

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

Via WebEx  
September 1, 2021 – 12:00 p.m. to 1:00 p.m.

12:00	Welcome and Approval of Minutes - <i>Sub-item</i>		Tab 1	Judge Blanch
	Review CR1402A, CR1403A, and CR1411A (agg. murder / murder <u>without</u> mitigation) and CR1402B, CR1403B, and CR1411B (agg. murder / murder <u>with</u> mitigation) for consistency		Tab 2	Staff
	Partial defense instructions (continued): - <i>Imperfect self-defense</i> - <i>Battered person mitigation</i> - <i>Mental illness special mitigation</i> - <i>Extreme emotional distress</i>		Tab 3	Committee
	Public Comment Review: - <i>Homicide instructions</i>		Tab 4	Committee
1:00	Adjourn			

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

**UPCOMING MEETING SCHEDULE:**

Meetings are held via Webex on the first Wednesday of each month from 12:00 noon to 1:30 p.m. (unless otherwise specifically noted):

October 6, 2021

| November 3, 2021

| December 1, 2021

**UPCOMING ASSIGNMENTS:**

1. Sandi Johnson = Burglary; Robbery
2. Judge McCullagh = DUI; Traffic
3. Karen Klucznik & Mark Fields = Murder

4. Stephen Nelson = Use of Force; Prisoner Offenses
5. Judge Jones = Wildlife Offenses

# **TAB 1**

## **Minutes – August 4, 2021 Meeting**

**NOTES:**

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

Via WebEx  
August 4, 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>	•		Gage Hansen
Jennifer Andrus		•	
Melinda Bowen	•		<b>STAFF:</b>
Mark Field	•		Michael Drechsel
Sandi Johnson	•		
Elise Lockwood		•	
Judge Brendan McCullagh	•		
Debra Nelson	•		
Stephen Nelson		•	
Nathan Phelps	•		
Judge Michael Westfall		•	
Scott Young	•		
Judge Linda Jones, <i>Emeritus</i>		•	
<i>Prosecutor – Vacant</i>			

**(1) WELCOME, COMMITTEE BUSINESS, AND RECOGNITION OF MEMBERS:**

Judge Blanch welcomed the committee members to the meeting. He then recognized six members whose membership terms are expiring. He noted the valuable contributions each had made over the years and thanked them individually for their time and efforts. The members are: Karen Klucznik (prosecutor), Mark Field (prosecutor), Nathan Phelps (defense attorney), Scott Young (defense attorney), Melinda Bowen (law professor), and Judge Michael Westfall (district court judge). The committee members gave a round of applause for these members.

Over the pandemic the committee has encountered more circumstances where it has been difficult to get a quorum present. Judge Blanch noted a need to have members present for meetings moving forward. He also noted that for the September 1 meeting, he is on the jury trial rotation which will require ending the meeting around 1:00 p.m. (instead of at the normal 1:30 p.m. time).

**(2) APPROVAL OF MINUTES:**

The committee considered the minutes from the May 5, 2021 meeting. Mr. Phelps moved to approve the draft minutes; Judge McCullagh seconded the motion. The committee voted unanimously in support of the motion. The motion passed.

**(3) PARTIAL DEFENSE INSTRUCTIONS:**

Judge Blanch noted that this has been one of the most complex and involved projects the committee has undertaken in his time working on MUJI instructions. He thanked the committee for the work performed on this project thus far.

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

Judge Blanch turned the committee’s attention to an instruction with modifications approved at the May 5, 2021 committee meeting: CR1450. Mr. Drechsel explained that immediately after the May 5, 2021 meeting, in his review of CR1450, he noticed that the version of CR1450 that had been approved by the committee had not displayed all of the changes that were actually proposed to the instruction (the “track changes” feature had not been used to highlight all of the proposed changes). As a result, the committee had only considered the change highlighted in pink text on page 7 of the May 5, 2021 meeting materials (that being the final paragraph of the proposed changes to CR1450). The committee had not considered other proposed changes in the two preceding paragraphs. Prior to today’s meeting, Mr. Drechsel prepared a version of CR1450 with all the changes properly displayed with the “track changes” feature in Word. That version of CR1450 was included in today’s meeting materials on page 13. With this history in mind, the committee made a fresh review of CR1450. After making the review and entertaining discussion, Judge McCullagh made a motion to approve the following language:

=====

**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 – 05/01/201908/04/2021

=====

Ms. Bowen 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.

***CR505A Roadmap for mitigation defenses***

The committee did not directly consider any proposed changes to CR505A at this meeting. The instruction had been approved at the May 5, 2021 meeting and was only included in the meeting materials to keep the complete set of proposed instructions together for committee consideration. Later in the meeting, the committee approved changes to the “Committee Note” language in other instructions, which language was identical to the committee note in CR505A. The committee instructed staff to apply the same changes to any instruction that employed the modified committee note language. Staff compared the committee notes of the various instructions and modified the previously approved committee note in CR505A, pursuant to the committee’s instruction. As a result, staff will publish the following final version of CR505A when the committee has completed its review and approval of the remaining instructions:

=====

**CR505A Roadmap 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.

[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 aggravated murder, murder, attempted aggravated murder, or attempted murder charges.

“Extreme Emotional Distress” mitigation is only applicable when the defendant causes the death of another or attempts to cause the death of another.

“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 when the defendant causes the death of another or attempts to cause the death of another, and will reduce the level of the offense; and
- 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.

Approved 08/04/2021

=====

***CR1402A and CR1403A: Current Aggravated Murder Instructions***

Judge Blanch turned the committee’s attention to the proposed versions of CR1402A, CR1402B, CR1403A, and CR1403B. Ms. Johnson explained the proposed instructions to the committee. She started with CR1402A and CR1403A, noting that these are consistent with the existing instructions (CR1402 and CR1403). The only addition is the new committee note. The committee reviewed the proposed committee note changes. Mr. Field noted a need to correct an internal reference from “element #3” to “element #5.” This same change is necessary in CR1403A (as well as CR1402B and CR1403B). After further review by the committee, Ms. Johnson and Ms. Nelson made a joint motion to approve CR1402A and CR1403A, as follows:

=====

**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 defense~~ as a defense in element #3-5 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 aggravated murder, murder, attempted aggravated murder, or attempted murder charges.~~

~~“Extreme Emotional Distress” mitigation is only applicable when the defendant causes the death of another or attempts to cause the death of another.~~

~~“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 when the defendant causes the death of another or attempts to cause the death of another, and will reduce the level of the offense; and

- 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.

Approved 08/04/2021

=====  
 AND  
 =====

**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 defense as a defense in element #53 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 aggravated murder, murder, attempted aggravated murder, or attempted murder charges.

“Extreme Emotional Distress” mitigation is only applicable when the defendant causes the death of another or attempts to cause the death of another.

“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 when the defendant causes the death of another or attempts to cause the death of another, and will reduce the level of the offense; and
- 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.

Approved 08/04/2021

=====

Judge McCullagh 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.

### ***CR1402B and CR1403B: New Mitigation Aggravated Murder Instructions***

The committee then turned its attention to CR1402B and CR1403B. Ms. Johnson explained that these are proposed new instructions that are designed to be used in Aggravated Murder cases when mitigation of some sort is at issue in the case. CR1402B and CR1403B start with CR1402A and CR1403A as their respective foundations. Ms. Johnson explained that CR1402B and CR1403B then add a new final paragraph to the body of each instruction, guiding the jurors to review the various mitigation defenses if they have found the defendant guilty of the offense described in that elements instruction. Each instruction also proposed to add the same committee note that had been added to the other instructions above.

The committee discussed removing the asterisk on element #5, as well as the related explanatory language in the committee note associated with the asterisk. After discussion, the committee agreed that this language should be removed from CR1402A, CR1402B, CR1403A, and CR1403B. Staff was instructed to make this same change across all four instructions, including CR1402A and CR1403A that the committee had already approved.

After the committee reviewed and discussed CR1402B, Mr. Field made a motion to approve proposed CR1402B, as follows:

=====

### **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.

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 defense as a defense in element #5 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 aggravated murder, murder, attempted aggravated murder, or attempted murder charges.

“Extreme Emotional Distress” mitigation is only applicable when the defendant causes the death of another or attempts to cause the death of another.

“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 when the defendant causes the death of another or attempts to cause the death of another, and will reduce the level of the offense; and
- 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.

Approved 08/04/2021

=====

Judge McCullagh 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.

After the committee reviewed and discussed CR1403B, Ms. Bowen made a motion to approve proposed CR1403B, as follows:

=====

**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.

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 defense as a defense in element #5 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 aggravated murder, murder, attempted aggravated murder, or attempted murder charges.

“Extreme Emotional Distress” mitigation is only applicable when the defendant causes the death of another or attempts to cause the death of another.

“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 when the defendant causes the death of another or attempts to cause the death of another, and will reduce the level of the offense; and
- 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.

Approved 08/04/2021

=====

Ms. Nelson 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.

***CR1404 Aggravated Murder Elements when Extreme Emotional Distress is at Issue***

The committee next turned its attention to CR1404. The subcommittee that prepared the instructions that were discussed at the meeting recommended that CR1404 be removed from the MUJI instructions. The approach used in CR1404 (including the mitigation in the elements instruction) has been replaced by the approach adopted in CR1402B and CR1403B (keeping mitigation out of the elements instruction, and instead handling mitigation using special verdict forms).

The committee reviewed and discussed this recommendation. After discussion, the committee agreed that CR1404 is no longer needed.

Ms. Johnson made a motion to remove CR1404 from the MUJI instructions. Mr. Young 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.

### ***CR1411A Murder***

Judge Blanch turned the committee's attention to CR1411A. Ms. Johnson explained that the approach taken here is the same as was taken with CR1402A and CR1403A (adding the same language to the committee note). Ms. Johnson also realized that element #3 of the body of the instruction should be modified to be consistent with element #5 in CR1402B and CR1403B. She also noted that the bullet point in the committee note that starts "Add the following paragraph at the bottom of this elements instruction:" followed by quote language should be removed from the committee note since that language has now been incorporated into CR1411B.

As part of the discussion, the committee made further revisions to the committee note language that has been added to all of these instruction, refining the language that describes what specific offenses are relevant for each type of mitigation. The committee instructed staff to propagate these same revisions to the other previously-approved instructions.

After further review and discussion, Mr. Field made a motion to approve proposed CR1403B, as follows:

=====

#### **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 [perfect self-defense][defense-of-others][defense-of-habitation][mental illness (76-2-305)] does not apply. 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, do not use CR1411A, but instead use CR1411B:

- ~~• 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 \_\_\_\_\_.”~~

“Imperfect Self-defense” mitigation is only applicable to aggravated murder, murder, attempted aggravated murder, or attempted murder charges.

“Extreme Emotional Distress” mitigation is only applicable when the defendant causes the death of another or attempts to cause the death of another.

“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 when the defendant causes the death of another or attempts to cause the death of another, and will reduce the level of the offense; and
- 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.

**Amended Dates:**

04/03/2019; 09/02/2020; 08/04/2021

=====

Judge McCullagh 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.

**CR1411B Murder with Mitigation Defenses**

The committee then focused on CR1411B. Ms. Johnson explained that this proposed new instruction is consistent with the approach taken with CR1402B and CR1403B, with similar changes to the body of the instruction and the addition of the new committee notes.

After review and discussion, Ms. Johnson made a motion to approve proposed CR1411B, as follows:

=====

**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**

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 defense 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 aggravated murder, murder, attempted aggravated murder, or attempted murder charges.

“Extreme Emotional Distress” mitigation is only applicable when the defendant causes the death of another or attempts to cause the death of another.

“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 when the defendant causes the death of another or attempts to cause the death of another, and will reduce the level of the offense; and
- 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.

Approved 08/04/2021

=====

Judge McCullagh 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.

**(4) PUBLIC COMMENT REVIEW – HOMICIDE INSTRUCTIONS:**

The committee did not address this item during the meeting. Consideration of what remains at issue for this agenda item hinges on how pending matters related to Item #3 above are resolved. The committee will address this at a future meeting.



**(5) ADJOURN**

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

# TAB 2

## Review for Consistency

### NOTES:

At the August 4, 2021 meeting, the committee reviewed and approved a large number of partial defense instructions, related specifically to aggravated murder and murder. These instructions are:

#### WITHOUT MITIGATION

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

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

**CR1411A** Murder

#### WITH MITIGATION

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

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

**CR1411B** Murder with Mitigation.

After the meeting, staff noticed that some changes implemented by the committee in the discussion of CR1411A may apply to CR1402A and CR1403A. But the committee did not instruct staff to apply those changes to CR1402A and CR1403A. Specifically, the questions are:

- 1) Should element #5 of CR1402A and CR1403A be modified to be consistent with element #3 of CR1411A?
- 2) Should the committee note language in CR1402A and CR1403A starting with “Whenever imperfect self-defense is submitted to the jury...” (followed by a bulleted list) be modified to be consistent with the related language in CR1411A (removing the bulleted list and stating that the instruction is not to be used where imperfect self-defense is at issue)?

# **WITHOUT MITIGATION:**

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

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

**CR1411A Murder**

### **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.

#### **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 defense as a defense in element #5 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 aggravated murder, murder, attempted aggravated murder, or attempted murder charges.

“Extreme Emotional Distress” mitigation is only applicable when the defendant causes the death of another or attempts to cause the death of another.

“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 when the defendant causes the death of another or attempts to cause the death of another, and will reduce the level of the offense; and
- 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.

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 defense as a defense in element #5 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 aggravated murder, murder, attempted aggravated murder, or attempted murder charges.

“Extreme Emotional Distress” mitigation is only applicable when the defendant causes the death of another or attempts to cause the death of another.

“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 when the defendant causes the death of another or attempts to cause the death of another, and will reduce the level of the offense; and
- 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.

## **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
    - iii. (DEFENDANT'S NAME) acted with the intent required as an element of [the predicate offense(s)]; or
  - e. Recklessly caused the death of (VICTIM'S NAME), a peace officer or military service member in uniform while in the commission of
    - i. an assault against a peace officer;
    - ii. interference with a peace officer making a lawful arrest, if (DEFENDANT'S NAME) used force against a peace officer; or
    - iii. an assault against a military service member in uniform.]
3. The defense of [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 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, do not use CR1411A, but instead use CR1411B.

“Imperfect Self-defense” mitigation is only applicable to aggravated murder, murder, attempted aggravated murder, or attempted murder charges.

“Extreme Emotional Distress” mitigation is only applicable when the defendant causes the death of another or attempts to cause the death of another.

“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 when the defendant causes the death of another or attempts to cause the death of another, and will reduce the level of the offense; and
- 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.

# **WITH MITIGATION:**

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

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

**CR1411B Murder with Mitigation Defenses.**

## **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.

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 defense as a defense in element #5 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 aggravated murder, murder, attempted aggravated murder, or attempted murder charges.

“Extreme Emotional Distress” mitigation is only applicable when the defendant causes the death of another or attempts to cause the death of another.

“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 when the defendant causes the death of another or attempts to cause the death of another, and will reduce the level of the offense; and
- 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.

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 defense as a defense in element #5 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 aggravated murder, murder, attempted aggravated murder, or attempted murder charges.

“Extreme Emotional Distress” mitigation is only applicable when the defendant causes the death of another or attempts to cause the death of another.

“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 when the defendant causes the death of another or attempts to cause the death of another, and will reduce the level of the offense; and
- 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

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 defense 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 aggravated murder, murder, attempted aggravated murder, or attempted murder charges.

“Extreme Emotional Distress” mitigation is only applicable when the defendant causes the death of another or attempts to cause the death of another.

“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 when the defendant causes the death of another or attempts to cause the death of another, and will reduce the level of the offense; and

- 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.

# TAB 3

## Partial defense instructions (continued)

**NOTES:** The materials that follow are a continuation of the specific work the committee addressed on May 5, 2021, and again on August 4, 2021. The following materials have not yet been discussed by the committee.

## OVERVIEW

### Mitigation Defenses:

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

### 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:

#### Completed at August 4, 2021 Meeting:

- ~~Modify CR1450 to add a note~~
- ~~Create new instruction CR505A for roadmap with mitigation defenses~~
- ~~Create new CR numbers for Aggravated Murder without mitigation defenses—1402A, 1403A~~
- ~~Create new elements instructions for Aggravated Murder with mitigation defenses—1402B, 1403B~~
- ~~Create new CR number for Murder without mitigation defenses—1411A~~
- ~~Create new elements instruction for Murder with mitigation defenses—1411B~~
- ~~Delete Murder with Extreme Emotional Distress in the elements 1404~~

#### Remaining Issues to Address:

- Modify current Imperfect Self-Defense instructions
- Need to add more imperfect self-defense instructions
- Added Mental Illness Special Mitigation Definitions/instructions
- Added Mental Illness Special Mitigation Special Verdict Form
- Added Battered Person Mitigation definitions/instructions
- Add elements template for any other crime involving mitigation defenses of Battered Person or a finding of Guilty but Mentally Ill
- Added Battered Person Special Verdict Form
- Need to add Extreme Emotional Distress Special Mitigation Definitions/instructions
- Need to add Extreme Emotional Distress Special Mitigation Special Verdict Form

## **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

## 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 instruction(s) in CR1402B, CR1403B, or CR1411B;
- Use the "SVF1450 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,  Plaintiff,  -vs-  (DEFENDANT'S NAME),  Defendant.	<b>SPECIAL VERDICT IMPERFECT SELF-DEFENSE</b>  Count (#)  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

**References**

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



## **CR570 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 CR570, 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 CR572 for every crime to which the defense applies;
- using SVF570, 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.

## **CR571 Definitions Applicable to Battered Person Mitigation Defense**

“Cohabitant”<sup>[MD1]</sup> means the (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”<sup>[MD2]</sup> 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<sup>[MD3]</sup> will already be given, in which case this instruction is not necessary.

**CR572 Elements with Battered Person Mitigation / 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 [battered person mitigation][mental illness special mitigation] applies.

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

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

### **CR573 Special Verdict Form – Battered Person Mitigation**

If you determine beyond a reasonable doubt that (DEFENDANT'S NAME) committed Count [#] (CRIME), you must complete the special verdict form titled “Special Verdict Form Battered Person Mitigation Defense.”

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

### **References**

Utah Code Ann. § 76-2-409

### **Committee Notes**

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

- include CR570, 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 CR572 for every crime to which the defense applies;
- using SVF570, 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.

**SVF570. 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

## **CR580 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 CR580, 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 CR572 for every crime to which it applies;
- using SVF580, 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.



### **CR581 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**

### **CR582 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 Form 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 “SVF580 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.

**SVF580. Mental Illness Special Mitigation**

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

<p><u>THE STATE OF UTAH,</u></p> <p style="text-align: right;"><u>Plaintiff,</u></p> <p style="text-align: center;"><u>-vs-</u></p> <p><u>(DEFENDANT'S NAME),</u></p> <p style="text-align: right;"><u>Defendant.</u></p>	<p style="text-align: center;"><b><u>SPECIAL VERDICT FORM</u></b> <b><u>MENTAL ILLNESS</u></b> <b><u>SPECIAL MITIGATION</u></b></p> <p style="text-align: center;"><u>Count (#)</u></p> <p style="text-align: center;"><u>Case No. (**)</u></p>
---	---

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 4

## Public Comment Review: Homicide Instructions

### NOTES:

=====

CR1411 – Felony Murder: level of intent

=====

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

=====

CR1450-1452 / SVF1450 – imperfect self-defense

=====

**Tom Brunner:** 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, CR1451 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 CR1450, CR1451, CR1452, 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

**CR1411\_\_\_ - 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