

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

Via Webex
January 4, 2023 – 12:00 p.m. to 1:30 p.m.

12:00	Welcome and Approval of Minutes		Tab 1	Judge Blanch
	"Avoiding Bias" Instruction: discussion of MUJI Criminal and MUJI Civil instructions	Discussion	Tab 2	Judge Blanch
	Partial Defenses (continued) – Imperfect Self-defense		Tab 3	Mr. Mann
	Partial Defenses (continued) – Extreme Emotional Distress		Tab 4	Judge Blanch Judge Jones
	Self-Represented Parties and Standby Counsel		Tab 5	Judge Blanch Judge Jones
1:30	Adjourn			

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

UPCOMING MEETING SCHEDULE:

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

February 1, 2023
March 1, 2023
April 5, 2023
May 3, 2023

June 7, 2023
July 5, 2023
August 2, 2023
September 6, 2023

October 4, 2023
November 1, 2023
December 6, 2023

TAB 1

Meeting Minutes – December 7, 2022

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

Via Webex
December 7, 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	•		STAFF:
Freyja Johnson	Defense Counsel	•		Michael Drechsel
Sandi Johnson	Prosecutor	•		Bryson King
Janet Lawrence	Defense Counsel	•		
Jeffrey Mann	Prosecutor	•		
Hon. Brendan McCullagh	Justice Court Judge	•		
Dustin Parmley	Defense Counsel	•		
Richard Pehrson	Prosecutor	•		
Hon. Teresa Welch	District Court Judge	•		
Brian Williams	Prosecutor		•	
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 November 2, 2022 meeting. Mr. Mann moved to approve the draft minutes; Mr. Pehrson seconded the motion. The committee voted unanimously in support of the motion. The motion passed. Judge Blanch facilitated committee introductions for new committee members Freyja Johnson and Dustin Parmley. The committee took note that Brian Williams is also a new member who was unable to join the meeting today due to a trial conflict.

(2) PARTIAL DEFENSE INSTRUCTIONS – BATTERED PERSON MITIGATION (CONTINUED):

Judge Blanch turned the committee’s attention to the second item on the agenda and returned the committee’s focus to the formulation of the special verdict form for the battered person mitigation finding. This is where the committee left off at the last meeting, where two different options had been discussed by the committee. Option one was to present the battered person mitigation finding as a unanimous finding that the defendant proved the mitigation, with a second checkbox indicating that the jury did not reach unanimity on the battered person mitigation issue. Option two was to require the jury to indicate a unanimous finding in either direction (either that the jury was unanimous that battered person mitigation had been proven or that the jury was

unanimous that battered person mitigation had not been proven). The committee resumed its discussion on these options with several committee members in support of each option, advocating the same views articulated in the minutes from the November 2, 2022 meeting.

Mr. Pehrson and Ms. Dunroe returned to a practicality issue raised by Ms. S. Johnson at the previous meeting regarding how the court and attorneys will know what issue a jury may be hung on (the offense or the special mitigation issue). Because the statute (Utah Code § 76-2-409(5)(a)(ii)) requires the verdict forms to be returned at the same time, it is conceivable that the issue preventing the jury from completing its work may be unknown to the court and parties. Inquiring about what issues the jury is struggling with can create issues in the case. And this also raises the issue of whether an Allen charge would be provided on the battered person mitigation issue. Judge McCullagh pointed out that if the jury can't reach unanimity on the battered person mitigation defense, they aren't a "hung jury." This is made clear in statute (Utah Code § 76-2-409(5)(b)).

Ms. Dunroe suggested that a third checkbox on the form may be advisable in this situation: 1) unanimous that battered person mitigation has been proven; 2) unanimous that battered person mitigation has not been proven; or 3) unable to reach unanimity on the issue. Judge Welch noted that while this may raise appellate issues, it creates clarity about what the jury decided. Committee members expressed support for this three-checkbox approach. Judge Blanch asked if any committee members were opposed to the three-checkbox option. Mr. Mann remained concerned that including a third checkbox indicating that the jury was unable to reach unanimity on the issue will result in appeals based on the verdict form possibly being seen as an invitation to the jury to treat the battered person mitigation issue without full consideration (because it is a simple way out of making a serious attempt to reach unanimity on the issue). For that reason, Mr. Mann continued to support a two-checkbox option requiring unanimity either way ("option two" described above and in the meeting materials on page 12). Ultimately, the committee agreed that the language in the special verdict form should contain three checkboxes.

The committee then discussed the language for a committee note on the special verdict form. Ms. Lawrence suggested that the committee note should inform practitioners that there is no caselaw guiding practitioners on how Utah Code § 76-2-409 should be implemented in any particular case. Judge Welch and Judge Jones suggested that such language may not be entirely accurate and may inadvertently affect practitioners' work in unanticipated and undesirable ways. After an informal vote, the majority of the committee members present (six in favor) agreed that the committee note should simply point practitioners to the underlying battered person mitigation statute without any additional commentary. Mr. Pehrson then made a formal motion to approve the following language for the complete special verdict form:

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),

SPECIAL VERDICT FORM
BATTERED PERSON
MITIGATION DEFENSE

Count (#)

<u>Defendant.</u>	<u>Case No. (**)</u>
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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 unanimously find that (DEFENDANT'S NAME) has not proven battered person mitigation by clear and convincing evidence.

OR

We are unable to reach unanimous agreement on this issue.

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

Foreperson

COMMITTEE NOTE:

Practitioners should be aware that Utah Code § 76-2-409(5)(b) states: "a nonunanimous vote by the jury on the question of mitigation under Subsection (2)(a) does not result in a hung jury."

The committee voted in favor of the motion, approving this formulation of the special verdict form, with Mr. Mann continuing to be opposed to the inclusion of the third checkbox.

(3) ADJOURN

Prior to the conclusion of the meeting, Bryson King introduced himself to the committee members. He will be taking over staffing this committee moving forward so that Mr. Drechsel's legislative commitments do not impede the committee's work in the coming months.

Judge Blanch asked the committee if there was interest in having an in-person meeting in January. Judge McCullagh suggested that having the in-person meeting after the winter, when whether is more predictable, may be advisable. Judge Blanch agreed that the January meeting (and most future meetings) will be via Webex, with further discussion of an in-person meeting to be held sometime in the next few months (possibly April).

The meeting then adjourned at approximately 1:30 p.m. The next meeting will be held on January 4, 2023, starting at 12:00 noon.

TAB 2

"Avoiding" Bias Instructions – MUJI Criminal vs. MUJI Civil Approaches

NOTES:

On December 19, 2022, Judge Blanch presented an update to the Judicial Council regarding the Committee on Model Utah Criminal Jury Instructions work during the last year. During that presentation, a member of the Judicial Council asked if the committee intended to take any action to update the MUJI criminal instructions regarding bias. The MUJI civil instructions committee recently focused its attention on this topic. The Judicial Council member wondered if there should be parity between the criminal and civil instructions on this topic.

The materials that follow contain a proposed civil rule on “Avoiding Bias” and a redacted email exchange that discusses some of the reasons for the proposed instruction.

CR202 — “Juror Duties” — of the MUJI criminal materials reads (emphasis added):

You have two main duties as jurors.

The first is to decide from the evidence what the facts are. Deciding what the facts are is your job, not mine. You are the exclusive judges of all questions of fact.

The second duty is to take the law I give you in the instructions, apply it to the facts, and decide if the prosecution has proved the defendant guilty beyond a reasonable doubt.

You are bound by your oath to follow the instructions that I give you, even if you personally disagree with them. This includes the instructions I gave you before trial, any instructions I may have given you during the trial, and these instructions. All the instructions are important, and you should consider them as a whole. The order in which the instructions are given does not mean that some instructions are more important than others. Whether any particular instruction applies may depend upon what you decide are the true facts of the case. If an instruction applies only to facts or circumstances you find do not exist, you may disregard that instruction.

Perform your duties fairly. **Do not let any bias, sympathy, or prejudice that you may feel toward one side or the other influence your decision in any way.** [You must also not let yourselves be influenced by public opinion.]

References:

Utah R. Crim. P. 18(h) / Utah Code Ann. § 77-1-6 / Holland v. United States, 348 U.S. 121, 141 (1954) / United States v. Rith, 164 F.3d 1323, 1338 (10th Cir. 1999) / State v. Sisneros, 631 P.2d 856, 859 (Utah 1981). / State v. Gleason, 40 P.2d 222, 226 (Utah 1935) / 75 Am. Jur.2d Trial §§ 719, 817.

Avoiding Bias

Our system of justice requires all of us—attorneys, judges, and jurors—to minimize the impact of our biases, whether conscious or subconscious, on our decision making. Researchers have identified several techniques we can use to accomplish this difficult, but necessary task:

First, reflect carefully and consciously about the evidence presented. Focus on the facts and on the evidence you hear and see. The law requires that jurors' decision(s) are to be based on the evidence, and not simply on intuition or a gut reaction.

Second, take the time you need to challenge what might be bias in your own thinking. Don't jump to conclusions that may be influenced by stereotypes about the parties, witnesses, or events.

Third, try taking another perspective. Ask yourself if your opinion of the parties or witnesses would be different if the people participating looked different or if they belonged to a different group or if they had a different accent or if they spoke in a more educated manner.

Fourth, listen to the opinions of the other jurors, who may have different backgrounds and perspectives from your own. Working together with the other jurors will help achieve a fair result. However, keep in mind that your decision(s) must be your own.

I have found these techniques helpful in lessening the impact of my own biases on my decision-making as a judge, and I therefore ask you to use these techniques as you consider the evidence in this case.

11/22/22 and 11/23/22 email correspondence

Date: Wed, Nov 23, 2022 at 12:45 PM
Subject: Re: Civil Jury Instruction - Implicit Bias

Our goal with the current proposed instruction was to produce an "avoiding bias" instruction that would not be controversial. We sought to create an instruction that would help jurors avoid invidious stereotypes, snap judgments, and implicit bias -- much like similar instructions about witness credibility and prohibitions against averaging or flipping a coin during deliberations.

Before the pandemic, the Civil MUJI Committee considered and rejected proposed implicit bias jury instructions suggested by the American College of Trial Lawyers ("ACTL"). Among the concerns expressed were that the proposed instructions were too intrusive in suggesting how the jurors should deliberate -- such as by suggesting they should consider the evidence as a "devil's advocate." Also, the members of the plaintiffs' and defense bars were at odds about language that should be used.

Earlier this year, several of us on the MUJI Civil Committee believed that we should revisit the issue. In particular, my thought was that we should be able to come up with a consensus instruction to encourage jurors to avoid bias -- one that both plaintiffs' and defendants' attorneys would approve.

The proposed "avoiding bias" instruction hopefully accomplishes this. In contrast to the proposed ACTL instructions, the current "avoiding bias" instruction discusses general principles for avoiding bias when weighting witness testimony and finding facts. It expressly avoids using the term "implicit bias." Rather it encourages jurors to carefully weigh the facts with four key non-controversial suggestions: a. reflect carefully on the evidence; b. don't jump to conclusions; c. consider other perspectives; and d. listen to other jurors who may have different backgrounds or perspectives. The closest it comes to raising the issue of implicit bias is by stating the importance of minimizing "the impact of our biases, whether conscious or subconscious, on our decision making." We expressly wanted to avoid the controversy over implicit bias issues.

While there may be controversy in the academic community about the existence and impact of implicit bias, the proposed "avoiding bias" instruction avoids those issues by generally addressing the issue of bias, and suggesting ways for jurors to avoid it.

Hopefully this provides helpful background to the Judicial Council. All proposed new jury instructions are sent out for comment to Utah State Bar members. I am reluctant to conclude that this particular instruction should be specially sent to the Board of District Court Judges. All judges are members of the Bar and will receive notice of the proposed instruction. I suggest that, if they have concerns about this instruction, they can provide comments through the normal process.

That being said, I recognize that the Judicial Council governs the Civil MUJI Committee. If the Council has concerns, it can decide to set aside the normal review process. I don't have concerns about giving any of our proposed jury instructions additional scrutiny. My sense is that the Civil MUJI Committee is always open to input and suggestions.

----- Forwarded message -----

Date: Tue, Nov 22, 2022 at 10:04 AM
Subject: Re: Civil Jury Instruction - Implicit Bias

I really appreciate your feedback and thoughts. Last year the judicial council expressed particular interest in this instruction, which is why it was brought up in more detail than others. Also, as you noted, it is unique. [REDACTED] will have more information as to the research that went into these discussions, but I know various readings were shared with the group, and that [REDACTED], who helped the subcommittee with drafting, has been participating in a study by Harvard regarding these types of instructions. We can take the recommendation to include references back to the committee and subcommittee as well.

In terms of presenting these instructions to the Board of District Court Judges, I am not sure whether we have done this in the past. I am open to suggestions but would like to make sure our Committee Chair and Vice Chair are included once we get to that point. I will also ask [REDACTED] whether we have done this in the past or if there are any reservations about doing so.

Thank you again for your attention to this instruction.

Hope you have a great holiday :)

On Tue, Nov 22, 2022 at 9:40 AM

wrote:

Hi [REDACTED]. Following up on a draft instruction on implicit bias that was brought to the Judicial Council's attention yesterday at our meeting during the update from the MUJI Civil JI committee. I have a vague recollection of an older study that found an

instruction could do harm instead of good, and was curious on the state of the social science and empirical studies on the issue so I did a very quick search last night, and saw a 2014 NCSC study and article from 2015 on NCSC website that recommended obtaining more empirical data. But that's about as far as I got--do either of you have more recent studies or data on the issue?

Also, at our meeting yesterday I asked about running this draft instruction by the District Board. As I said yesterday, I am not advocating the Board be involved in all jury instructions out of the committees, but this one seems a little bit different to me--as demonstrated by the fact that the Committee brought it specifically to the Council's attention which is not normally done--it is not a recitation of the law from cases/statutes--and I am not sure if there is consensus from the experts in this field on what an instruction like this should say in order to be effective and do no harm, but if this is presented to the District Board it might be helpful to cite those studies. On the draft presented to the Council yesterday, there were no citations for support--not sure if you have one that has those citations, but seems to me we'll have better buy in if one is prepared with citations.

Thanks for all the work you do on this committee--it is so important!

TAB 3

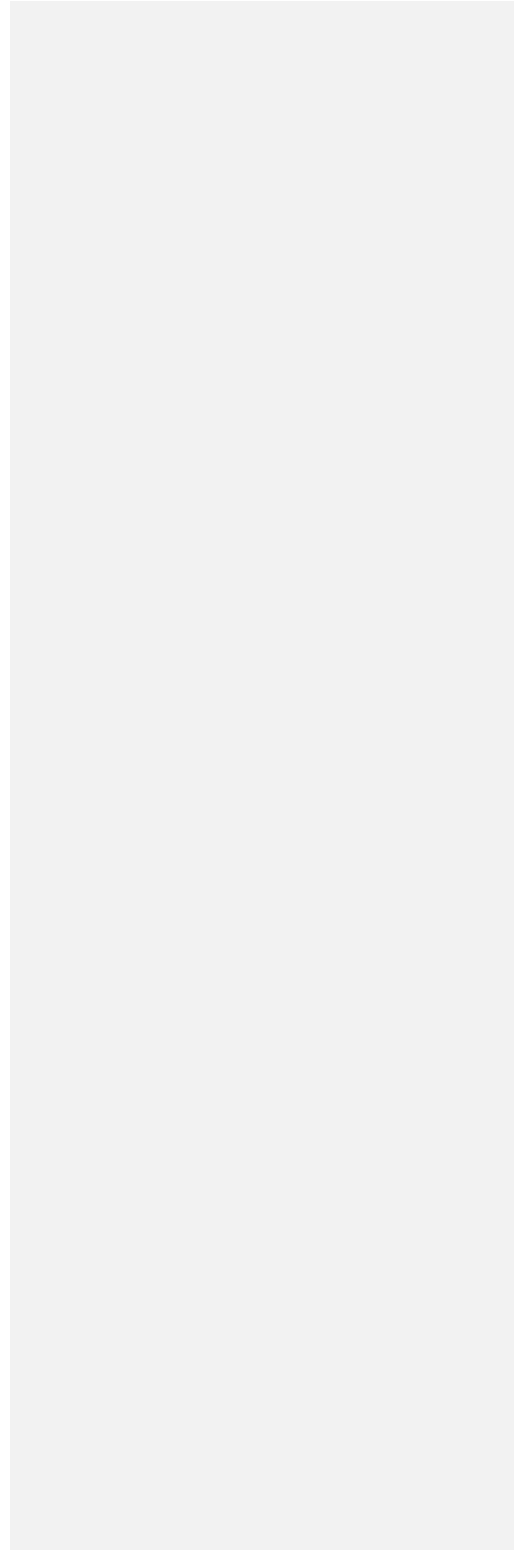
Partial Defenses (continued) – Imperfect Self-defense Instructions

NOTES:

The materials that follow are identical to those previously provided to the committee in earlier meeting materials packets. If you reviewed these in preparation for an earlier meeting, there is nothing new to review here.

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* 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, <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">-vs-</p> (DEFENDANT'S NAME), <p style="text-align: center;">Defendant.</p>	SPECIAL VERDICT IMPERFECT SELF-DEFENSE Count (#) Case No. (**)
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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.

DRAFT: 06/01/2022

- 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

TAB 4

Partial Defenses (continued) – Extreme Emotional Distress

NOTES:

Judge Jones provided the materials that follow for initial committee consideration. They detail instructions and special verdict forms for the extreme emotional distress mitigation defense.

NEW:CR Extreme emotional distress mitigation.

You have heard me say repeatedly that the prosecution bears the burden of proof at all times in a criminal case. There is one exception to this rule, which I will discuss with you now.

Under Utah law, special mitigation exists when a defendant causes the death or attempts to cause the death of another person while the defendant is under extreme emotional distress.

“Extreme emotional distress” means that the defendant had an overwhelming reaction of anger, shock, or grief that:

- (1) caused the defendant to be incapable of reflection and restraint; and
- (2) would cause an objectively reasonable person to be incapable of reflection and restraint.

The first factor is a subjective factor, and the second factor is an objective factor.

The defendant is required to prove extreme emotional distress by a preponderance of the evidence.

References

Utah Code § 76-5-205.5

Committee Notes

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

Last Revised - 00/00/0000

NEW:CR Extreme emotional distress mitigation - Factors.

In considering the first subjective factor, the defendant must be acting under the influence of extreme emotional distress at the time he causes or attempts to cause the death of another.

A defendant may prove that he was subjectively under the influence of extreme emotional distress by showing:

- (1) he was exposed to extremely unusual and overwhelming stress,
- (2) he had an extreme emotional reaction to it, as a result of which he experienced a loss of self-control and his reason was overborne by intense feelings, such as passion, anger, distress, grief, excessive agitation, or other similar emotions,
- (3) his emotional distress was not a condition resulting from mental illness, and
- (4) his emotional distress was not substantially caused by his own conduct.

In considering the second objective factor, the circumstances must support a reasonable explanation or excuse for the extreme emotional distress. This factor asks whether a reasonable person facing the same situation would have reacted in a similar way. Reasonableness shall be determined from the viewpoint of a reasonable person under the then-existing circumstances.

References

Utah Code § 76-5-205.5

Committee Notes

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

Last Revised - 00/00/0000

NEW:CR Extreme emotional distress mitigation – Applicability.

Extreme emotional distress exists if the circumstances support that the defendant acted predominantly in response to a highly provoking act by the other person, which provoking act immediately preceded the defendant’s actions.

Extreme emotional distress does not include distress that is substantially caused by the defendant’s own conduct.

In addition, special mitigation for extreme emotional distress does not exist if:

- (1) a period of time has passed long enough for a reasonable person to have recovered from the extreme emotional distress;
- (2) the defendant responded to the circumstances by inflicting serious or substantial bodily injury over a prolonged period of time or inflicted torture; or
- (3) the other person’s highly provoking act was comprised of words alone.

References

Utah Code § 76-5-205.5

Committee Notes

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

Last Revised - 00/00/0000

NEW:CR Extreme emotional distress mitigation – Burden of proof.

A defendant is required to establish the special mitigation of extreme emotional distress by a preponderance of the evidence. I have already instructed you on the reasonable doubt standard that applies to the prosecution; and now I will instruct you on the preponderance of the evidence standard that applies to the defendant.

Under the preponderance of the evidence standard, the defendant must persuade you, by the evidence, that a particular fact is more likely to be true than not true.

Another way of saying this is proof by the greater weight of the evidence, however slight. Weighing the evidence does not mean counting the number of witnesses nor the amount of testimony. Rather, it means evaluating the persuasive character of the evidence. In weighing the evidence, you should consider all of the evidence that applies to a particular fact, no matter which party presented it. The weight to be given to each piece of evidence is for you to decide.

After weighing all of the evidence, if you decide that the facts for extreme emotional distress are more likely true than not, then you must find that the defendant has proved that fact. On the other hand, if you decide that the evidence regarding the facts for extreme emotional distress is evenly balanced or is not more likely true, then you must find that the fact has not been proved by the defendant.

Your decision on special mitigation, extreme emotional distress, will be reflected in the Special Verdict Form.

References

Utah Code § 76-5-205.5

Committee Notes

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

Last Revised - 00/00/0000

NEW: SVF____. Extreme Emotional Distress Mitigation Defense

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

<p>THE STATE OF UTAH,</p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">-vs-</p> <p>(DEFENDANT’S NAME),</p> <p style="text-align: right;">Defendant.</p>	<p>SPECIAL VERDICT FORM</p> <p>EXTREME EMOTIONAL DISTRESS</p> <p>MITIGATION DEFENSE</p> <p>Count (#)</p> <p>Case No. (**)</p>
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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 established the existence of special mitigation for Extreme Emotional Distress.
- OR
- We unanimously find that (DEFENDANT’S NAME) has not established the existence of special mitigation for Extreme Emotional Distress.

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

Foreperson

TAB 5

Self-Represented Parties and Standby Counsel

NOTES:

During a recent trial, there was a need to instruct the jury on the roles of a self-represented party and standby counsel. From that trial, the following draft instructions were submitted for committee consideration. Should instructions of this nature be included in the MUJI Criminal instructions?

NEW:CR444 Pro Se Defendant.

(DEFENDANT’S NAME) has decided to represent [himself] [herself] in this trial and not to use the services of a lawyer. [He] [She] has a constitutional right to do that. [His] [Her] decision has no bearing on whether [he] [she] is guilty or not guilty, and it must not affect your consideration of the case.

Because (DEFENDANT’S NAME) has decided to act as [his] [her] own lawyer, you will hear [him] [her] speak at various times during the trial. [He] [She] may make an opening statement and closing argument and may ask questions of witnesses, make objections, and argue legal issues to the court. I want to remind you that when [name of defendant] speaks in these parts of the trial, [he] [she] is acting as a lawyer in the case, and [his] [her] words are not evidence. The only evidence in this case comes from witnesses who testify under oath on the witness stand and from exhibits that are admitted.

References

Committee Notes

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NEW:CR445 Standby Counsel.

The Sixth Amendment to the United States Constitution guarantees that a person charged with a crime has the right to the assistance of counsel. This Constitutional guarantee also provides that an individual charged with a crime has the right to waive representation by legal counsel, and proceed to trial representing himself/herself, and act as his/her own attorney. The defendant has elected to waive his/her right to counsel and represent himself/herself in this matter. You are not to let the fact that (DEFENDANT'S NAME) has elected to represent himself/herself influence your decision in this case. Instead, you must decide this case based upon the law in the court's instructions and the evidence received during the course of the trial.

(STANDBY COUNSEL'S NAME) has been appointed as standby counsel to the defendant but not to act as his/her attorney in this case. The role of standby counsel is limited to answering (DEFENDANT'S NAME)'s questions and providing other assistance but standby counsel will not be participating directly in the trial. In electing to represent himself/herself, the defendant has assumed the full responsibility of acting as his/her own attorney in this case and will be held to the same standards and requirements of an actual practicing attorney. Standby counsel will be available to answer (DEFENDANT'S NAME)'s questions during the course of the trial but the defendant will solely make all of the decisions concerning his/her defense.

References

Committee Notes

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