

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

Via WebEx
November 3, 2021 – 12:00 p.m. to 1:00 p.m.

| | | | | |
|-------|--|--|-------|---------------------|
| 12:00 | Welcome and Approval of Minutes | | Tab 1 | Judge Blanch |
| | Review CR1402A, CR1403A, and CR1411A (agg. murder / murder without mitigation) and CR1402B, CR1403B, and CR1411B (agg. murder / murder with mitigation) for consistency | | Tab 2 | Staff and Committee |
| | Partial defense instructions (continued): <ul style="list-style-type: none"> - <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: <ul style="list-style-type: none"> - <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 at the Matheson Courthouse in the Judicial Council Room (N301), on the first Wednesday of each month from 12:00 noon to 1:30 p.m. (unless otherwise specifically noted):

November 3, 2021
December 1, 2021
January 5, 2022
February 2, 2022
March 2, 2022

April 6, 2022
May 4, 2022
June 1, 2022
July 6, 2022
August 3, 2022

September 7, 2022
October 5, 2022
November 2, 2022
December 7, 2022

TAB 1

Minutes – October 6, 2021 Meeting

NOTES:

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

Via Webex
October 6, 2021 – 12:00 p.m. to 1:30 p.m.

DRAFT

| COMMITTEE MEMBER: | ROLE: | PRESENT | EXCUSED | GUESTS: |
|------------------------|------------------------------|---------|---------|------------------|
| Hon. James Blanch | District Court Judge [Chair] | • | | None |
| Jennifer Andrus | Linguist / Communications | | • | |
| Sharla Dunroe | Defense Counsel | • | | STAFF: |
| Sandi Johnson | Prosecutor | • | | Michael Drechsel |
| Janet Lawrence | Defense Counsel | • | | Gage Hansen |
| Elise Lockwood | Defense Counsel | | • | |
| Jeffrey Mann | Prosecutor | • | | |
| Hon. Brendan McCullagh | Justice Court Judge | • | | |
| Debra Nelson | Defense Counsel | • | | |
| Stephen Nelson | Prosecutor | • | | |
| Richard Pehrson | Prosecutor | • | | |
| Hon. Teresa Welch | District Court Judge | • | | |
| <i>vacant</i> | Criminal Law Professor | | • | |
| Hon. Linda Jones | <i>Emeritus</i> | • | | |

(1) WELCOME AND APPROVAL OF MINUTES:

Judge Blanch welcomed the committee to the meeting. The committee considered the minutes from the September 1, 2021 meeting. Ms. Johnson moved to approve the draft minutes; Mr. Nelson seconded the motion. The committee voted unanimously in support of the motion. The motion passed.

As part of the welcome, Judge Blanch welcomed the new members of the committee: Jeffrey Mann (who had been unavailable to introduce himself at the last meeting) and Judge Teresa Welch. The committee members then introduced themselves to the new members.

(2) REVIEW AND COMPARE CR1402A, CR1403A, AND CR1411A WITH CR1402B, CR1403B, AND CR1411B:

Mr. Drechsel reviewed with the committee the current versions of CR1402A, CR1403A, CR1411A, CR1402B, CR1403B, and CR1411B. He explained that in preparing these instructions consistent with the committee’s direction after the September 1 meeting, there were a few questions of consistency that arose. Mr. Drechsel directed the committee’s attention to two issues for discussion related to the committee notes in the “without mitigation” instructions. The first issue was what term to use in the “Elements” section of each committee note

("aggravating circumstances," "predicate felonies," or "options," depending on the instruction). The second issue is whether the yellow highlighted language regarding mitigation (see pages 8-10 of the meeting materials) should be included in the committee notes for CR1402A, CR1403A, and CR1411A where the instruction is not to be used in cases where mitigation is relevant.

CR1402A, CR1403A, and CR1411A "Without Mitigation" Committee Notes – Elements Subsection

The committee discussed whether the "aggravating circumstances," "predicate felonies," or "options" language in the committee notes is an accurate statement of the law in terms of jury unanimity, as outlined in the meeting materials:

If more than one **aggravating circumstance** applies in element 4, the jury should be given a special verdict form requiring the jury to identify the **aggravating circumstance(s)** they unanimously find. See *State v. Mendoza*, 2021 UT App 79; *State v. Alires*, 2019 UT App 206.

Ms. Johnson expressed concern that, as currently drafted in the meeting materials, this language is not accurate, particularly considering cases such as *State v. Mendoza*, 2021 UT App 79; *State v. Alires*, 2019 UT App 206; *State v. Saunders*, 1999 UT 59; and *State v. Tillman*, 750 P.2d 546 (Utah 1987). The committee discussed this concern. The primary issue is whether, by including language about unanimity, the committee note requires more of the prosecution than the law says in necessary. The committee then discussed the issue, including the various cases. The committee also discussed whether an approach used in CR1402A would be appropriately used in CR1403A, as well, or whether the language will need to be different based on unanimity concerns in the one instruction, but not in the other. After discussion, the committee made proposed revisions to the language in the meeting materials, as follows.

There is some uncertainty in the case law regarding a unanimity requirement as it relates to the aggravating circumstances in element 4. See *State v. Hummel*, 2017 UT 19. Therefore, if more than one aggravating circumstance applies in element 4, practitioners are encouraged to use a special verdict form requiring the jury to identify the aggravating circumstance(s) they unanimously find. See *State v. Mendoza*, 2021 UT App 79; *State v. Alires*, 2019 UT App 206; *State v. Saunders*, 1999 UT 59; *State v. Tillman*, 750 P.2d 546 (Utah 1987).

Ms. Dunroe moved to approve the language; Ms. Lawrence seconded the motion. The committee voted unanimously in support of the motion.

The committee then discussed whether this same change should apply in CR1403A regarding predicate felonies. The committee voted in favor of applying this same language to the committee note in CR1403A, as follows:

There is some uncertainty in the case law regarding a unanimity requirement as it relates to the predicate felony in element 4. See *State v. Hummel*, 2017 UT 19. Therefore, if more than one predicate felony applies in element 4, practitioners are encouraged to use a special verdict form requiring the jury to identify the aggravating circumstance(s) they unanimously find. See *State v. Mendoza*, 2021 UT App 79; *State v. Alires*, 2019 UT App 206; *State v. Saunders*, 1999 UT 59; *State v. Tillman*, 750 P.2d 546 (Utah 1987).

The committee then began its consideration of whether this same language should be reflected in CR1411A and the various element options that constitute murder. Judge Jones began some mid-meeting research on the topic while the committee moved on to the following matters. The committee did not circle back around to finalize its discussion of this language for CR1411A.

CR1402A, CR1403A, and CR1411A “Without Mitigation” Committee Notes – Mitigation Subsection

Ms. Johnson proposed that the committee note language highlighted in yellow in the meeting materials be deleted from CR1402A, CR1403A, and CR1411A. She also proposed in making that deletion that the parenthetical "(imperfect self-defense mitigation, extreme emotional distress mitigation, battered person mitigation, or mental illness mitigation)" be added to the line that remains to make sure it is clear to practitioners that imperfect self-defense is a partial mitigation. Judge McCullagh moved in support of that proposal; Ms. Lawrence seconded the motion. The committee voted in favor of that motion so that the language in CR1402A, CR1403A, and CR1411A will read:

CR1402A:

Whenever any mitigation defense (imperfect self-defense mitigation, extreme emotional distress mitigation, battered person mitigation, or mental illness mitigation) is submitted to the jury, do not use CR1402A, but instead use CR1402B.

CR1403A:

Whenever any mitigation defense (imperfect self-defense mitigation, extreme emotional distress mitigation, battered person mitigation, or mental illness mitigation) is submitted to the jury, do not use CR1403A, but instead use CR1403B.

CR1411A:

Whenever any mitigation defense (imperfect self-defense mitigation, extreme emotional distress mitigation, battered person mitigation, or mental illness mitigation) is submitted to the jury, do not use CR1411A, but instead use CR1411B.

CR1402B, CR1403B, and CR1411B “With Mitigation” Committee Notes – Elements Subsection

Mr. Drechsel asked the committee if the same changes to the “elements” subsection of the committee notes of the “without mitigation” instructions should be made to the corresponding language in the “with mitigation” instructions. The committee members confirmed that was their intention. Staff will make those changes to CR1402B and CR1403B, but will hold on CR1411B until the committee specifically address the language for that committee note (per Judge Jones’ mid-meeting research that was not revisited during the meeting).

CR1402B, CR1403B, and CR1411B “With Mitigation” Committee Notes – Mitigation Subsection

The committee then turned its attention to the “mitigation” subsection of the committee notes in the “with mitigation” instructions (CR1402B, CR1403B, and CR1411B). The committee discussed the language as it existed in the meeting materials, revising the language to address a concern raised by Judge Welch about what is sufficient and what is necessary (by adding “potentially applicable” to the committee notes. The committee

made other minor stylistic changes. The committee then agreed that the mitigation subsection of each “with mitigation” committee note should be tailored to the elements instruction to which it is attached (i.e., in the aggravated murder instructions, the committee note will reflect only aggravated murder in its discussion of mitigation).

The committee concluded its meeting by directing staff to prepare revised versions of each of CR1402A, CR1402B, CR1403A, CR1403B, CR1411A, and CR1411B.

(3) PARTIAL DEFENSE INSTRUCTIONS (CONTINUED):

This agenda item was not considered at this meeting. It will be addressed at the November meeting.

(4) PUBLIC COMMENT REVIEW: HOMICIDE INSTRUCTIONS:

This agenda item was not considered at this meeting. It will be addressed at the November meeting.

(5) ADJOURN

The meeting adjourned at approximately 1:33 p.m. The next meeting will be held on November 3, 2021, starting at 12:00 noon.

TAB 2

Review for Consistency and Intent

NOTES:

At the October 6, 2021 meeting, the committee considered the following instructions:

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.

During the meeting, staff was instructed to make a review and bring consistency between the various instructions. Staff has made that review and has included the revised instructions for further committee consideration.

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) – Without 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] 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

Elements

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.

There is some uncertainty in the case law regarding a unanimity requirement as it relates to the aggravating circumstances in element 4. See *State v. Hummel*, 2017 UT 19. Therefore, if more than one aggravating circumstance applies in element 4, practitioners are encouraged to use a special verdict form requiring the jury to identify the aggravating circumstance(s) they unanimously find. See *State v. Mendoza*, 2021 UT App 79; *State v. Alires*, 2019 UT App 206; *State v. Saunders*, 1999 UT 59; *State v. Tillman*, 750 P.2d 546 (Utah 1987).

Mitigation

Whenever any mitigation defense (imperfect self-defense mitigation, extreme emotional distress mitigation, battered person mitigation, or mental illness mitigation) is submitted to the jury, do not use CR1402A, but instead use CR1402B.

CR1403A Aggravated Murder Elements – Utah Code § 76-5-202(2) – Without 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] 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

Elements

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.

There is some uncertainty in the case law regarding a unanimity requirement as it relates to the predicate felony in element 4. See *State v. Hummel*, 2017 UT 19. Therefore, if more than one predicate felony applies in element 4, practitioners are encouraged to use a special verdict form requiring the jury to identify the predicate felony or felonies they unanimously find. See *State v. Mendoza*, 2021 UT App 79; *State v. Alires*, 2019 UT App 206; *State v. Saunders*, 1999 UT 59; *State v. Tillman*, 750 P.2d 546 (Utah 1987).

Mitigation

Whenever any mitigation defense (imperfect self-defense mitigation, extreme emotional distress mitigation, battered person mitigation, or mental illness mitigation) is submitted to the jury, do not use CR1403A, but instead use CR1403B.

CR1411A Murder – Without 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]; and]
3. [The defense of [perfect self-defense][defense-of-others][defense-of-habitation] 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.

Committee Notes

Elements

There is some uncertainty in the case law regarding a unanimity requirement as it relates to proving the alternatives in element 2. See *State v. Hummel*, 2017 UT 19. Therefore, if more than one alternative applies in element 2, practitioners are encouraged to use a special verdict form requiring the jury to identify the alternative(s) they unanimously find. See *State v. Mendoza*, 2021 UT App 79; *State v. Alires*, 2019 UT App 206; *State v. Saunders*, 1999 UT 59; *State v. Tillman*, 750 P.2d 546 (Utah 1987).

Mitigation

Whenever any mitigation defense (imperfect self-defense mitigation, extreme emotional distress mitigation, battered person mitigation, or mental illness mitigation) is submitted to the jury, do not use CR1411A, but instead use CR1411B.

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] 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

Elements

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.

There is some uncertainty in the case law regarding a unanimity requirement as it relates to the aggravating circumstances in element 4. See *State v. Hummel*, 2017 UT 19. Therefore, if more than one aggravating circumstance applies in element 4, practitioners are encouraged to use a special verdict form requiring the jury to identify the aggravating circumstance(s) they unanimously find. See *State v. Mendoza*, 2021 UT App 79; *State v. Alires*, 2019 UT App 206; *State v. Saunders*, 1999 UT 59; *State v. Tillman*, 750 P.2d 546 (Utah 1987).

Mitigation

For mitigation defenses (imperfect self-defense mitigation, extreme emotional distress mitigation, battered person mitigation, or mental illness mitigation), the committee has prepared other definitional instructions and special verdict forms that should be used together with this elements instruction.

“Imperfect Self-defense” mitigation is potentially applicable to aggravated murder and attempted aggravated murder. 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 other 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.

“Extreme Emotional Distress” mitigation is potentially applicable to aggravated murder and attempted aggravated murder (Utah Code § 76-5-205.5; CR_____).

“Battered Person” mitigation is potentially applicable to offenses between cohabitants (Utah Code § 76-2-409; CR_____)

“Mental Illness”:

- is never a complete defense to aggravated murder or attempted aggravated murder (Utah Code § 76-2-305);
- can be a special mitigation, reducing the level of an aggravated murder or attempted aggravated murder offense (Utah Code § 76-5-205.5); and
- can be the basis for a finding of guilty with a mental illness at the time of the aggravated murder and attempted aggravated murder, which does not reduce the offense, but is a necessary finding by the trier of fact and changes sentencing requirements (Utah Code §§ 77-16a-102 and 77-16a-104).

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] 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

Elements

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.

There is some uncertainty in the case law regarding a unanimity requirement as it relates to the predicate felony in element 4. *See State v. Hummel*, 2017 UT 19. Therefore, if more than one predicate felony applies in element 4, practitioners are encouraged to use a special verdict form requiring the jury to identify the predicate felony or felonies they unanimously find. *See State v. Mendoza*, 2021 UT App 79; *State v. Alires*, 2019 UT App 206; *State v. Saunders*, 1999 UT 59; *State v. Tillman*, 750 P.2d 546 (Utah 1987).

Mitigation

For mitigation defenses (imperfect self-defense mitigation, extreme emotional distress mitigation, battered person mitigation, or mental illness mitigation), the committee has prepared other definitional instructions and special verdict forms that should be used together with this elements instruction.

“Imperfect Self-defense” mitigation is potentially applicable to aggravated murder and attempted aggravated murder. 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 other 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.

“Extreme Emotional Distress” mitigation is potentially applicable to aggravated murder and attempted aggravated murder (Utah Code § 76-5-205.5; CR _____).

“Battered Person” mitigation is potentially applicable to offenses between cohabitants (Utah Code § 76-2-409; CR _____)

“Mental Illness”:

- is never a complete defense to aggravated murder or attempted aggravated murder (Utah Code § 76-2-305);
- can be a special mitigation, reducing the level of an aggravated murder or attempted aggravated murder offense (Utah Code § 76-5-205.5); and
- can be the basis for a finding of guilty with a mental illness at the time of the aggravated murder and attempted aggravated murder, which does not reduce the offense, but is a necessary finding by the trier of fact and changes sentencing requirements (Utah Code §§ 77-16a-102 and 77-16a-104).

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]; and]
3. [The defense of [perfect self-defense][defense-of-others][defense-of-habitation] does not apply.]

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

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 Notes

Elements

There is some uncertainty in the case law regarding a unanimity requirement as it relates to proving the alternatives in element 2. See *State v. Hummel*, 2017 UT 19. Therefore, if more than one alternative applies in element 2, practitioners are encouraged to use a special verdict form requiring the jury to identify the alternative(s) they unanimously find. See *State v. Mendoza*, 2021 UT App 79; *State v. Alires*, 2019 UT App 206; *State v. Saunders*, 1999 UT 59; *State v. Tillman*, 750 P.2d 546 (Utah 1987).

Mitigation

For mitigation defenses (imperfect self-defense mitigation, extreme emotional distress mitigation, battered person mitigation, or mental illness mitigation), the committee has prepared other definitional instructions and special verdict forms that should be used together with this elements instruction.

“Imperfect Self-defense” mitigation is potentially applicable to murder and attempted murder. 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 other 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.

“Extreme Emotional Distress” mitigation is potentially applicable to murder and attempted murder (Utah Code § 76-5-205.5; CR_____).

“Battered Person” mitigation is potentially applicable to offenses between cohabitants (Utah Code § 76-2-409; CR_____)

“Mental Illness”:

- is never a complete defense to murder or attempted murder (Utah Code § 76-2-305);

- can be a special mitigation, reducing the level of a murder or attempted murder offense (Utah Code § 76-5-205.5);
and
- can be the basis for a finding of guilty with a mental illness at the time of the murder and attempted murder, which does not reduce the offense, but is a necessary finding by the trier of fact and changes sentencing requirements (Utah Code §§ 77-16a-102 and 77-16a-104).

SVF ####. Aggravated Murder (knowingly or intentionally under specified circumstances).

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

| | |
|---|---|
| <p>THE STATE OF UTAH, Plaintiff, vs. [DEFENDANT'S NAME], Defendant.</p> | <p>SPECIAL VERDICT AGGRAVATED MURDER</p> <p>Case No. [#] Count [#]</p> |
|---|---|

We, the jury, have found the defendant, [Defendant], guilty of Aggravated Murder, [as charged in Count ____]. We also unanimously find beyond a reasonable doubt that the defendant knowingly or intentionally caused the death under the following circumstance[s] (check all that apply):

- [The defendant committed the homicide while confined in a jail or other correctional institution;]
- [The defendant committed the homicide incident to one act, scheme, course of conduct, or criminal episode during which two or more persons were killed, or during which the actor attempted to kill one or more persons in addition to the victim who was killed;]
- [The defendant created a great risk of death to a person other than the victim and the actor;]
- [The defendant committed the homicide incident to an act, scheme, course of conduct, or criminal episode during which the actor committed or attempted to commit the following offense[s]:
 - aggravated robbery, as defined in Instruction[s] [#];
 - robbery, as defined in Instruction[s] [#];
 - rape, as defined in Instruction[s] [#];
 - rape of a child, as defined in Instruction[s] [#];
 - object rape, as defined in Instruction[s] [#];
 - object rape of a child, as defined in Instruction[s] [#];
 - forcible sodomy, as defined in Instruction[s] [#];
 - sodomy upon a child, as defined in Instruction[s] [#];
 - forcible sexual abuse, as defined in Instruction[s] [#];

- sexual abuse of a child, as defined in Instruction[s] [#];
- aggravated sexual abuse of a child, as defined in Instruction[s] [#];
- child abuse, as defined in Instruction[s] [#];
- aggravated sexual assault, as defined in Instruction[s] [#];
- aggravated arson, as defined in Instruction[s] [#];
- arson, as defined in Instruction[s] [#];
- aggravated burglary, as defined in Instruction[s] [#];
- burglary, as defined in Instruction[s] [#];
- aggravated kidnapping, as defined in Instruction[s] [#];
- kidnapping, as defined in Instruction[s] [#];
- child kidnapping, as defined in Instruction[s] [#];

- [The defendant committed the homicide incident to one act, scheme, course of conduct, or criminal episode during which the actor committed the crime of abuse or desecration of a dead human body as defined in Instruction[s] [#];]

- [The defendant committed the homicide for the purpose of avoiding or preventing an arrest of the defendant or another by a peace officer acting under color of legal authority or for the purpose of effecting the defendant's or another's escape from lawful custody;]

- [The defendant committed the homicide for pecuniary gain;]

- [The defendant committed, or engaged or employed another person to commit the homicide pursuant to an agreement or contract for remuneration or the promise of remuneration for commission of the homicide;]

- [The defendant previously committed or was convicted of the following offense[s]:
 - aggravated murder, as defined in Instruction[s] [#];
 - attempted aggravated murder, as defined in Instruction[s] [#];
 - murder, as defined in Instruction[s] [#];
 - attempted murder, as defined in Instruction[s] [#]; or
 - an offense committed in another jurisdiction which if committed in this state would be a violation of another crime in this list;]

- [The defendant was previously convicted of the following offense[s]:
 - aggravated assault, as defined in Instruction[s] [#];
 - mayhem, as defined in Instruction[s] [#];
 - kidnapping, as defined in Instruction[s] [#];
 - child kidnapping, as defined in Instruction[s] [#];
 - aggravated kidnapping, as defined in Instruction[s] [#];
 - rape, as defined in Instruction[s] [#];
 - rape of a child, as defined in Instruction[s] [#];
 - object rape, as defined in Instruction[s] [#];
 - object rape of a child, as defined in Instruction[s] [#];
 - forcible sodomy, as defined in Instruction[s] [#];
 - sodomy on a child, as defined in Instruction[s] [#];

- aggravated sexual abuse of a child, as defined in Instruction[s] [#];
 - aggravated sexual assault, as defined in Instruction[s] [#];
 - aggravated arson, as defined in Instruction[s] [#];
 - aggravated burglary, as defined in Instruction[s] [#];
 - aggravated robbery, as defined in Instruction[s] [#];
 - felony discharge of a firearm, as defined in Instruction[s] [#]; or
 - an offense committed in another jurisdiction which if committed in this state would be a violation of a crime listed in this list;]
-
- [The defendant committed the homicide for the purpose of:
 - preventing a witness from testifying;
 - preventing a person from providing evidence or participating in any legal proceedings or official investigation;
 - retaliating against a person for testifying, providing evidence, or participating in any legal proceedings or official investigation;
 - disrupting or hindering any lawful governmental function or enforcement of laws;]
-
- [The defendant committed the homicide by means of a destructive device, bomb, explosive, incendiary device, or similar device which was planted, hidden, or concealed in any place, area, dwelling, building, or structure, or was mailed or delivered;]
-
- [The defendant committed the homicide by means of any weapon of mass destruction, as defined in Instruction [#];]
-
- [The defendant committed the homicide to target a law enforcement officer, as defined in Instruction [#];]
-
- [The defendant committed the homicide during the act of unlawfully assuming control of any aircraft, train, or other public conveyance by use of threats or force with intent to obtain any valuable consideration for the release of the public conveyance or any passenger, crew member, or any other person aboard, or to direct the route or movement of the public conveyance or otherwise exert control over the public conveyance;]
-
- [The defendant committed the homicide by means of the administration of a poison or of any lethal substance or of any substance administered in a lethal amount, dosage, or quantity;]
-
- [The defendant committed the homicide in an especially heinous, atrocious, cruel, or exceptionally depraved manner, any of which must be demonstrated by physical torture, serious physical abuse, or serious bodily injury of the victim before death;]
-
- [The defendant dismembered, mutilated, or disfigured the victim's body, whether before or after death, in a manner demonstrating the actor's depravity of mind;]
-
- [The victim was or had been a local, state, or federal public official, or a candidate for public office, and the homicide was based on, was caused by, or was related to that official position, act, capacity, or candidacy;]

- [The victim was on duty in a verified position or the homicide was based on, was caused by, or was related to the victim's position, and the actor knew, or reasonably should have known, that the victim held or had held the position of:
 - a law enforcement officer, correctional officer, special function officer, or any other peace officer, as defined in Instruction[s] [#];
 - an executive officer, prosecuting officer, jailer, or prison official;
 - a firefighter, search and rescue personnel, emergency medical personnel, ambulance personnel, or any other emergency responder, as defined in Instruction[s] [#];
 - a judge or other court official, juror, probation officer, or parole officer;
 - a security officer contracted to secure, guard, or otherwise protect tangible personal property, real property, or the life and well-being of human or animal life in the area of the offense;]

- [The victim was a person held or otherwise detained as a shield, hostage, or for ransom;]

- [The victim, at the time of the death, was younger than 14 years of age and was not an unborn child.]

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

Foreperson

Amended ***.

References

Utah Code § 76-5-202(1)

Committee Notes

This instruction contains bracketed language which suggests optional language. Please review and edit before finalizing the instruction. Only the circumstances that apply to the state's theory of the case should be included.

SVF #####. Aggravated Murder (reckless indifference to human life).

[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
AGGRAVATED MURDER**

Case No. [#]

Count [#]

We, the jury, have found the defendant, [Defendant], guilty of Aggravated Murder, [as charged in Count ____]. We also unanimously find beyond a reasonable doubt that the defendant, with reckless indifference to human life, caused the death incident to an act, scheme, course of conduct, or criminal episode during which the defendant was a major participant in the commission or attempted commission of any of the following (check all that apply):

- child abuse, as defined in Instruction[s] [#];
- child kidnapping, as defined in Instruction[s] [#];
- rape of a child, as defined in Instruction[s] [#];
- object rape of a child, as defined in Instruction[s] [#];
- sodomy on a child, as defined in Instruction[s] [#];
- sexual abuse or aggravated sexual abuse of a child, as defined in Instruction[s] [#];

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

Foreperson

Amended ***.

References

Utah Code § 76-5-202(2)

Committee Notes

This instruction contains bracketed language which suggests optional language. Please review and edit before finalizing the instruction. Only the circumstances that apply to the state's theory of the case should be included.

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. | SPECIAL VERDICT IMPERFECT SELF-DEFENSE 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”^[MD1] 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”^[MD2] 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^[MD3] 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;"><u>SPECIAL VERDICT FORM</u> <u>MENTAL ILLNESS</u> <u>SPECIAL MITIGATION</u></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.~~

Discussed and
rejected at the
20211103 meeting

~~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.

Discussed, but not resolved, at the 20211103 meeting

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.

----- Discussed and rejected by committee 20211103

~~**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