

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

Via Webex  
June 1, 2022 – 12:00 p.m. to 1:30 p.m.

12:00	Welcome and Approval of Minutes	Tab 1	Judge Blanch
	Jury Unanimity: - <i>Proposed instruction for more acts than charged counts</i>	Tab 2	Ms. Lawrence Ms. Johnson
	Partial Defense Instructions (continued): - <i>Battered Person mitigation</i> - <i>Imperfect self-defense</i>	Tab 3	Mr. Mann Ms. Lawrence Committee
1:30	Adjourn		

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

**UPCOMING MEETING SCHEDULE:**

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

July 6, 2022  
August 3, 2022

September 7, 2022  
October 5, 2022

November 2, 2022  
December 7, 2022

# TAB 1

## Meeting Minutes – April 6, 2022

### NOTES:

This is an explanation of this item, if necessary

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

Via Webex  
April 6, 2022 – 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	•	•	<b>STAFF:</b> Michael Drechsel
Sandi Johnson	Prosecutor	•		
Janet Lawrence	Defense Counsel	•		
<i>vacant</i>	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 March 9, 2022 meeting.  
Mr. Mann moved to approve the draft minutes; Ms. Lawrence seconded the motion.  
The committee voted unanimously in support of the motion. The motion passed.

**(2) RECAP OF FEEDBACK ON NEW UNANIMITY INSTRUCTIONS:**

Judge Blanch explained to the committee that he spoke with Judge Harris about approved instructions CR216, CR430, and CR431. The brief initial feedback from Judge Harris was positive. Judge Blanch thanked the committee for the work that was conducted on this project.

Ms. Lawrence shared some feedback on these three instructions from the appellate defense division at SLLDA. The first was to change the word “proved” to “proven” in the second sentence of CR430 (to mirror the construction in CR431). The committee agreed and instructed staff to make the change to the published instruction.

Ms. Lawrence's second point of feedback was on the use of the words "...the defendant committed..." in the first sentence of CR430 and CR431. She noted that although it is not incorrect as written, from the appellate defense attorneys' perspective this language may suggested to the jury that the defendant actually committed the offense. They suggested that the word "allegedly" be inserted into the phrase to say "...the defendant allegedly committed..." Judge Blanch indicated that seemed redundant in his view. Ms. Andrus noted that it is both redundant and incorrect (in that the prosecution hasn't charged that the defendant "allegedly" committed the act). Judge Blanch suggested that perhaps the language could be that the prosecution has "alleged that the defendant committed" the offense(s) (rather than "charged"). Mr. Mann indicated he prefers "charged," which mirrors all of the other elements instructions in MUJI. Ms. Andrus noted that "charged" and "alleged" are not synonymous and that "charged" is the more accurate statement. Judge Blanch agreed. The committee agreed to not make any change to the existing language. Ms. Lawrence accepted this feedback and agreed to share with her colleagues the committee's position.

Ms. Lawrence's third point of feedback was a suggestion to add additional instruction language about evidence of more occurrences than charges (i.e., prosecutors providing evidence of uncharged conduct or conduct that isn't clearly associated with an existing count). Ms. Lawrence noted that she has a draft of proposed language that the committee could consider at some point. Judge Blanch noted that this seems like a CR431-type situation. He explained that the hope (as expressed in the committee note) is that practitioners will modify the elements instructions to clearly connect elements instructions for each count to specific facts / acts. Ms. Lawrence agreed that would solve the issue. Ms. Lawrence noted that her proposed language would be incorporated into the elements instruction for each count. Ms. Lawrence read her proposed language to the committee members, as follows:

You must consider only the occasion the prosecutor has specifically identified for this count and unanimously agree as to whether the defendant is guilty or not guilty of [NAME OF OFFENSE] on [THAT OCCASION]. You may not find the defendant guilty unless you unanimously agree that the prosecutor has proven all the elements of the alleged offense for on [THAT OCCASION].

Ms. Johnson noted that she had proposed similar language many months earlier. Ms. Johnson's language would be a separate standalone instruction, as follows:

The prosecution has presented evidence that the defendant may have committed [INSERT NAME OF OFFENSE] more times than the number of counts reflected in the verdict. When determining whether the defendant committed [INSERT NAME OF OFFENSE] in Count(s) [Count #], you must be unanimous as to which act the defendant committed for each count, and that the prosecution has proven all of the elements for that count. You may find the defendant guilty of some of these counts and not guilty of others, but for each count, your decision must be unanimous.

Ms. Johnson expressed opposition to including language in the elements instruction. The elements should be geared toward specific facts and changing the template for the elements instructions generally is undesirable; the more the parties move away from that template, the more likelihood there is of messing up the elements instruction. In her view, a separate instruction can accomplish the same purpose. Ms. Lawrence agreed that this could be a separate instruction but included at the end of the elements instruction. Ms. Lawrence and Ms. Johnson agreed to coordinate via email on some proposed language in advance of the next committee meeting. Staff was instructed to include discussion of this subject as the first agenda item for the May meeting.

### **(3) PARTIAL DEFENSE INSTRUCTIONS (CONTINUED):**

Mr. Drechsel provided the committee with a recap of what work has taken place so far on the partial defense instructions, including a description of instructions that have been previously approved by the committee, instructions that have been considered but not approved, and instructions that remain unconsidered as part of

this project (see Tab 3 of meeting materials). This review was made in light of passage of SB0123 – Criminal Code Recodification, from the 2022 General Legislative Session. Mr. Drechsel provided a brief overview of the changes regarding special mitigation / affirmative defenses in SB0123.

The committee then undertook a review of its previously approved work on partial defense instructions to ensure those instructions are consistent with the committee's intentions, in light of SB0123. After review, the committee felt that no changes were necessary for the following previously approved instructions: CR505A, CR1450, CR1402A, CR1403A, and CR1411A.

The committee then reviewed CR1402B, CR1403B, and CR1411B in light of the passage of SB0123. The committee discussed and made a number of minor revisions to the version of CR1402B in the meeting materials. Having made a final review of CR1402B, Ms. Johnson made motion to approve CR1402B. The committee then voted unanimously in favor of the motion, approving CR1402B, as follows:

-----

**CR1402B Aggravated Murder Elements – Utah Code § 76-5-202(2)(a) – 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 of Aggravated Murder, 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. Your decision on any mitigation defense will be reflected on a special verdict form.

[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 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).

-----

The committee then turned its attention to CR1403B, making the same minor revisions as were made in CR1402B. Having made a final review of CR1403B, Ms. Johnson made motion to approve CR1403B. The committee then voted unanimously in favor of the motion, approving CR1403B, as follows:

-----

### **CR1403B Aggravated Murder Elements – Utah Code § 76-5-202(2)(b) – 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 of Aggravated Murder, 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. Your decision on any mitigation defense will be reflected on a special verdict form.

[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 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).

-----

The committee then turned its attention to CR1411B, making the same minor revisions as were made in CR1402B and CR1403B. Having made a final review of CR1411B, Ms. Johnson made motion to approve CR1411B. The committee then voted unanimously in favor of the motion, approving CR1411B, as follows:

-----

**CR1411B Murder – With Mitigation Defenses**

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

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

[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).

The committee then turned its attention to the partial mitigation instructions that it has not yet considered, starting with CR1451. Ms. Johnson noted that the final paragraph of the committee note is no longer necessary in light of the committee's subsequent work in CR1402B, CR1403B, and CR1411B (that language has been added directly to each of the "with mitigation" agg murder and murder instructions). The committee agreed. Mr. Mann noted that it may not be necessary for CR1451 to include both "perfect" and "imperfect" self-defense since not every case involves both types of self-defense. The committee reviewed the instructions that are for perfect self-defense (CR530, for instance). Judge Blanch asked if the committee note for CR1451 should say something about how CR1451 should only be used in cases involving both "perfect" and "imperfect" self-defense; if the only issue is perfect self-defense, then practitioners should look to CR530. Ms. Johnson noted that when the instructions in CR510-CR540 are used in any case involving "perfect" self-defense, practitioners should be advised to clearly delineate that the CR501-CR540 instructions are about "perfect" self-defense. This is already noted in the committee note ("Always distinguish between 'perfect self-defense' and 'imperfect self-defense' throughout the instructions."), but perhaps this should instead instruct practitioners to add the word "perfect" to the relevant instructions as the appropriate way to distinguish between the various instructions. The committee did not take action on CR1451 at this meeting.

Mr. Mann and Ms. Johnson had an exchange regarding the need for a group of imperfect self-defense instructions (as a compliment to the perfect self-defense instructions that exist in CR501-CR540). Ms. Johnson and Mr. Mann agreed to try to create imperfect self-defense instructions. Ms. Johnson noted that looking at CR530, CR531, CR532, and CR533 would likely be sufficient (since these are the defenses related to persons, as opposed to property).

Prior to adjourning, several of the committee members had a brief discussion about what next steps to take on the remaining instructions. Mr. Drechsel agreed to send the packet of remaining instructions to Ms. Johnson, Mr. Mann, and Ms. Lawrence ASAP for their review in advance of the next meeting.

#### **(4) ADJOURN**

The meeting adjourned at approximately 1:25 p.m. The next meeting will be held on May 4, 2022, starting at 12:00 noon.

# TAB 2

## **Jury Unanimity (continued and revisited)**

### **NOTES:**

Ms. Johnson and Ms. Lawrence collaborated on the following materials regarding jury unanimity, though they are not necessarily unanimous in their recommended approach.

## CR216 Jury Unanimity and Deliberations.

Because this is a criminal case, every single juror must agree with the verdict before the defendant can be found “guilty” or “not guilty.” That is, you must be unanimous in your verdict for each count charged.

To help you in reaching unanimous agreement, I recommend that you not commit yourselves to a particular verdict before discussing all the evidence. In addition, you may not speculate, and you may not use methods of chance, such as drawing straws or flipping a coin.

Rather, in the jury room, consider the evidence and speak your minds with each other. Listen carefully and respectfully to each other’s views and keep an open mind about what others have to say. If there is a difference of opinion about the evidence or the verdict, do not hesitate to change your mind if you become convinced that your position is wrong. On the other hand, do not give up your honestly held views about the evidence simply to agree on a verdict, to give in to pressure from other jurors, or just to get the case over with.

In the end, your vote must be your own. A unanimous verdict must reflect the individual, careful, and conscientious judgment of each juror as to whether the defendant is guilty or not guilty.

### References

Utah Const. Art. I, § 10  
Utah R. Crim. P. 21(b)  
Utah R. Civ. P. 59(a)(2)  
*Burroughs v. United States*, 365 F.2d 431, 434 (10th Cir. 1966)  
*State v. Lactod*, 761 P.2d 23, 30-31 (Utah Ct. App. 1988)  
[\*State v. Russell\*, 733 P.2d 162 \(Utah 1987\)](#)  
[\*State v. Tillman\*, 750 P.2d 546 \(Utah 1987\)](#)  
[\*State v. Johnson\*, 821 P.2d 1150 \(Utah 1991\)](#)  
[\*State v. Saunders\*, 1999 UT 59](#)  
*State v. Hummel*, 2017 UT 19  
*State v. Alires*, 2019 UT App 206  
*State v. Case*, 2020 UT App 81  
*State v. Whytock*, 2020 UT App 107  
[\*State v. Covington\*, 2020 UT App 110](#)  
[\*State v. Mendoza\*, 2021 UT App 79](#)  
[\*State v. Paule\*, 2021 UT App 120](#)  
[\*State v. Baugh\*, 2022 UT App 3](#)  
75 Am. Jur.2d Trial §§ 1647, 1753, 1781

### Committee Notes

Utah’s courts have directed that, under certain circumstances, juries must be instructed on something more than simply being unanimous as to the verdict. In cases where different acts and mental states can satisfy the same element, practitioners should add or amend proposed jury instructions and verdict forms to address unanimity concerns.

Utah’s appellate courts have tried to distinguish between elements of a crime—on which a jury must be unanimous—and theories of a crime—on which a jury does not have to be unanimous. The line between elements and theories, however, is not clearly defined in the case law. Thus, the nature of the additional required instruction will vary depending upon the crimes charged and the facts and circumstances of a particular case. Refer to CR430 and CR431 for model instructions regarding specific jury unanimity requirements in particular types of cases.

**Commented [MCD1]:** Both Janet and Sandi apparently agree on this addition.

The committee discussed (and rejected) this language at the March 9 meeting. Here are the minutes from that meeting on this specific point:

"Judge McCullagh asked about the language in the second sentence of the second paragraph, "...you may not speculate," wondering why that language was included in this new version. Judge Jones noted that it would be appropriate to not include that language, as it may convey to the jury that they jury cannot draw reasonable inferences from the evidence presented at trial. The committee agreed that language should be removed from the draft."

FYI.

Increasingly, Utah's appellate courts are identifying circumstances where it is not clear that the jury was adequately instructed on the constitutional requirement that a jury's verdict be unanimous. See the references above for examples. In cases where different alleged acts can satisfy the same element, practitioners should add or amend proposed jury instructions and verdict forms to address unanimity concerns.

Because different facts and circumstances will require case-specific unanimity instructions, practitioners should tailor elements instructions and use CR430, CR431, and CR432 where appropriate to meet Utah's constitutional requirement that a jury's verdict be unanimous.

- **CR430** should be used in circumstances where the prosecution presents evidence that, if believed, could support a finding that the defendant committed two or more acts that could have been charged as separate offenses, but were not. See, e.g., *State v. Paule*, 2021 UT App 120. For example, the prosecution presents evidence that the defendant obstructed justice by attempting to dispose of a weapon, disposing of his phone, and fleeing the state, but the defendant was charged with only one count of obstruction of justice. In addition to CR430, the committee encourages practitioners to use a special verdict form or forms to confirm that the jury reached a unanimous verdict.
- **CR431** should be used in circumstances where multiple counts have identical elements but are alleged to have occurred on different occasions or are different acts allegedly committed on the same occasion. See, e.g., *State v. Alires*, 2019 UT App 206. For example, the prosecutor presents evidence of sexual abuse of a child on multiple occasions over time or different acts of touching on the same occasion. In addition to CR431, the committee encourages practitioners to specify in the elements instruction the particular act that is the basis for the charge and to use a special verdict form or forms where appropriate to confirm that the jury reached a unanimous verdict.
- **CR432** should be used in circumstances where the prosecution has presented evidence that the offense may have occurred more times than the prosecution has charged. See, e.g., *State v. Alires*, 2019 UT App 206. For example, an alleged victim testifies that sexual abuse happened on five occasions and the prosecution charges only three counts of sexual abuse. In addition to CR432, the committee encourages practitioners to specify in the elements instruction the particular act that is the basis for the charge and to use a special verdict form or forms where appropriate to confirm that the jury reached a unanimous verdict.

The committee cautions against relying exclusively on the model instructions to ensure unanimity. Practitioners should amend the language of particular elements instructions and verdict forms to clarify which specific acts relate to which charged offenses. The instructions must instruct the jury that it must unanimously agree that all elements have been proven beyond a reasonable doubt for each count. The use of special verdict forms is also encouraged. The committee recommends that practitioners employ additional approaches where needed to confirm that jury verdicts are unanimous.

### CR430 Jury Unanimity – Single Offense in More Than One Way.

Count (#) charges (DEFENDANT'S NAME) with (CRIME). Evidence was introduced that the defendant may have committed this offense either by [WAY 1] [WAY 2] [WAY 3]. The prosecution has charged that the defendant committed [Count \_\_\_\_] in more than one way.

You may not find (DEFENDANT'S NAME) the defendant guilty of that offense on this count unless you unanimously agree that the prosecution has proven that (DEFENDANT'S NAME) the defendant committed the offense (CRIME) in at least one of those specific ways AND you unanimously agree on the specific way(s) in which the defendant committed the offense.

#### References

*State v. Russell*, 733 P.2d 162 (Utah 1987)  
*State v. Tillman*, 750 P.2d 546 (Utah 1987)  
*State v. Johnson*, 821 P.2d 1150 (Utah 1991)  
*State v. Saunders*, 1999 UT 59  
*State v. Hummel*, 2017 UT 19  
*State v. Alires*, 2019 UT App 206  
*State v. Case*, 2020 UT App 81  
*State v. Whytock*, 2020 UT App 107  
*State v. Covington*, 2020 UT App 110  
*State v. Mendoza*, 2021 UT App 79  
*State v. Paule*, 2021 UT App 120  
*State v. Baugh*, 2022 UT App 3

#### Committee Notes

CR430 should be used in circumstances where the prosecution presents evidence that, if believed, could support a finding that the defendant committed two or more acts that could have been charged as separate offenses, but were not. See, e.g., *State v. Paule*, 2021 UT App 120. For example, the prosecution presents evidence that the defendant obstructed justice by attempting to dispose of a weapon, disposing of his phone, and fleeing the state, but the defendant was charged with only one count of obstruction of justice. In addition to CR430, the committee encourages practitioners to use a special verdict form or forms to confirm that the jury reached a unanimous verdict.

Counsel and trial courts should consider the use of either CR430 or CR431 in certain cases to help eliminate confusion or ambiguity about whether the jury has reached a unanimous conclusion regarding a defendant's guilt. When appropriate, these instructions should be included in addition to the general unanimity principles contained within instructions CR216 and CR218.

Increasingly, Utah's appellate courts are identifying circumstances in which it is not clear, based on instructions given, that juries necessarily reached unanimous agreement as to all elements of a particular charged crime. Examples of such case law are set forth in the references above.

CR430 is meant for use in circumstances in which the prosecution has alleged the defendant committed a particular crime in more than one way, such as asserting the defendant committed two or more acts that each would constitute a charged offense of obstruction of justice. See, e.g., *State v. Mendoza*, 2021 UT App 79. The committee encourages the use of a special verdict form or forms to reduce further the possibility of confusion in this context.

CR431 is meant for use in circumstances in which the prosecution has alleged the defendant committed multiple crimes consisting of identical elements on separate occasions, such as asserting the defendant

#### Commented [MCD2]: Sandi says:

I don't know which way the committee wants to address the defendant. In stock instructions, we usually use "the defendant" and in elements instructions we use "(DEFENDANT'S NAME)". I don't really have a preference, but I went with "the defendant" because that is how it is listed in these instructions originally.

#### Janet says:

I prefer using the defendant's name where the instruction is being tailored to this specific case and is not just a stock instruction.

committed multiple acts constituting separate instances of aggravated sexual abuse of a child over a period of time. See, e.g., *State v. Alires*, 2019 UT App 206. In circumstances such as these, use of CR430 or CR431, in addition to the unanimity language in CR216 and CR218, should help reduce confusion or ambiguity over whether the jury has reached unanimous agreement as to whether the defendant committed a particular specific criminal act.

The committee cautions counsel and trial courts against relying exclusively on these instructions to ensure it is clear a jury's verdict is unanimous. To remove ambiguity, it may also be advisable to amend the language of particular elements instructions and verdict forms to ensure it is clear which specific acts relate to which charged offenses. The instructions must instruct the jury it must unanimously agree that the applicable mental state(s) and other essential elements have been proven for each count. The use of special verdict forms is also encouraged. The appellate courts have further encouraged counsel to explain clearly to jurors in closing arguments which specific acts relate to which charged offenses. The committee recommends to counsel and trial courts that they employ such approaches, in addition to use of the instructions described above, to ensure it is sufficiently clear that jury verdicts are unanimous.

Last Revised - 03/09/2022

### CR431 Jury Unanimity – Multiple Offenses with Identical Elements.

The prosecution has charged in Count \_\_\_\_\_ (#) through Count \_\_\_\_\_ (#) that ~~the defendant~~(DEFENDANT'S NAME) committed ~~[INSERT NAME OF OFFENSE](CRIME)~~ multiple times. Although each of these counts has similar or identical elements, you must consider each count separately and reach unanimous agreement ~~as to~~ whether ~~the defendant~~(DEFENDANT'S NAME) is guilty or not guilty of each ~~specific individual~~ count. You may not find the defendant guilty of any ~~one of these counts~~ unless you unanimously agree ~~the prosecution has proven on~~ the specific act ~~the prosecution has proven that is within~~ the elements of the offense ~~for each count~~ AND you unanimously agree the prosecution has proven all other elements of the count. You may find the defendant guilty of all of these counts, none of these counts, or only some of these counts; but for each count your decision must be unanimous.

In this case:

- Count (#) is based on the alleged conduct of (INSERT SPECIFIC CONDUCT AND OCCASION).
- Count (#) is based on the alleged conduct of (INSERT SPECIFIC CONDUCT AND OCCASION).
- [Count (#) is based on the alleged conduct of (INSERT SPECIFIC CONDUCT AND OCCASION).]

### References

State v. Russell, 733 P.2d 162 (Utah 1987)  
State v. Tillman, 750 P.2d 546 (Utah 1987)  
State v. Johnson, 821 P.2d 1150 (Utah 1991)  
State v. Saunders, 1999 UT 59  
State v. Hummel, 2017 UT 19  
State v. Alires, 2019 UT App 206  
State v. Case, 2020 UT App 81  
State v. Whytock, 2020 UT App 107  
State v. Covington, 2020 UT App 110  
State v. Mendoza, 2021 UT App 79  
State v. Paule, 2021 UT App 120  
State v. Baugh, 2022 UT App 3

### Committee Notes

CR431 should be used in circumstances where multiple counts have identical elements but are alleged to have occurred on different occasions or are different acts allegedly committed on the same occasion. See, e.g., State v. Alires, 2019 UT App 206. For example, the prosecutor presents evidence of sexual abuse of a child on multiple occasions over time or different acts of touching on the same occasion. In addition to CR431, the committee encourages practitioners to specify in the elements instruction the particular act that is the basis for the charge and to use a special verdict form or forms where appropriate to confirm that the jury reached a unanimous verdict.

Counsel and trial courts should consider the use of either CR430 or CR431 in certain cases to help eliminate confusion or ambiguity about whether the jury has reached a unanimous conclusion regarding a defendant's guilt. When appropriate, these instructions should be included in addition to the general unanimity principles contained within instructions CR216 and CR218.

Increasingly, Utah's appellate courts are identifying circumstances in which it is not clear, based on instructions given, that juries necessarily reached unanimous agreement as to all elements of a particular charged crime. Examples of such case law are set forth in the references above.



CR430 is meant for use in circumstances in which the prosecution has alleged the defendant committed a particular crime in more than one way, such as asserting the defendant committed two or more acts that each would constitute a charged offense of obstruction of justice. See, e.g., *State v. Mendoza*, 2021 UT App 79. The committee encourages the use of a special verdict form or forms to reduce further the possibility of confusion in this context.

CR431 is meant for use in circumstances in which the prosecution has alleged the defendant committed multiple crimes consisting of identical elements on separate occasions, such as asserting the defendant committed multiple acts constituting separate instances of aggravated sexual abuse of a child over a period of time. See, e.g., *State v. Alires*, 2019 UT App 206. In circumstances such as these, use of CR430 or CR431, in addition to the unanimity language in CR216 and CR218, should help reduce confusion or ambiguity over whether the jury has reached unanimous agreement as to whether the defendant committed a particular specific criminal act.

The committee cautions counsel and trial courts against relying exclusively on these instructions to ensure it is clear a jury's verdict is unanimous. To remove ambiguity, it may also be advisable to amend the language of particular elements instructions and verdict forms to ensure it is clear which specific acts relate to which charged offenses. The instructions must instruct the jury it must unanimously agree that the applicable mental state(s) and other essential elements have been proven for each count. The use of special verdict forms is also encouraged. The appellate courts have further encouraged counsel to explain clearly to jurors in closing arguments which specific acts relate to which charged offenses. The committee recommends to counsel and trial courts that they employ such approaches, in addition to use of the instructions described above, to ensure it is sufficiently clear that jury verdicts are unanimous.

Last Revised - 03/09/2022

### **CR432 Jury Unanimity – Evidence of More Occurrences than Charges.**

The prosecution has charged in Count (#) through Count (#) that (DEFENDANT'S NAME) committed (CRIME). Evidence was introduced that (DEFENDANT'S NAME) may have committed (CRIME) more times than the number of charged counts. When determining whether (DEFENDANT'S NAME) committed (CRIME), you must be unanimous as to which occasion and which act (DEFENDANT'S NAME) committed for each count, and that the prosecution has proven all the elements for that count. You may find (DEFENDANT'S NAME) guilty of all these counts, none of these counts, or only some of these counts; but for each count your decision must be unanimous.

In this case:

- Count (#) is based on the alleged conduct of (INSERT SPECIFIC CONDUCT AND OCCASION).
- Count (#) is based on the alleged conduct of (INSERT SPECIFIC CONDUCT AND OCCASION).
- [Count (#) is based on the alleged conduct of (INSERT SPECIFIC CONDUCT AND OCCASION).]

### **References**

*State v. Russell*, 733 P.2d 162 (Utah 1987)  
*State v. Tillman*, 750 P.2d 546 (Utah 1987)  
*State v. Johnson*, 821 P.2d 1150 (Utah 1991)  
*State v. Saunders*, 1999 UT 59  
*State v. Hummel*, 2017 UT 19  
*State v. Alires*, 2019 UT App 206  
*State v. Case*, 2020 UT App 81  
*State v. Whytock*, 2020 UT App 107  
*State v. Covington*, 2020 UT App 110  
*State v. Mendoza*, 2021 UT App 79  
*State v. Paule*, 2021 UT App 120  
*State v. Baugh*, 2022 UT App 3

### **Committee Notes**

**CR432** should be used in circumstances where the prosecution has presented evidence that the offense may have occurred more times than the prosecution has charged. See, e.g., *State v. Alires*, 2019 UT App 206. For example, an alleged victim testifies that sexual abuse happened on five occasions and the prosecution charges only three counts of sexual abuse. In addition to CR432, the committee encourages practitioners to specify in the elements instruction the particular act that is the basis for the charge and to use a special verdict form or forms where appropriate to confirm that the jury reached a unanimous verdict.

Last Revised - 00/00/0000

Examples of how elements  
instructions could be used  
in conjunction with  
CR430, CR431, and CR432:

**INCORPORATED vs. STANDALONE**

Example of how CR430 could be used with an elements instruction

## **INCORPORATED**

Mr. Jones is charged in **Count 3** with committing Sexual Abuse of a Minor **in the blue truck** on or about June 24, 2020. You cannot convict him of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. Mr. Jones
2. intentionally, knowingly, or recklessly
  - a. touched any part of A.J.'s genitals, even if accomplished through clothing; or
  - b. touched A.J.'s breast, even if accomplished through clothing
3. with the intent to arouse or gratify the sexual desire of any person
4. and A.J. was 14 or 15 years old at the time of the conduct
5. and Mr. Jones was seven or more years older than A.J.

The prosecution has charged in this count that Mr. Jones committed Sexual Abuse of a Minor and has presented evidence that it could have happened by either (a) touching any part of A.J.'s genitals, even if accomplished through clothing OR (b) touching A.J.'s breast, even if accomplished through clothing.

You may not find Mr. Jones guilty on this count unless you unanimously agree that the prosecution has proven beyond a reasonable doubt that Mr. Jones committed Sexual Abuse of a Minor, AND if so, you unanimously agree on the specific way(s) Mr. Jones committed the offense.

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.

## **OR STANDALONE**

Count 3 charges the defendant with Sexual Abuse of a Minor. Evidence was introduced that the defendant may have committed this offense either by (a) touching any part of A.J.'s genitals, even if accomplished through clothing; or (b) touching A.J.'s breast, even if accomplished through clothing.

You may not find the defendant guilty on this count unless you unanimously agree that the prosecution has proven beyond a reasonable doubt that the defendant committed Sexual Abuse of a Minor in at least one of those specific ways AND you unanimously agree on the specific way(s) in which the defendant committed the offense.

Example of how CR431 could be used with an elements instruction

## **INCORPORATED**

Mr. Jones is charged in Count 3 with committing Sexual Abuse of a Minor in the blue truck on or about June 24, 2020. You cannot convict him of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. Mr. Jones
2. intentionally, knowingly, or recklessly
  - a. touched A.J.'s breast, even if accomplished through clothing
3. with the intent to arouse or gratify the sexual desire of any person
4. and A.J. was 14 or 15 years old at the time of the conduct
5. and Mr. Jones was seven or more years older than A.J.

The prosecution has charged in Counts 3 through 6 that Mr. Jones committed Sexual Abuse of a Minor and has presented evidence that it could have happened multiple times. Although each of these counts has similar or identical elements, you must consider each count separately and reach unanimous agreement on whether Mr. Jones is guilty or not guilty of each individual count.

You may not find Mr. Jones guilty on this count unless you unanimously agree that the prosecution has proven beyond a reasonable doubt that Mr. Jones committed Sexual Abuse of a Minor for this specific count.

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.

## **OR STANDALONE**

The prosecution has charged in Count 3 through Count 6 that the defendant committed Sexual Abuse of a Minor multiple times. Although each of these counts has similar or identical elements, you must consider each count separately and reach unanimous agreement as to whether the defendant is guilty or not guilty of each specific count. You may not find the defendant guilty of any one of these counts unless you unanimously agree on the specific act the prosecution has proven that is within the elements of the offense AND you unanimously agree the prosecution has proven all other elements of the count. You may find the defendant guilty of all these counts, none of these counts, or only some of these counts; but for each count your decision must be unanimous.

In this case:

- Count 3 is based on the alleged conduct of the defendant touching A.J.'s breast in the blue truck.
- Count 4 is based on the alleged conduct of the defendant touching A.J.'s genitals in the blue truck.
- Count 5 is based on the alleged conduct of the defendant touching A.J.'s genitals in the defendant's basement.
- Count 6 is based on the alleged conduct of the defendant touching A.J.'s genitals at Vivian Park.

Example of how CR432 could be used with an elements instruction

## **INCORPORATED**

Mr. Jones is charged in Count 3 with committing Sexual Abuse of a Minor **in the blue truck** on or about June 24, 2020. You cannot convict him of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. Mr. Jones
2. intentionally, knowingly, or recklessly
  - a. touched A.J.'s breast, even if accomplished through clothing
3. with the intent to arouse or gratify the sexual desire of any person
4. and A.J. was 14 or 15 years old at the time of the conduct
5. and Mr. Jones was seven or more years older than A.J.

You must consider only the occasion the prosecutor has specifically identified for this count and unanimously agree as to whether Mr. Jones is guilty or not guilty of Sexual Abuse of a Minor in the blue truck on or about June 24, 2020.

You may not find Mr. Jones guilty unless you unanimously agree that the prosecutor has proven all the elements of the alleged offense in the blue truck on or about June 24, 2020.

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.

## **OR STANDALONE**

The prosecution has charged in **Count 3 through Count 5** that the defendant committed Sexual Abuse of a Minor. Evidence was introduced that the defendant may have committed Sexual Abuse of a Minor **more times than the number of charged counts**. When determining whether the defendant committed Sexual Abuse of a Minor, you must be unanimous as to which occasion and which act the defendant committed for each count, and that the prosecution has proven all the elements for that count. You may find the defendant guilty of all these counts, none of these counts, or only some of these counts; but for each count your decision must be unanimous.

In this case:

- **Count 3** is based on the alleged conduct of **(INSERT SPECIFIC CONDUCT AND OCCASION)**.
- Count 4 is based on the alleged conduct of (INSERT SPECIFIC CONDUCT AND OCCASION).
- Count 5 is based on the alleged conduct of (INSERT SPECIFIC CONDUCT AND OCCASION).

# TAB 3

## Partial Defenses (continued)

**NOTES:**

Ms. Johnson, Mr. Mann, and Ms. Lawrence collaborated on the following materials regarding battered person mitigation instructions and imperfect self-defense instructions.

#### CR505A Roadmap for mitigation defenses.

If you find the defendant guilty of (~~CHARGED CRIME~~) ~~or (LESSER INCLUDED CRIME)~~ ~~on~~ [in Count (#)], you will then need to decide whether ~~the mitigation defense of [imperfect self defense]~~ [extreme emotional distress special mitigation] [mental illness special mitigation] [or] [battered person mitigation] applies to that crime.

~~—[The elements for imperfect self defense are set forth in Instruction (#).]~~

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

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

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

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

#### References

[Utah Code § 76-2-409](#)

[Utah Code § 76-2-305](#)

[Utah Code § 76-5-205.5](#)

[Utah Code § 77-16a-102](#)

#### Committee Notes

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

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

~~"Imperfect self defense" mitigation is only applicable to aggravated murder, murder, attempted aggravated murder, or attempted murder charges.~~

~~"Extreme Emotional Distress" mitigation is only applicable when the defendant causes the death of another or attempts to cause the death of another to homicide or attempted homicide charges. See Utah Code § 76-5-205.5.~~

~~"Battered Person" mitigation is applicable to any offense between cohabitants as defined in Utah Code § 78B-7-102 or the relationship of a minor to a natural parent, an adoptive parent, a stepparent, or an individual living with the minor's natural parent as if a stepparent to the minor. See Utah Code § 76-2-409.~~

Mental Illness can be ~~both either a defense and or a mitigation depending on the crime charged.~~

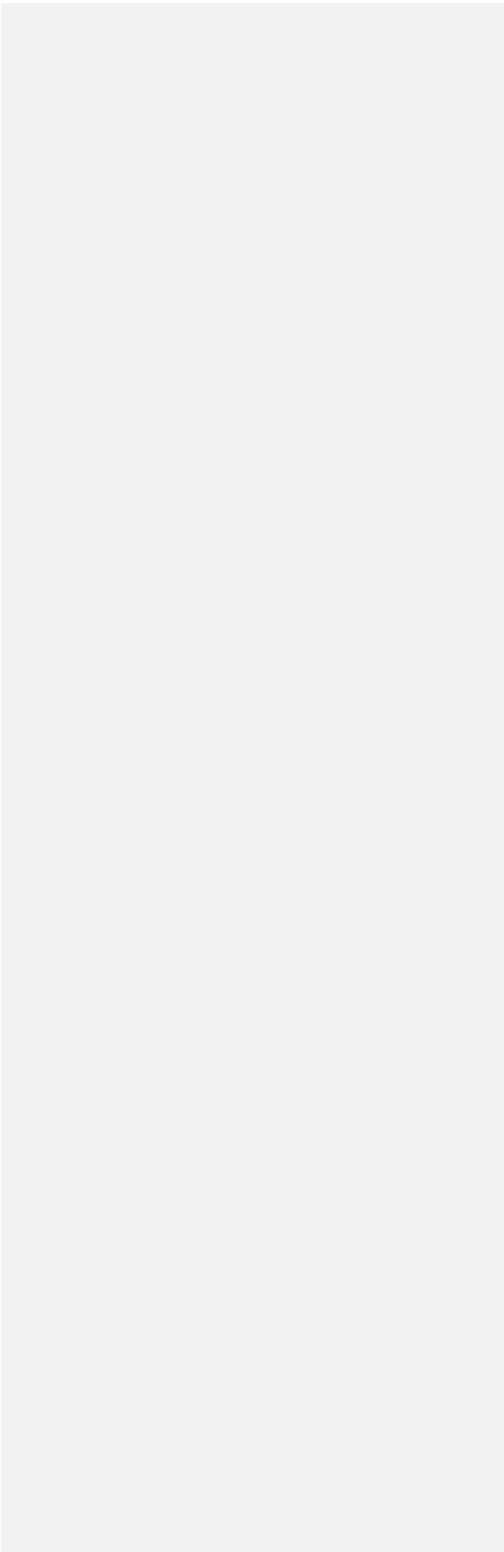
- Under Utah Code [§ 76-2-305](#), ~~except for homicide or attempted homicide, mental illness~~ it is a complete defense if it negates the mental state ~~required as an element of the offense charged, except for homicide or attempted homicide.~~
- Under Utah Code [§ 76-5-205.5](#) ~~it mental illness~~ is a special mitigation ~~for homicide or attempted homicide when the defendant causes the death of another or attempts to cause the death of another, and will reduce the level of the offense; and. See Utah Code §§ 76-5-202(3)(f)(i), 76-5-202(3)(f)(ii), 76-5-203(3)(b)(i), and 76-5-203(3)(b)(ii).~~
  - Mental illness mitigation must be found by the trier of fact by a preponderance of the evidence.
  - If a jury is the trier of fact, a finding of mental illness mitigation must be unanimous.
- 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 ~~in accordance with Utah Code § 77-16a-104 and is a necessary finding by the trier of fact.~~
  - ~~Mental illness at the time of the offense must be found by the trier of fact by a preponderance of the evidence.~~

**Commented [MCD1]:** Similar language might need to be adjusted in recently approved new instructions CR1402B, CR1403B, and CR1411B (the agg murder / murder with mitigation instructions).



DRAFT: 06/01/2022

Approved: 08/04/2021  
Reapproved: 04/06/2022



**NEW: CR570 Elements with Mitigation (Battered Person/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. [Insert All Applicable Elements] [; and]
3. [The defense of \_\_\_\_\_ does not apply.]

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

If you find the defendant guilty, you must then decide whether [Battered Person Mitigation] [or] [Mental Illness Special Mitigation] applies.

[Battered Person Mitigation is defined in Instruction [#].]

[Mental Illness Special Mitigation is defined in Instruction [#].]

**References**

Utah Code § 76-2-409

Utah Code § 76-2-305

Utah Code § 76-5-205.5

Utah Code § 77-16a-102

**Committee Note**

Battered Person Mitigation is applicable to any offense between cohabitants as defined in Utah Code § 78B-7-102 or the relationship of a minor and a natural parent, an adoptive parent, a stepparent, or an individual living with the minor's natural parent as if a stepparent to the minor. See Utah Code § 76-2-409.

Mental Illness can be either a defense or a mitigation depending on the crime charged.

- Under Utah Code § 76-2-305, except for homicide or attempted homicide mental illness is a complete defense if it negates the mental state required as an element of the offense charged.
- Under Utah Code § 76-5-205.5, mental illness is a special mitigation for homicide or attempted homicide and will reduce the level of the offense. See Utah Code §§ 76-5-202(3)(f)(i), 76-5-202(3)(f)(ii), 76-5-203(3)(b)(i), and 76-5-203(3)(b)(ii).
  - Mental illness mitigation must be found by the trier of fact by a preponderance of the evidence.
  - If a jury is the trier of fact, a finding of mental illness mitigation must be unanimous.
- 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 in accordance with Utah Code § 77-16a-104.
  - Mental illness at the time of the offense must be found by the trier of fact by a preponderance of the evidence.

DRAFT: 06/01/2022

# **BATTERED PERSON MITIGATION**

**NEW: CR571 Definitions Applicable to Battered Person Mitigation Defense**

“Abuse” means

- [intentionally or knowingly causing or attempting to cause another individual physical harm;]
- [intentionally or knowingly placing another individual in reasonable fear of imminent physical harm;]
- [physical abuse;]
- [sexual abuse;]
- [sexual exploitation of a minor or aggravated sexual exploitation of a minor;]
- [sexual exploitation of a vulnerable adult;]
- [distribution of an intimate image or misuse of an intimate image during a criminal action;]
- [sexual extortion;]
- [unlawful distribution of a counterfeit intimate image;] [or]
- [human trafficking of a child for sexual exploitation.]

“Cohabitant” means at the time of the offense:

[(VICTIM’S NAME) was a minor and (DEFENDANT’S NAME) is (VICTIM’S NAME)’s natural parent, adoptive parent, stepparent, or an individual living with the minor’s natural parent as if a stepparent to the minor]

[OR]

[(VICTIM’S NAME) was 16 years of age or older at the time of the offense, and (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 by blood or marriage to (VICTIM’S NAME) as a [parent][grandparent][child][grandchild][aunt][uncle][niece][nephew][sibling][half-sibling];]
- [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, or 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;
- 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; and
- 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 the facts and circumstances of this case.]

#### References

Utah Code § 76-2-409

*Keene v. Bonser*, 2005 UT App 37

*State v. Salt*, 2015 UT App 72

#### Committee Note

Practitioners should tailor the definitions in this instruction so they include only those that are relevant to the charged crime.

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

Battered Persons Mitigation has an expanded definition of “cohabitant” so practitioners should be deliberate when determining whether Battered Person mitigation applies.

If practitioners are relying on a definition of “abuse” that references a criminal offense, an instruction detailing the elements for that offense should be included.

- Sexual exploitation of a minor – see Utah Code § 76-5b-201.
- Aggravated sexual exploitation of a minor – see Utah Code § 76-5b-201.1.
- Sexual exploitation of a vulnerable adult – see Utah Code § 76-5b-202.
- Distribution of an intimate image or misuse of an intimate image during a criminal action – see Utah Code §§ 76-5b-203, 203.5.
- Sexual extortion – see Utah Code § 76-5b-204.
- Unlawful distribution of a counterfeit intimate image – see Utah Code § 76-5b-205.
- Human trafficking of a child for sexual exploitation – see Utah Code §§ 76-5-308.5(2) and (4)(b).

**NEW: CR572 Battered Person Mitigation – Elements and Burden of Proof**

Battered Person Mitigation is a mitigating circumstance that only applies if you have unanimously found that the defendant committed (CRIME) [in Count \_\_\_\_] beyond a reasonable doubt.

Battered Person Mitigation is the only time the defendant has the burden of proof. For Battered Person Mitigation to apply, you must unanimously find the defendant has proven by clear and convincing evidence that:

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 of (DEFENDANT'S NAME); and
3. (DEFENDANT'S NAME) reasonably believed committing (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 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

*Essential Botanical Farms, LLC v. Kay*, 2011 UT 71

CV118 “Clear and Convincing Evidence”

**Committee Note**

Whenever Battered Person Mitigation is submitted to the jury:

- Provide roadmap instruction CR505A and include each count to which the mitigation may apply;
- Use the elements instruction template in CR570 for every crime to which Battered Person Mitigation might apply;
- Include CR571, the definitional instruction for Battered Person Mitigation;
- Include CR572, the elements of Battered Person Mitigation and the Burden of Proof;
- Using SVF570, prepare a special verdict form for each count and offense to which Battered Person Mitigation might apply;
- Make sure the special verdict forms are labeled in the same way they are referenced in the roadmap instruction; and
- Include special verdict forms as outlined in the roadmap instruction.

DRAFT: 06/01/2022

**NEW: CR573 Special Verdict Form – Battered Person Mitigation**

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

- 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 Battered Person Mitigation is submitted to the jury:

- Provide roadmap instruction CR505A and include each count to which the mitigation may apply;
- Use the elements instruction template in CR570 for every crime to which Battered Person Mitigation might apply;
- Include CR571, the definitional instruction for Battered Person Mitigation;
- Include CR572, the elements of Battered Person Mitigation and the Burden of Proof;
- Using SVF570, prepare a special verdict form for each count and offense to which Battered Person Mitigation might apply;
- Make sure the special verdict forms are labeled in the same way they are referenced in the roadmap instruction; and
- Include special verdict forms as outlined in the roadmap instruction.

Commented [JL2]: I don't see that this is needed if CR505A is used.

**NEW: 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 proven battered person mitigation by clear and convincing evidence.
- OR
- ☐ We do not unanimously find that (DEFENDANT'S NAME) has proven battered person mitigation by clear and convincing evidence.

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

\_\_\_\_\_  
Foreperson



DRAFT: 06/01/2022

# **IMPERFECT SELF-DEFENSE**

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

Defense of Self or Other is also sometimes called Perfect perfect self-defense because it is a complete defense to [Aggravated Murder][Attempted Aggravated Murder][Murder][Attempted Murder][Manslaughter]. As explained, perfect self-defense applies when a defendant is justified in using force against another person when and to the extent that the defendant reasonably believes that force is necessary to defend [himself][herself], or a third party, against another person's imminent use of unlawful force.

Another form of self-defense is called imperfect self-defense because it is only a partial defense, not a complete defense, to [Aggravated Murder][Attempted Aggravated Murder][Murder][Attempted Murder]. Imperfect self-defense reduces the level of the offense to [Murder][Attempted Murder][Manslaughter][Attempted Manslaughter]. Imperfect self-defense applies when the defendant [causes the death of another] [attempts to cause the death of another] when [he][she] reasonably, but mistakenly, believes that the circumstances provide a legal justification or excuse for the use of deadly force. In other words, although a reasonable person in the defendant's circumstances could reasonably believe that [he][she] was justified in using deadly force, the use of deadly force was not actually legally justified under the circumstances.

The defendant is not required to prove that either perfect self-defense or imperfect self-defense applies. Rather, the prosecution must prove beyond a reasonable doubt that perfect self-defense and imperfect self-defense do not apply.

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 (#).

If you find the defendant guilty of [Aggravated Murder] [Attempted Aggravated Murder] [Murder] [Attempted Murder], you must also consider imperfect self-defense. Your decision regarding imperfect self-defense will be reflected in the special verdict form titled "Special Verdict Imperfect Self-Defense."

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 § 76-5-203(4)  
Utah Code § 76-5-205

Utah Code § 76-2-402

~~Utah Code § 76-2-404~~

~~Utah Code § 76-2-405~~

~~Utah Code § 76-2-407~~

*State v. Silva*, 2019 UT 36, 456 P.3d 718

*State v. Low*, 2008 UT 58, 192 P.3d 867

*State v. Spillers*, 2007 UT 13, 152 P.3d 315

*State v. Lee*, 2014 UT App 4, 318 P.3d 1164

#### Committee Notes

Whenever imperfect self-defense is submitted to the jury:

- In addition to other applicable imperfect self-defense instructions (~~see CR510 through CR540~~), use CR1451 (~~amended as appropriate~~);
- Use the *SVF1450* “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. Imperfect self-defense does not apply to manslaughter;~~
- Always distinguish between “perfect self-defense” and “imperfect self-defense” throughout the instructions; and
- Add the following paragraph at the bottom of the ~~aggravated murder, attempted aggravated murder, murder, or attempted murder~~ elements instruction:

“If you find the ~~Defendant~~~~defendant~~ ~~GUILTY~~~~guilty~~ beyond a reasonable doubt of ~~[Aggravated Murder]~~~~[Attempted Aggravated Murder]~~~~[Murder]~~~~[Attempted Murder]~~~~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 \_\_\_\_.”

~~In the rare circumstance where imperfect self-defense is available but perfect self-defense is not available, practitioners will have to modify this instruction as appropriate. For example, practitioners should include CR510 through CR540, as applicable, because the jury will have to understand basic principles of perfect self-defense in order to understand imperfect self-defense. The imperfect self-defense instruction should state clearly that even though the jury should not consider perfect self-defense, it must still consider imperfect self-defense.~~

Last Revised – 04/03/2019

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

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

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

Having found the defendant, (DEFENDANT'S NAME), guilty beyond a reasonable doubt 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

**Committee Notes**

Whenever imperfect self-defense is submitted to the jury:

- In addition to other applicable imperfect self-defense instructions (see CR510 through CR540), use CR1451 (amended as appropriate);
- Use the SVF1450 "Special Verdict Imperfect Self-Defense" special verdict form;
- Do not include "imperfect self-defense" as a defense in the elements instruction;

**Commented [MCD3]:** Janet proposes that this language be changed to:

•→ We unanimously find that the defense of imperfect self-defense applies.

OR

•→ We unanimously find that the defense of imperfect self-defense does not apply.

- Do not use an “imperfect self-defense manslaughter” elements instruction. Imperfect self-defense does not apply to manslaughter;
- Always distinguish between “perfect self-defense” and “imperfect self-defense” throughout the instructions; and
- Add the following paragraph at the bottom of the aggravated murder, attempted aggravated murder, murder, or attempted murder elements instruction:

“If you find the ~~Defendant~~ defendant ~~GUilty~~ guilty beyond a reasonable doubt of [Aggravated Murder][Attempted Aggravated Murder][Murder][Attempted Murder] ~~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 \_\_\_\_.”

In the rare circumstance where imperfect self-defense is available but perfect self-defense is not available, practitioners will have to modify this instruction as appropriate. For example, practitioners should include CR510 through CR540, as applicable, because the jury will have to understand basic principles of perfect self-defense in order to understand imperfect self-defense. The imperfect self-defense instruction should state clearly that even though the jury should not consider perfect self-defense, it must still consider imperfect self-defense.

Last amended – 05/01/2019