

## **HB0400S01 compared with HB0400**

**{deleted text}** shows text that was in HB0400 but was deleted in HB0400S01.

**Inserted text** shows text that was not in HB0400 but was inserted into HB0400S01.

**DISCLAIMER:** This document is provided to assist you in your comparison of the two bills. Sometimes this automated comparison will NOT be completely accurate. Therefore, you need to read the actual bills. This automatically generated document could contain inaccuracies caused by: limitations of the compare program; bad input data; or other causes.

**Representative Andrew Stoddard proposes the following substitute bill:**

### **MURDER MITIGATION AMENDMENTS**

2019 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: Andrew Stoddard**

Senate Sponsor: \_\_\_\_\_

---

#### **LONG TITLE**

#### **General Description:**

This bill relates to special mitigation of the penalty for a criminal homicide offense.

#### **Highlighted Provisions:**

This bill:

- ▶ defines terms;
- ▶ modifies the circumstances under which a defendant's extreme emotional distress is special mitigation of the penalty for a criminal homicide offense;
- ▶ modifies the consequences in a criminal trial if the jury is unable to unanimously agree that special mitigation based on the defendant's extreme emotional distress or mental illness is established; and
- ▶ makes technical changes.

#### **Money Appropriated in this Bill:**

## **HB0400S01 compared with HB0400**

None

### **Other Special Clauses:**

None

### **Utah Code Sections Affected:**

AMENDS:

**76-5-205.5**, as last amended by Laws of Utah 2009, Chapter 206

**77-14-4**, as last amended by Laws of Utah 2009, Chapter 206

**77-16a-102**, as last amended by Laws of Utah 2011, Chapter 366

**77-16a-301**, as last amended by Laws of Utah 2009, Chapter 206

---

---

*Be it enacted by the Legislature of the state of Utah:*

Section 1. Section **76-5-205.5** is amended to read:

**76-5-205.5. Special mitigation for mental illness or provocation reducing the level of criminal homicide offense -- Burden of proof -- Application to reduce offense.**

(1) As used in this section:

(a) (i) "Extreme emotional distress" means an overwhelming reaction of anger, shock, or grief that:

(A) causes the defendant to be incapable of reflection and restraint; and

(B) would cause an objectively reasonable person to be incapable of reflection and restraint.

(ii) "Extreme emotional distress" does not include:

(A) a condition resulting from mental illness; or

(B) distress that is substantially caused by the defendant's own conduct.

{ (b) (i) "Highly provoking act" means:

(A) an act constituting a felony that would cause an objectively reasonable individual to experience extreme emotional distress; or

(B) sexual activity involving an individual with whom the defendant has a reasonable expectation of sexual fidelity and an individual other than the defendant, if the defendant witnesses the sexual activity in person and witnessing the sexual activity would cause an objectively reasonable individual to experience extreme emotional distress.

(ii) "Highly provoking act" does not include words alone.

## HB0400S01 compared with HB0400

+ ~~(f)(b)~~ "Mental illness" means the same as that term is defined in Section 76-2-305.

[+] (2) Special mitigation exists when [the actor] a defendant causes the death of another or attempts to cause the death of another:

(a) ~~(f)(i)f~~ under circumstances that are not legally justified~~f~~, but~~f~~ if:

~~(i)f~~ the [actor] defendant acts under a delusion attributable to a mental illness [~~as defined in Section 76-2-305~~];

(ii) the nature of the delusion is such that, if the facts existed as the defendant believed them to be in the delusional state, those facts would provide a legal justification for the defendant's conduct; and

(iii) the defendant's actions, in light of the delusion, [~~were~~] are reasonable from the objective viewpoint of a reasonable person; or

(b) except as provided in Subsection (4), under the influence of extreme emotional distress [for which there is a reasonable explanation or excuse] that is predominantly caused by the victim's highly provoking act immediately preceding the defendant's actions.

[+] (3) A defendant who [was] is under the influence of voluntarily consumed, injected, or ingested alcohol, controlled substances, or volatile substances at the time of the alleged offense may not claim mitigation of the offense under Subsection [+] (2)(a) on the basis of mental illness if the alcohol or substance [caused, triggered, or substantially contributed to the] causes, triggers, or substantially contributes to the defendant's mental illness.

[+] (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.]

[+] (4) The reasonableness of an explanation or excuse under Subsection (1)(b) shall be determined from the viewpoint of a reasonable person under the then existing circumstances.]

(4) A defendant may not claim special mitigation under Subsection (2)(b) if:

(a) the time period after the victim's highly provoking act and before the defendant's actions was long enough for an objectively reasonable person to have recovered from the extreme emotional distress;~~for~~

(b) the defendant responded to the victim's highly provoking act by inflicting serious or substantial bodily injury on the victim over a prolonged period, or by inflicting torture on the

## **HB0400S01 compared with HB0400**

victim, regardless of whether the victim was conscious during the infliction of serious or substantial bodily injury or torture~~§ 5~~; or

(c) the victim's highly provoking act, described in Subsection (2)(b), is comprised of words alone.

(5) (a) If the trier of fact finds that the elements of an offense ~~[as listed]~~ described in Subsection (5)(b) are proven beyond a reasonable doubt, and also finds that the existence of special mitigation under this section is established by a preponderance of the evidence, ~~[it]~~ the trier of fact shall return a verdict on the reduced charge as provided in Subsection (5)(b).

- (b) If under Subsection (5)(a) the offense is:
- (i) aggravated murder, the defendant shall instead be found guilty of murder;
  - (ii) attempted aggravated murder, the defendant shall instead be found guilty of attempted murder;
  - (iii) murder, the defendant shall instead be found guilty of manslaughter; or
  - (iv) attempted murder, the defendant shall instead be found guilty of attempted manslaughter.

(c) If the trier of fact finds that special mitigation is not established under this section, the trier of fact shall convict the defendant of the offense for which the prosecution proves all the elements beyond a reasonable doubt.

(6) (a) If a jury is the trier of fact, a unanimous vote of the jury is required to establish the existence of the special mitigation under this section.

(b) If the jury ~~[does find]~~ finds special mitigation by a unanimous vote, ~~[it]~~ the jury shall return a verdict on the reduced charge as provided in Subsection (5).

(c) If the jury finds by a unanimous vote that special mitigation ~~[has not been established, it]~~ is not established, or if the jury is unable to unanimously agree special mitigation is established, the jury shall convict the defendant of the greater offense for which the prosecution ~~[has established]~~ proves all the elements beyond a reasonable doubt.

~~(d) If the jury is unable to unanimously agree whether or not special mitigation has been established, the result is a hung jury.]~~

(7) (a) If the issue of special mitigation is submitted to the trier of fact, ~~[it]~~ the trier of fact shall return a special verdict indicating whether the existence of special mitigation ~~[has been]~~ is found.

## **HB0400S01 compared with HB0400**

(b) The trier of fact shall return the special verdict at the same time as the general verdict, to indicate the basis for [its] the general verdict.

(8) Special mitigation under this section does not, in any case, reduce the level of an offense by more than one degree from that offense, the elements of which the evidence [~~has established~~] proves beyond a reasonable doubt.

Section 2. Section 77-14-4 is amended to read:

### **77-14-4. Insanity or diminished mental capacity -- Notice requirement.**

(1) If a defendant [proposes] intends to offer evidence that the defendant is not guilty as a result of insanity or that the defendant had diminished mental capacity, or [proposes] intends to offer evidence in mitigation of a criminal homicide or attempted criminal homicide offense under Subsection 76-5-205.5[~~(1)~~](2)(a), the defendant shall file and serve the prosecuting attorney with written notice of the intention to claim the defense at the time of arraignment or as soon afterward as practicable, but not [~~fewer~~] less than 30 days before the trial.

(2) If the court receives notice that a defendant intends to claim that the defendant is not guilty by reason of insanity or that the defendant had diminished mental capacity, the court shall proceed in accordance with the requirements described in Section 77-16a-301.

Section 3. Section 77-16a-102 is amended to read:

### **77-16a-102. Jury instructions.**

(1) If a defendant asserts a defense of not guilty by reason of insanity, the court shall instruct the jury that [it] the jury may find the defendant:

- (a) guilty;
- (b) guilty with a mental illness at the time of the offense;
- (c) guilty of a lesser offense;
- (d) guilty of a lesser offense with a mental illness at the time of the offense;
- (e) not guilty by reason of insanity; or
- (f) not guilty.

(2) (a) When a defendant asserts a mental defense pursuant to Section 76-2-305 or asserts special mitigation reducing the level of an offense pursuant to Subsection 76-5-205.5[~~(1)~~](2)(a), or when the evidence raises the issue and either party requests the instruction, the [jury shall be instructed that if it] court shall instruct the jury that if the jury

## **HB0400S01 compared with HB0400**

finds a defendant guilty by proof beyond a reasonable doubt of [any] a charged offense or lesser included offense, [it] the jury shall also return a special verdict indicating whether [it] the jury finds that the defendant had a mental illness at the time of the offense.

(b) If the jury finds the defendant guilty of the charged offense by proof beyond a reasonable doubt, and by special verdict finds the defendant had a mental illness at the time of the offense, [it] the jury shall return the general verdict of "guilty with a mental illness at the time of the offense."

(c) If the jury finds the defendant guilty of a lesser offense by proof beyond a reasonable doubt, and by special verdict finds the defendant had a mental illness at the time of the offense, [it] the jury shall return the general verdict of "guilty of a lesser offense with a mental illness at the time of the offense."

(d) If the jury finds the defendant guilty of the charged offense or a lesser included offense and does not find that the defendant had a mental illness at the time of the offense, the jury shall return a verdict of "guilty" of [that] the offense, along with the special verdict form indicating that the jury did not find that the defendant had a mental illness at the time of the offense.

(e) The special verdict shall be returned by the jury at the same time as the general verdict, to indicate the basis for [its] the jury's general verdict.

(3) (a) In determining whether a defendant should be found guilty with a mental illness at the time of the offense, the [jury shall be instructed] court shall instruct the jury that the standard of proof applicable to a finding of mental illness is by a preponderance of the evidence. [The jury shall also be instructed]

(b) The court shall also instruct the jury that the standard of preponderance of the evidence does not apply to the elements establishing a defendant's guilt, and that the proof of the elements establishing a defendant's guilt of [any] an offense must be proven beyond a reasonable doubt.

(4) (a) When special mitigation based on extreme emotional distress is at issue pursuant to Subsection 76-5-205.5~~(f)(1)~~(2)(b), the jury shall, in addition to [its] the jury's general verdict, return a special verdict.

(b) The special verdict shall be returned by the jury at the same time as the general verdict, to indicate the basis for [its] the jury's general verdict.

## **HB0400S01 compared with HB0400**

Section 4. Section **77-16a-301** is amended to read:

### **77-16a-301. Mental examination of defendant.**

(1) (a) When the court receives notice that a defendant intends to claim that the defendant is not guilty by reason of insanity or that the defendant had diminished mental capacity, or that the defendant intends to assert special mitigation under Subsection 76-5-205.5~~(1)~~<sup>(2)</sup>(a), the court shall order the [Department of Human Services] department to examine the defendant and investigate the defendant's mental condition.

(b) The person or organization directed by the department to conduct the examination shall testify at the request of the court or either party in [any] a proceeding in which the testimony is otherwise admissible.

(c) Pending trial, unless the court or the executive director directs otherwise, the defendant shall be retained in the same custody or status the defendant was in at the time the examination was ordered.

(2) (a) The defendant shall be available and shall fully cooperate in the examination by the department and [any] other independent examiners for the defense and the prosecuting attorney.

(b) If the defendant fails to be available and to fully cooperate, and that failure is established to the satisfaction of the court at a hearing prior to trial, the defendant is barred from presenting expert testimony relating to the defendant's defense of mental illness at the trial of the case.

(c) The department shall complete the examination within 30 days after the court's order, and shall prepare and provide to the court prosecutor and defense counsel a written report concerning the condition of the defendant.

(3) Within 10 days after receipt of the report described in Subsection (2)(c) from the department, but not later than five days before the trial of the case, or at any other time the court directs, the prosecuting attorney shall file and serve upon the defendant a notice of rebuttal of the defense of mental illness, which shall contain the names of witnesses the prosecuting attorney proposes to call in rebuttal.

(4) The [~~reports of any other~~] report of another independent examiner [are] is admissible as evidence upon stipulation of the prosecution and defense.

(5) (a) This section does not prevent [any] a party from producing [any] other

## **HB0400S01 compared with HB0400**

testimony as to the mental condition of the defendant. [Expert witnesses who are]

(b) An expert witness who is not appointed by the court [~~are~~] ~~is~~ not entitled to compensation under Subsection (7).

(6) This section does not require the admission of evidence not otherwise admissible.

[~~(7) Expenses of examination ordered by the court under this section shall be paid by the Department of Human Services. Travel expenses associated with the examination incurred by the defendant shall be charged by the department to the county where prosecution is commenced. Examination of defendants charged with violation of municipal or county ordinances shall be charged by the department to the entity commencing the prosecution.~~]

(7) (a) The department shall pay the expenses of an examination ordered by the court under this section.

(b) The department shall charge the county where the prosecution is commenced for travel expenses associated with an examination incurred by a defendant.

(c) The department shall charge the entity commencing the prosecution for an examination of a defendant charged with a violation of a municipal or county ordinance.