

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

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

COMMITTEE MEMBER:	ROLE:	PRESENT	EXCUSED	GUESTS:
Hon. James Blanch	District Court Judge [Chair]	•		Gage Hansen
Jennifer Andrus	Linguist / Communications	•		
Sharla Dunroe	Defense Counsel		•	STAFF:
Sandi Johnson	Prosecutor	•		Michael Drechsel
Janet Lawrence	Defense Counsel	•		
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 October 6, 2021 meeting.
Ms. Johnson moved to approve the draft minutes; Mr. Mann seconded the motion.
The committee voted unanimously in support of the motion. The motion passed.

(2) REVIEW CR1402A, CR1403A, AND CR1411A, AND CR1402B, CR1403B, AND CR1411B FOR CONSISTENCY:

Mr. Drechsel explained the materials to the committee. These materials compare CR1402A, CR1403A, and CR1411A (agg. murder / murder without mitigation) and CR1402B, CR1403B, and CR1411B (agg. murder / murder with mitigation) to ensure the instructions are consistent with the committee’s intentions. The committee reviewed the various instructions, starting with CR1402A and CR1403A. Mr. Pehrson asked why there is language in the Committee Notes section under “Elements” regarding “date and/or location.” The committee discussed the need for this language, reviewing the history of the instruction. After discussion, the committee agreed that this language should not be included in the committee note. The relevant committee note language being removed from CR1402A, CR1403A, CR1402B, and CR1403B is:

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.

The committee then considered feedback from Mr. Mann about the passive “has been proven” language used in the concluding paragraph of the elements instruction. Ms. Johnson pointed out that the same language is used in each of the element instructions across the full collection of MUJI criminal instructions. Ms. Andrus pointed out that the language would be improved if it were changed from a passive construction. Judge McCullagh suggested that this be reviewed in the future as a general to-do item for the committee to tackle. Mr. Drechsel captured that as a future item.

The committee then turned its attention to CR1411A and whether the committee note should include the same “unanimity uncertainty” language as exists in the other instructions under consideration. At the last meeting, Judge Jones had begun some mid-meeting research on the topic while the committee moved on to the other matters. The committee did not have time at the last meeting to circle back around to finalize its discussion of this language for CR1411A. Ms. Johnson suggested that the language remain included in CR1411A, noting her belief that the same uncertainty applies to both aggravated murder (a la CR1402A, CR1403A, CR1402B, and CR1403B) as it does to murder (CR1411A and CR1411B). After discussion and review, the committee agreed that the language should remain in the two versions of the murder instruction.

Having made a review of CR1402A, CR1403A, and CR1411A, and not finding any additional issues with the proposed language, the committee turned its attention to the “with mitigation” versions of the same instructions (CR1402B, CR1403B, and CR1411B). Ms. Johnson pointed the committee’s attention to pages 40-43 of the meeting materials (specifically the “CR1450-1452 / SVF1450 – imperfect self-defense” public comments from Tom Brunker and Fred Burmester from back in 2020 when the imperfect self-defense instructions were originally published for public comment). The committee discussed these comments in light of the approach that the committee has elected to take with CR1402B, CR1403B, and CR1411B (the special verdict form approach). The committee reviewed those public comments and concluded that most of the feedback speaks to the “lesser included offense” context than to the special mitigation reduction scenario. Mr. Mann noted his concern about the issue identified in the final paragraph of Mr. Brunker’s comment (regarding finding the defendant “guilty” of the greater offense before addressing the special mitigation component). The committee discussed the elements instruction language in the concluding two paragraphs of CR1402B, CR1403B, and CR1411B:

... 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.

Judge Welch pointed out that, in her view, the primary difference between special mitigation and a lesser included offense is that in the lesser included offense context some proof related to the greater charge was missing, while in the special mitigation context, everything for the greater offense has been proven, but there is something more that needs to be addressed beyond that (the additional evidence regarding special mitigation). Order of deliberation concerns are relevant in the lesser-included context, but not the special mitigation context.

The committee considered whether that distinction was adequately expressed in the language above. The concern is that the elements instruction requires the jury to find the defendant guilty of the greater offense, but then also consider something more. Mr. Mann suggested that perhaps it would be more advisable in the elements instruction to say something less final, like “then you must find that all of the elements have been proven...” (as opposed to “then you must find the defendant guilty”). Ms. Johnson asked what the verdict form would then look like under that scenario, since the committee has been pursuing a verdict form / special verdict form approach on this issue. Mr. Mann acknowledged that was a good question, but that he didn’t have an answer at this point. Judge Welch and Ms. Lawrence agreed that Mr. Mann’s suggestion would more clearly align with what the jury is actually finding in this special mitigation context. Judge Blanch asked, though, what the issue would be if a defendant were first found guilty of aggravated murder, but then, after special mitigation was resolved, was ultimately sentenced only to murder (consistent with the special verdict form on special mitigation). Judge Blanch asked what the issue on appeal would be in that scenario. Mr. Mann acknowledged that there likely would never be an appeal in that circumstance, but suggested that one possible issue would be in the circumstance where the jury finds special mitigation does not apply, and a defendant argues that because the elements instruction language required the jury to find the defendant guilty of aggravated murder the jury didn’t adequately consider the special mitigation issue. Judge Blanch suggested that if that were the case, the jury would not have followed the instructions as currently proposed. Judge Blanch asked that the committee members continue to reflect on this issue in preparation for the next meeting, where the committee will resume its discussion on how to approach and resolve this issue.

Prior to adjourning the meeting, Mr. Pehrson made a motion to approve all changes to these six proposed instructions (up to, but not including, this final issue) as previously discussed by the committee during the meeting. Judge Welch seconded that motion. The motion passed. This resulted in CR1402A, CR1403A, and CR1411A being approved by the committee in the following form:

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

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

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.

Staff will revise CR1402B, CR1403B, and CR1411B accordingly and bring them back around for further discussion on the unresolved topic at the next meeting.

(3) ADJOURN

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