

**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.

COMMITTEE MEMBER:	ROLE:	PRESENT	EXCUSED	GUESTS:
Hon. James Blanch	District Court Judge [Chair]	•		None
Jennifer Andrus	Linguist / Communications		•	
Sharla Dunroe	Defense Counsel	•		<b>STAFF:</b>
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.

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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).

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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:

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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).

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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:

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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.  
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CR1403A:

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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.  
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CR1411A:

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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.  
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**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.