigation][mental illness special mitigation][battered person mitigation] applies.

Imperfect self-defense is defined in Instruction [#].]

Extreme emotional distress special mitigation is defined in Instruction [#].]

Mental illness special mitigation is defined in Instruction [#].]

Battered person mitigation is defined in Instruction [#].]

### **Committee Notes**

If the date and/or location of a crime is an element of the offense, those can be included within the list of elements. In some circumstances, identifying the specific counts might assist the jury in sorting through offenses with overlapping elements. In those circumstances, the specific count to which the instruction applies should be identified in the first paragraph.

\*See explanatory note at the beginning of the homicide section. The committee recommends that practitioners consider replacing this phrase with more specific language relating to the legal justification or excuse at issue in the case. For example, if the issue is self-defense, this element could be tailored to: "That the defendant did not act in self-defense."

Whenever imperfect self-defense is submitted to the jury:

- In addition to other applicable imperfect self-defense instructions, use CR1451 (amended as appropriate);
- Use the “Special Verdict Imperfect Self-Defense” special verdict form or special verdict forms for other applicable mitigation defenses;
- Do not include “imperfect self-defense” or any mitigation defenses as a defense in element #3 above;
- Do not use an “imperfect self-defense manslaughter” elements instruction; and
- Always distinguish between “perfect self-defense” and “imperfect self-defense” throughout the instructions.

Imperfect self-defense mitigation is only applicable to homicide or attempted homicide charges

Extreme Emotional Distress mitigation is only applicable to homicide or attempted homicide charges

Battered Person Mitigation is applicable to any offense between cohabitants

Mental Illness can be both a defense and mitigation:

- Under Utah Code 76-2-305 it is a complete defense if it negates the mental state, except for homicide or attempted homicide
- Under Utah Code 76-5-205.5 it is a special mitigation for homicide or attempted homicide, and will reduce the level of the offense
- Under Utah Code 77-16a-102 it can be the basis for a finding of guilty with a mental illness at the time of the offense, which does not reduce the offense but changes sentencing requirements and is a necessary finding by the trier of fact.

## CR1404

**Propose that this instruction be deleted.**

### CR1404 Aggravated Murder Elements When Extreme Emotional Distress Is at Issue.

The defendant, [DEFENDANT'S NAME], is charged with Aggravated Murder. You cannot convict (him) (her) of this offense unless you find beyond a reasonable doubt, based on the evidence, each of the following elements:

1. That the defendant, [DEFENDANT'S NAME];
2. Intentionally or knowingly;
3. Caused the death of [VICTIM'S NAME]; and
4. That the defendant did so under any one or more of the following circumstances: (INSERT ALL APPLICABLE AGGRAVATING CIRCUMSTANCES HERE); and
5. That the defendant did not cause the death of [VICTIM'S NAME] under the influence of extreme emotional distress for which there is a reasonable explanation or excuse.
6. [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 of Aggravated Murder. On the other hand, if you are not convinced that one or more of these elements has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY of Aggravated Murder.

#### Committee Notes

If the date or location of a crime is an element of the offense, those can be included within the list of elements. In some circumstances, identifying the specific counts might assist the jury in sorting through offenses with overlapping elements. In those circumstances, the specific count to which the instruction applies should be identified in the first paragraph.

\*See explanatory note at the beginning of the homicide section. The committee recommends that practitioners consider replacing this phrase with more specific language relating to the legal justification or excuse at issue in the case. For example, if the issue is self-defense, this element could be tailored to: "That the defendant did not act in self-defense."

This instruction applies only to crimes committed prior to May 12, 2009. For crimes committed on May 12, 2009 and thereafter, see special mitigation instructions relating to extreme emotional distress.

## CR1411A MURDER

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

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

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

### References

Utah Code § 76-5-203

### Committee Notes

Whenever imperfect self-defense is submitted to the jury:

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



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

Last Revised – 04/03/2019

**Amended Dates:**

04/13/2019; 09/02/2020

Imperfect self-defense mitigation is only applicable to homicide or attempted homicide charges

Extreme Emotional Distress mitigation is only applicable to homicide or attempted homicide charges

Battered Person Mitigation is applicable to any offense between cohabitants

Mental Illness can be both a defense and mitigation:

- Under Utah Code 76-2-305 it is a complete defense if it negates the mental state, except for homicide or attempted homicide
- Under Utah Code 76-5-205.5 it is a special mitigation for homicide or attempted homicide, and will reduce the level of the offense
- Under Utah Code 77-16a-102 it can be the basis for a finding of guilty with a mental illness at the time of the offense, which does not reduce the offense but changes sentencing requirements and is a necessary finding by the trier of fact.

## **CR1411B MURDER with Mitigation Defenses**

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

1. (DEFENDANT'S NAME);
2. [a. intentionally or knowingly caused the death of (VICTIM'S NAME); or]
  - [b. intending to cause serious bodily injury to another, (DEFENDANT'S NAME) committed an act clearly dangerous to human life that causes the death of (VICTIM'S NAME); or]
  - [c. acting under circumstances evidencing a depraved indifference to human life, (DEFENDANT'S NAME) knowingly engaged in conduct which created a grave risk of death to another and thereby caused the death of (VICTIM'S NAME); or]
  - [d. While engaging in the commission, attempted commission, or immediate flight from the commission or attempted commission of [the predicate offense(s)], or as a party to [the predicate offense(s)],
    - i. (VICTIM'S NAME) was killed;
    - ii. (VICTIM'S NAME) was not a party to [the predicate offense(s)]; and
    - ii. (DEFENDANT'S NAME) acted with the intent required as an element of [the predicate offense(s)]; or
  - [e. Recklessly caused the death of (VICTIM'S NAME), a peace officer or military service member in uniform while in the commission of
    - i. an assault against a peace officer;
    - ii. interference with a peace officer making a lawful arrest, if (DEFENDANT'S NAME) used force against a peace officer; or
    - iii. an assault against a military service member in uniform.]
- [3. The defense of [perfect self-defense][defense-of-others][defense-of-habitation][mental illness (76-2-305)] does not apply.]

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

On the other hand, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY of Murder. If you find the defendant guilty, you must then decide whether the mitigation defense[s] of [imperfect self-defense][extreme emotional distress special mitigation][mental illness special mitigation][battered person mitigation] applies.

Imperfect self-defense is defined in Instruction [#].]

Extreme emotional distress special mitigation is defined in Instruction [#].]

Mental illness special mitigation is defined in Instruction [#].]

Battered person mitigation is defined in Instruction [#].]

### **Committee Note**

Imperfect self-defense mitigation is only applicable to homicide or attempted homicide charges

Extreme Emotional Distress mitigation is only applicable to homicide or attempted homicide charges

Battered Person Mitigation is applicable to any offense between cohabitants

Mental Illness can be both a defense and mitigation:

- Under Utah Code 76-2-305 it is a complete defense if it negates the mental state, except for homicide or attempted homicide
- Under Utah Code 76-5-205.5 it is a special mitigation for homicide or attempted homicide, and will reduce the level of the offense
- Under Utah Code 77-16a-102 it can be the basis for a finding of guilty with a mental illness at the time of the offense, which does not reduce the offense but changes sentencing requirements and is a necessary finding by the trier of fact.

**CR301???** Elements with Battered Person or Mental Illness Special Mitigation.

(DEFENDANT'S NAME) is charged [in Count \_\_\_\_] with committing (CRIME) [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. ELEMENT ONE...;
3. ELEMENT TWO...;
4. [That 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.~~

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

~~On the other hand, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. If you find the defendant guilty, you must then decide whether the mitigation defense[s] of [mental illness special mitigation][battered person mitigation] applies.~~

~~[Mental illness special mitigation is defined in Instruction [#].]~~

~~[Battered person mitigation is defined in Instruction [#].]~~

## Imperfect Self Defense

## **CR1451 Explanation of Perfect and Imperfect Self-Defense as Defenses**

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

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

### **References**

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

### **Committee Notes**

Whenever imperfect self-defense is submitted to the jury:

- In addition to other applicable imperfect self-defense instructions, use CR1451 (amended as appropriate);
- Use the “Special Verdict Imperfect Self-Defense” special verdict form;
- Do not include “imperfect self-defense” as a defense in the elements instruction;
- Do not use an “imperfect self-defense manslaughter” elements instruction;
- Always distinguish between “perfect self-defense” and “imperfect self-defense” throughout the instructions; and
- Add the following paragraph at the bottom of the elements instruction:  
“If you find Defendant GUILTY beyond a reasonable doubt of murder, you must decide whether the defense of imperfect self-defense applies and complete the special verdict form concerning that defense. Imperfect self-defense is addressed in Instructions \_\_\_\_\_.”

Last Revised – 04/03/2019

## **Imperfect Self-Defense Definitions/Elements**

## CR1452 Special Verdict Form - Imperfect Self-Defense

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

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

### References

*State v. Lee*, 2014 UT App 4

*State v. Ramos*, 2018 UT App 161

*State v. Navarro*, 2019 UT App 2

### Committee Notes

Whenever imperfect self-defense is submitted to the jury:

- In addition to other applicable imperfect self-defense instructions, use CR1451 (amended as appropriate);
- [Use the specific Aggravated Murder or Murder Elements Instructions in CR1402B, 1403B, or 1411B](#)
- Use the "Special Verdict Imperfect Self-Defense" special verdict form;
- Do not include "imperfect self-defense" as a defense in element #3 [of the elements instruction above](#);
- Do not use an "imperfect self-defense manslaughter" elements instruction; and
- Always distinguish between "perfect self-defense" and "imperfect self-defense" throughout the instructions; and
- ~~• Add the following paragraph at the bottom of this elements instruction:  
    "If you find Defendant GUILTY beyond a reasonable doubt of murder, you must decide whether the defense of imperfect self-defense applies and complete the special verdict form concerning that defense. Imperfect self-defense is addressed in Instructions \_\_\_\_\_."~~

Use Special Verdict Form SVF1450 in connection with this instruction.

Last Revised – 04/03/2019



**SVF 1450. Imperfect Self-Defense.**

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

|   |   |
|---|---|
| THE STATE OF UTAH,<br><br>Plaintiff,<br><br>-vs-<br><br>(DEFENDANT'S NAME),<br><br>Defendant. | <b>SPECIAL VERDICT<br/>IMPERFECT SELF-DEFENSE</b><br><br>Count (#)<br><br>Case No. (**) |
|---|---|

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 proved beyond a reasonable doubt that the defense of imperfect self-defense DOES NOT apply.

DATED this \_\_\_\_\_ day of (Month), 20(\*\*).

\_\_\_\_\_  
Foreperson

Battered Person

Mitigation Defense

## **CR Battered Person Mitigation Defense**

The battered person mitigation defense is a partial defense to Count [#], (CRIME). The battered person mitigation defense does not result in an acquittal, but instead is a mitigating circumstance.

The battered person mitigation defense is the only time the defendant has the burden of proof. For the battered person mitigation defense to apply, you must unanimously find the defendant has proved by clear and convincing evidence:

1. (VICTIM'S NAME) was a cohabitant of [DEFENDANT'S NAME];
2. (VICTIM'S NAME) engaged in a pattern of abuse against (DEFENDANT'S NAME) or another cohabitant; and
3. (DEFENDANT'S NAME) reasonably believed committing the crime was necessary to end the pattern of abuse.

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

### **References**

Utah Code § 76-2-409

### **Committee Note**

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

- include the definitional instruction for the defense;
- provide roadmap instruction CR505A and include each count to which the defense may apply;
- use the elements instruction template in CR???? for every crime to which it applies;
- prepare a special verdict form for each count and offense to which the defense might apply; make sure the special verdict forms are labeled in the same way they are referenced in the roadmap instruction; and present the special verdict forms in the same manner provided by the roadmap instruction

## **CR Definitions applicable to Battered Persons Mitigation Defense**

“Cohabitant” means he (DEFENDANT’S NAME) and (VICTIM’S NAME) were 16 years of age or older, and at the time of the offense, (DEFENDANT’S NAME):

- [Is or was a spouse of (VICTIM’S NAME);]
- [Is or was living as if a spouse of (VICTIM’S NAME);]
- [is related to the other party as the person’s [parent][grandparent]][child][aunt][uncle][niece][nephew];]
- [is a natural, adoptive, step, or foster sibling to the other party, provided at least one of the siblings is over 18 years of age]
- [Has or had one or more children in common with (VICTIM’S NAME);]
- [Is the biological parent of (VICTIM’S NAME)'s unborn child;]
- [Resides or has resided in the same residence as (VICTIM’S NAME);] or
- [Is or was in a consensual sexual relationship with (VICTIM’S NAME)].

“Reside” means to dwell permanently or for a length of time; to have a settled abode for a time; to dwell permanently or continuously.

“Residence” is defined as “a temporary or permanent dwelling place, abode, or habitation to which one intends to return as distinguished from a place of temporary sojourn or transient visit.” It does not require an intention to make the place one’s home. It is possible that a person may have more than one residence at a time. When determining whether (DEFENDANT’S NAME) and (VICTIM’S NAME) resided in the same residence, factors to consider include the following:

- the amount of time one spends at the shared abode and the amount of effort expended in its upkeep;
- whether a person is free to come and go as he pleases, treating the place as if it were his own home;
- whether there has been a sharing of living expenses or sharing of financial obligations for the maintenance of a household;
- whether there has been sexual contact evidencing a conjugal association;
- whether furniture or personal items have been moved into a purported residence;
- voting, owning property, paying taxes, having family in the area, maintaining a mailing address, being born or raised in the area, working or operating a business, and having children attend school in the forum.

In deciding whether (DEFENDANT’S NAME) and (VICTIM’S NAME) were residing in the same residence, you are not limited to the factors listed above, but you may also apply the common, ordinary meaning of the definition to all of the facts and circumstances of this case.

“Preponderance of the Evidence” means the fact is more likely to be true than not true.

### **References**

Utah Code § 76-2-409

### **Committee Note**

For purposes of the battered person mitigation defense, “abuse” and “cohabitant” are defined by reference to statutory definitions in other parts of the Utah Code. See Utah Code § 76-2-409. Where possible, this instruction integrates those references into a unified whole.

Because Battered Persons Mitigation Defense can only be used between cohabitants, it is likely the cohabitant definitions will already be given, in which case this instruction is not necessary.

**SVF \_\_\_\_\_ . Battered Person Mitigation Defense**

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

THE STATE OF UTAH,

Plaintiff,

-vs-

(DEFENDANT'S NAME),

Defendant.

**SPECIAL VERDICT FORM**  
**BATTERED PERSON**  
**MITIGATION DEFENSE**

Count (#)

Case No. (\*\*)

Having found (DEFENDANT'S NAME), guilty beyond a reasonable doubt of (CRIME), as charged in Count  
[#],

Check ONLY ONE of the following boxes:

We unanimously find that (DEFENDANT'S NAME) has proved by clear and convincing evidence that  
the battered person mitigation defense applies.

OR

We do not unanimously find that (DEFENDANT'S NAME) has proved by clear and convincing  
evidence that the battered person mitigation defense applies.

DATED this \_\_\_\_\_ day of (Month), 20(\*\*).

\_\_\_\_\_  
Foreperson

## Mental Illness Special Mitigation

Mental Illness can be both a defense and mitigation:

- Under Utah Code 76-2-305, it is a complete defense if it negates the mental state, except for homicide or attempted homicide;
- Under Utah Code 76-5-205.5, it is a special mitigation for homicide or attempted homicide, and will reduce the level of the offense
  - Must be found by the trier of fact by a preponderance of the evidence
- Under Utah Code 77-16a-102 it can be the basis for a finding of guilty with a mental illness at the time of the offense, which does not reduce the offense but changes sentencing requirements and is a necessary finding by the trier of fact.
  - Must be found by the trier of fact by a preponderance of the evidence

## **CR\_\_\_\_. Mental Illness Special Mitigation**

Mental illness special mitigation is a partial defense to Count [#], [Aggravated Murder] [Attempted Aggravated Murder] [Murder] [Attempted Murder]. It does not result in an acquittal, but instead is a mitigating circumstance that reduces [Aggravated Murder to Murder] [Attempted Aggravated Murder to Attempted Murder] [Murder to Manslaughter] [Attempted Murder to Attempted Manslaughter].

Mental illness special mitigation exists when a person [causes] [attempts to cause] the death of another under circumstances that are not legally justified, but the person acts under a delusion attributable to a mental illness, and the nature of the delusion is such that, if the facts existed as the defendant believed them to be in [his] [her] delusional state, those facts would provide a legal justification for [his] [her] conduct.

Mental illness special mitigation applies only if the defendant's actions, in light of [his] [her] delusion, were reasonable from the objective viewpoint of a reasonable person.

A person who was under the influence of voluntarily consumed, injected or ingested alcohol, controlled substances, or volatile substances at the time of the alleged offense may not avail [himself] [herself] of special mitigation based on mental illness if the alcohol or substance caused, triggered, or substantially contributed to the mental illness.

### **References**

Utah Code Ann. § 76-2-305

Utah Code Ann. § 76-5-205.5

### **Committee Note**

Whenever mental illness special mitigation is submitted to the jury,

- include the definitional instruction for the defense;
- provide roadmap instruction CR505A and include each count to which the defense may apply;
- use the elements instruction template in CR\_\_\_\_ for every crime to which it applies;
- prepare a special verdict form for each count and offense to which the defense might apply; make sure the special verdict forms are labeled in the same way they are referenced in the roadmap instruction; and present the special verdict forms in the same manner provided by the roadmap instruction.



## **CR\_\_\_\_. Definitions Applicable to Mental Illness Special Mitigation**

“Mental illness” means a mental disease or defect that substantially impairs a person’s mental, emotional, or behavioral functioning. A mental defect may be a condition as the result of a birth defect, the result of injury, or a residual effect of a physical or mental disease and includes, but is not limited to, intellectual disability.

“Intellectual disability” means a significant subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior, and manifested prior to age 22.

“Mental illness” does not mean an abnormality manifested primarily by repeated criminal conduct.

“Preponderance of the evidence” means the fact is more likely to be true than not true.

### **References**

Utah Code Ann. § 76-2-305

### **Committee Note**

## **CR\_\_\_\_. Special Verdict Form – Mental Illness Special Mitigation**

If you determine beyond a reasonable doubt that (DEFENDANT'S NAME) committed [Aggravated Murder][Attempted Aggravated Murder][Murder][Attempted Murder], you must complete the special verdict form titled “Special Verdict Mental Illness Special Mitigation.”

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

### **References**

Utah Code Ann. § 76-5-205.5(7)

### **Committee Notes**

Whenever mental illness special mitigation is submitted to the jury:

- Use the specific Aggravated Murder or Murder Elements Instructions in CR1402B, 1403B, or 1411B
- Use the “Special Verdict Mental Illness Special Mitigation” special verdict form;
- Do not include “mental illness special mitigation” as a defense in element #3 of the elements instruction; and
- Always distinguish between “mental illness defense” and “mental illness special mitigation” throughout the instructions.

Use Special Verdict Form SVF\_\_\_\_ in connection with this instruction.

**SVF\_\_\_\_. Mental Illness Special Mitigation**

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

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THE STATE OF UTAH,

Plaintiff,

-vs-

(DEFENDANT'S NAME),

Defendant.

**SPECIAL VERDICT FORM  
MENTAL ILLNESS  
SPECIAL MITIGATION**

Count (#)

Case No. (\*\*)

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Having found (DEFENDANT'S NAME), guilty beyond a reasonable doubt of (CRIME), as charged in Count [#],

Check ONLY ONE of the following boxes:

We unanimously find that (DEFENDANT'S NAME) has proved by a preponderance of the evidence that mental illness special mitigation exists.

OR

We do not unanimously find that (DEFENDANT'S NAME) has proved by a preponderance of the evidence that mental illness special mitigation exists.

DATED this \_\_\_\_\_ day of (Month), 20(\*\*).

\_\_\_\_\_  
Foreperson

### Extreme Emotional Distress Special Mitigation

- Under Utah Code 76-5-205.5, it is a special mitigation for homicide or attempted homicide, and will reduce the level of the offense
  - Must be found by the trier of fact by a preponderance of the evidence

# TAB 3

## Public Comment Review: Homicide Instructions

### NOTES:

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CR1411 – Felony Murder: level of intent

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

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CR1450-1452 / SVF1450 – imperfect self-defense

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

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

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

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

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

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

**Sean Brian:** [For SVF1450] "Having found the defendant, (DEFENDANT'S NAME), guilty of [Aggravated Murder][Attempted Aggravated Murder][Murder][Attempted Murder], as charged in Count [#], Check ONLY ONE of the following boxes:

We unanimously find that the State has proved beyond a reasonable doubt that the defense of imperfect self-defense DOES NOT apply.

OR

We do not unanimously find that the State has **NOT (ADD THIS "NOT")** proved beyond a reasonable doubt that the defense of imperfect self-defense DOES NOT apply **(ADD THIS:) and therefore the level of offense should be reduced.**"

Notes/ Explanation:

The phrasing could be misinterpreted to negate the unanimity requirement, so the "not" is moved so that it clearly modifies "proved."

The emphasis should be placed on the difference between the two options. It may also be helpful to the jury to clarify the consequence of their selection. The verdict form appears to successfully avoid the issue raised in *State v. Campos*, 2013 UT App 213, 309 P. 3d 1160, where the instruction failed to place the burden of proof on the State.

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

## **CR1411A - Additional instruction when felony murder is charged**

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

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 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