<u>Extreme Emotional Distress</u>

Extreme Emotional Distress—Statutory Scheme

Extreme Emotional Distress (EED) is a mitigation defense, as opposed to an affirmative defense, available only to a charge of murder, aggravated murder or attempt of either. However, EED has its roots in the old Heat of Passion affirmative defense. In the 1988 case, *State v. Bishop*, the Utah Supreme Court sought to distance EED from Heat of Passion and to "substantially enlarge [] the class of cases" in which the defense might be available.[1] In 1999 the legislature moved the defense from the manslaughter statute and placed it in the murder statute §76-5-203(4) as an affirmative defense to murder and attempted murder.[2] In 2009 the Utah Legislature once again moved EED from an affirmative defense to Special Mitigation §76-5-205.5 along with delusion.

In the new statutory scheme the legislature stopped using the term affirmative defense and now requires the defendant to prove the defense by a preponderance of the evidence.[3] If the defense is able to prove EED then the charge (aggravated murder, murder or attempt of either) is reduced by one degree. Thus for example, if the jury found the State had proved the elements of murder and that the defense had proved the elements of EED the verdict the jury would enter is guilty of manslaughter. Further, the legislature has continued to limit the evidence available for the defense by maintaining the exclusion of evidence of mental illness and distress substantially caused by the defendant's own conduct.

Section 76-5-205.5 does not define what Extreme Emotional Distress is.[4] However, the state supreme court has said that a "person acts under the influence of extreme emotional distress when 'he is exposed to extremely unusual and overwhelming stress' that would cause the average reasonable person under the same circumstances to 'experience a loss of self-control,' and 'be overborne by intense feelings, such as passion, anger, distress, grief, excessive agitation, or other similar emotions.'"[5] In the past, heat of passion defense required a contemporaneous triggering event. However, the supreme court changed that in *State v. Bishop* when it held that there did not need to be an "immediate trigger." Instead, the court held "that a significant mental trauma [can affect] a defendant's mind for a substantial period of time, simmering in the unknowing subconscious and then inexplicably coming to the fore."[6] Thus, **context**, the court reasoned, is extremely important. When the defendant's conduct is viewed as a reaction in that broader context it may give a more accurate understanding of the defendant's actions. Therefore, in the wake of

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[1] *State v. White*, 2011 UT 21, ¶29, 251 P.3d 820. At the time EED was an affirmative defense and not mitigation.
[2] The defense was also made available in Aggravated Murder and Attempted Aggravated Murder §76-5-201(4).
[3] Utah Code Ann. §76-5-205.5(5)(a).
[4] *State v. Lambdin*, 2015 UT App 176, ¶8, 356 P.3d 165.
[5] *White*, 2011 UT 21, ¶26, (quoting *State v. Bishop*, 753 P.2d 439, 471 (Utah 1988).
[6] *Id.* ¶30.

Bishop and *White* more evidence of context is relevant and admissible. Furthermore, that context evidence can go back months or even years from the homicide.[7]

Although more evidence in the form of context is now admissible there still must be an **external triggering event**. The context merely contributes to the extreme emotional distress. Because mental illness and the defendant's own conduct cannot be the initiating cause some other external triggering event is necessary. "Thus, 'some external initiating circumstance must bring about' the defendant's distress and resulting conduct."[8] However, as the Utah Supreme Court noted in *White* the term "contemporaneous" is not used in the statute and therefore a contemporary or immediate trigger is not required. Accordingly, regardless that "[i]n many cases this triggering event will naturally occur just before the criminal act" it need not be "contemporaneous with the defendant's loss of self-control."[9]

Burden Shift

The Due Process clause of the United States Constitution does not preclude a statutory scheme that shifts the burden to the defense to prove the elements of their defense.[10] To this point in time, neither does Article I, Section 7 of the Utah Constitution.[11] However, Utah common law and statute requires that the State disprove the elements of an affirmative defense beyond a reasonable doubt.[12]

Special mitigation, as distinguished from an affirmative defense, does not require that the State prove the nonexistence of the defense. Importantly, §76-1-502 only states that the State must prove the absence of an affirmative defense. The special mitigation statute does not mention the term affirmative defense. Thus, the Utah Supreme Court has concluded that the legislature did not intend for special mitigation to be an affirmative defense. Moreover, the "elements of special mitigation do not contravene or rebut any of the statutory elements of murder."[13]

Although the language of the statute does not specifically state that the defense must prove the elements of special mitigation it is clear from the context that it is the defense burden:

> If the trier of fact finds the elements of an offense as listed in Subsection (5)(b) are proven beyond a reasonable doubt, and also that the existence of special mitigation

[7] *See e.g.*, *State v. Shumway*, 2002 UT 124.
[8] *White*, 2011 UT 21, ¶32.
[9] *State v. White*, 2011 UT 21, ¶32.
[10] *State v. Drej*, 2010 UT 35, ¶14, 233 P.3d 476, (citing *Patterson v. New York*, 432 U.S. 197 (1997)).
[11] Id. ¶16.
[12] Id. ¶15; §76-1-502; *State v. Low*, 2008 UT 58.
[13] *Drej*, 2010 UT 35, ¶20.

under this section is established by a preponderance of the evidence, it shall return a verdict on the reduced charge…

Mental Illness and Defendant's Own Conduct

Certain evidence may not be used to establish EED.

(3) Under Subsection (1)(b), emotional distress does not include:
(a) a condition resulting from mental illness as defined in Section 76-2-305; or
(b) distress that is substantially caused by the defendant's own conduct.

Mental illness is a much broader term than what one might think. "'Mental illness' means a mental disease or defect that substantially impairs a person's mental, emotional, or behavioral functioning. A mental defect may be a congenital condition, the result of injury, or residual effect of a physical or mental disease and includes, but is not limited to, mental retardation."[14] If a defendant suffers an illness and in its aftermath the disease impairs his or her "mental, emotional, or behavioral functioning" at the time of the homicide, it nevertheless ought not be part of the evidence of context that would otherwise be admissible. Even though a disease or traumatic brain injury may cause symptoms that affect "a defendant's mind for a substantial period of time" it is "mental illness" by definition and therefore inadmissible.

Similarly, evidence of the defendant's intoxicated state, so long as it is voluntary intoxication, is not admissible even though it impairs the defendant's "mental, emotional, or behavioral functioning."

Reasonable Emotional Reaction or Loss of Self Control

In EED an accused seeks to mitigate or reduce the punishment of the charged offense by offering an explanation for their loss of control during which they caused the death of another. Under the Utah scheme special mitigation occurs "when a person causes the death of another under the influence of extreme emotional distress for which there is a ***reasonable explanation or excuse***."[15] First, the jury must evaluate all of the evidence including context to determine whether the defendant experienced a loss of self-control, and was overborne by intense feelings, such as passion, anger, distress, grief, excessive agitation, etc. Next, the jury must determine whether there is a reasonable explanation or excuse for the loss of self-control. To that end, the jury must view the evidence, including the act that caused the death, triggering event, and context, using an

[14] Utah Code Ann. §76-2-305(4)(a).
[15] *Lambdin*, 2015 UT App 176, ¶11 (emphasis added).

objective standard, from the vantage of a reasonable person in the defendant's "then-existing circumstances."[16]

In *Lambdin*, the defense argued that it only needed to prove that EED caused a "reasonable emotional reaction" not that "the resulting loss of self-control or murder to be reasonable...because it is inherently unreasonable to lose self-control and kill someone."[17] The court of appeals held that interpretation to be inconsistent with the statute's purpose. Such an interpretation would cause mitigation to engulf all homicides except those that involve "cold-blooded calculation."[18] The instructions at issue did not require the jury to conclude that the killing was a reasonable response but rather that the "external emotional stressors trigger a loss of self-control that is reasonable."[19] The loss of self-control is separate and distinct from the ensuing killing" and that was clear from the instructions.[20]

Instructions

The defense will argue for their own EED instructions which will likely deviate from that which is proper. Instructions should include burden shift, definition of Extreme Emotional Distress and preponderance of the evidence among others. None of these are routine instructions. I have included the following instructions as attachments.

The first instructions that the court must give define EED. These instructions explain to the jury that acts committed while under the influence of EED are less blameworthy because the actor is overborne by the extremely unusual and overwhelming stress. Further, the instructions should explain that the standard is not a subjective inquiry into whether the defendant's reaction was reasonable but rather an objective standard from the viewpoint of a reasonable person in the then existing circumstances facing the defendant. The initial instructions should also explain the distinction between context and the need for an external triggering event. These instructions are the subject of Lambden's appeal.

Other instructions that are necessary are the burden shift and a definition of proof by a preponderance of the evidence. Next the instructions should explain to the jury that they should not consider distress substantially caused by the defendant's own conduct and that resulting from mental illness. A definition of "mental illness" is also necessary.

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[16] *Id.* ¶12.
[17] *Id.* ¶13.
[18] *Id.* ¶16.
[19] *Id.*
[20] *Id.*

The court should also give a road map instruction because there should be a verdict with three possible choices; guilty as charged, guilty of the lesser mitigated crime and not guilty. Further, the court should give a special verdict for the unanimous decision regarding mitigation: defendant proved, or did not prove special mitigation.[21]

The court should give the standard elements instruction for the crime charged and then a lesser included elements instruction. This instruction will include language that gives an order of deliberation that I believe is necessary given the burden shift. However, the court should also instruct the jury that they need not make the determination in any particular order and consider the instructions as a whole.[22] However, remind them that they cannot find the defendant guilty of both murder and manslaughter.

Verdict Forms

The statutory scheme allows for the maximum of a one-step reduction if the jury unanimously finds the defense has met the burden of proving the EED by a preponderance of the evidence.[23] However the code requires that the defendant will be found guilty of a particular crime. For example, in the case of "murder, the defendant shall instead be found guilty of manslaughter."[24] Thus the jury must choose between murder, manslaughter and not guilty. Further, the scheme requires the jury also enter a special verdict "to indicate the basis for its general verdict."[25] Accordingly, sufficient instructions are necessary to explain these alternatives and the ramifications. I have attached verdict form samples from the *Lambden* case. As mentioned above the code discusses the consequences of a jury unable to reach a unanimous verdict on EED. "If the jury is unable to unanimously agree whether or not special mitigation has been established, the result is a hung jury."[26] Paragraph (6) is not a requirement for special verdict choices but rather the mechanics of implementation. Nevertheless, in the *Lambdin* case the defense requested a special verdict that included the unanimous finding the defense met its burden, the unanimous finding that it did not meet its burden, and "the jury was unable to agree unanimously on whether special mitigation was proved by preponderance of the evidence." I argued, unsuccessfully, that this legitimized the jury being hung as if this were a valid alternative. Although a unanimous verdict of guilty or not guilty is required we do not give the possibility on the verdict form for hung jury, the jury is able to communicate its position to the judge and the judge determines when there is no ability to reach a unanimous verdict. I believe it should be the same with special mitigation.

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[21] Utah Code Ann. §76-5-205.5(7).
[22] *See Shumway*, 2002 UT 124, ¶5.
[23] Utah Code Ann. §76-5-205.5(8).
[24] Utah Code Ann. §76-5-205.5(5)(b)(iii).
[25] Utah Code Ann. §76-5-205.5(7)(b).
[26] Utah Code Ann. §76-5-205.5(6)(d).