

AGENDA

COMMITTEE ON THE MODEL UTAH CRIMINAL JURY INSTRUCTIONS

Administrative Office of the Courts
450 South State Street
Salt Lake City, Utah 84114

Wednesday, June 3, 2015
12:00 p.m. to 1:30 p.m.
Judicial Council Room

12:00	Welcome and Approval of Minutes (Tab 1)	Judge James Blanch
12:05	Sex Offense Definitions (Tab 2)	Committee
1:20	Other Business	
1:30	Adjourn	

Upcoming Meetings (held on the 1st Wednesday of each month unless otherwise noted)

September 2, 2015
October 7, 2015
November 4, 2015

Tab 1

MINUTES

**SUPREME COURT’S ADVISORY COMMITTEE ON THE
MODEL UTAH JURY INSTRUCTIONS – CRIMINAL**

Administrative Office of the Courts
450 South State Street
Salt Lake City, Utah 84114

Wednesday, May 6, 2015
12:00 p.m. to 1:30 p.m.
Judicial Council Room

PRESENT

Judge James Blanch, Chair
Alison Adams-Perlac, Staff
Mark Field
Professor Carissa Byrne Hessick
Sandi Johnson
Linda Jones
Karen Klucznik
Judge Brendon McCullagh
Steve Nelson
Jesse Nix
Nathan Phelps
Judge Michael Westfall (remotely via Vidyo)

EXCUSED

Jennifer Andrus
David Perry
Thomas Pedersen, Intern
Scott Young

1. Welcome, Approval of Minutes

Judge Blanch

Judge Blanch welcomed everyone to the meeting. Because the committee recently appointed new members, each member introduced themselves to each other.

Ms. Johnson moved to approve the minutes from the April 1 meeting. Judge McCullagh seconded the motion and it passed unanimously.

2. CR 1613 Sexual Abuse of a Child

Committee

Judge Blanch asked the committee for comment on the proposed instruction.

Judge McCullagh moved to approve the instruction. Ms. Klucznik seconded the motion and it passed unanimously.

3. CR 1614 Aggravated Sexual Abuse of a Child.

Committee

Ms. Klucznik asked if an intent element was needed for part 5. Ms. Jones stated that *Barela* requires an intent element for every act of the crime. Ms. Klucznik agreed. Ms. Johnson stated that *Barela* requires an intent element for each act, but not necessarily every element such

as age. Ms. Johnson stated that an intent element was not necessary for part H (position of special trust). Ms. Klucznik suggested adding an intent element to part A, B, D, I, and J. Mr. Phelps suggested dividing part 5 into two groups, one with the intent element and one without the intent element. Ms. Johnson suggested putting the intent element before the parts that require it.

Mr. Field asked if the intent element was necessary for F. Ms. Johnson stated that F refers to a previous act. Judge Blanch stated that intent does not matter for previous acts.

Judge Blanch asked whether a statute or case law prevented a defendant from using ignorance to the age of the victim as a defense. Ms. Jones stated that the court in *Martinez* limited the strict liability aspect of the crime to the age. Ms. Klucznik stated that the limitation is from case law. Judge Blanch asked if *Barela* and *Martinez* conflict with each other. Ms. Jones stated that they are not in conflict because the referenced statute for each case is different.

Ms. Jones asked if the committee created a definition for “position of special trust” to comply with *Watkins*. Ms. Klucznik asked if the statute was amended to use the pre-*Watkins* definition for “special trust.” Ms. Johnson stated that *Watkins* said that the reason for the aggravating factor of “special trust” is that the person is using their position to facilitate the crime. She stated that if a person is not using their position to facilitate the crime, it would not be an aggravating factor. She stated that *Watkins* narrowed the definition. Ms. Klucznik stated that the *Watkins* instruction would apply to the catch-all definition. Ms. Jones stated that crimes before 2013 are governed by *Watkins* and crimes after 2013 are governed by statute. Ms. Johnson stated that “position of special trust” should have two definitions: crimes prior to 2013 and crimes after 2013.

Judge Blanch asked if anyone on the committee thought that the mens rea requirement should apply to “position of special trust.” Ms. Jones stated that *Watkins* required the defendant to be in the position for the purposes of accomplishing the act and there could possibly be a mens rea component. Ms. Klucznik stated that this instruction needs a supplemental instruction. Ms. Adams-Perlac stated that this will be discussed at the next meeting. Judge Blanch suggested including a committee note that references *Watkins*.

Ms. Jones agreed that the instruction should include a committee note with an alternative subpart H for crimes pre-*Watkins* and crimes post-*Watkins*. Ms. Klucznik stated that the catch-all definition of “position of special trust” includes the position of authority and use of that authority. Judge McCullagh agreed that the position must enable the defendant. Ms. Johnson stated that the position of special trust must be from the perspective of the victim.

Ms. Jones moved to moved to approve the instruction. Ms. Kluznick seconded the motion and it passed unanimously.

4. CR 1620 Consent

Committee

Ms. Johnson stated that *Barela* requires prosecutor to prove two things: (1) that the victim did not consent and (2) the defendant must have known the victim did not consent. She stated that the prosecution must still prove the victim did not consent. Ms. Johnson asked Ms. Jones if the instruction was based on the recently amended statute. Ms. Jones said it was not.

Ms. Klucznik asked if the committee should amend statute-based instructions after the Legislature amends the statute. Judge McCullagh stated that sexual offense statutes frequently change. Judge Blanch stated that it could be an overwhelming task for the committee to create alternative instructions each time a statute is amended. He stated that instructions for recently

amended statutes should include a committee note cautioning practitioners to ensure that the instruction is appropriate to the amended statute.

Judge Blanch asked if CR1620 is correct with the amended statute. Ms. Jones suggested changing the sixth paragraph to reflect the amended statute.

Ms. Johnson stated that the statute changed regarding paragraph seven (mental illness or defect) and added catch-all language. Professor Hessick suggested “the defendant knew the victim was incapable of consenting because of mental illness, defect, or any other reason.” Ms. Jones stated that “any reason” modifies incapability. She stated that if it stands alone, it becomes an unintentional catch-all. She suggested “for any other reason was incapable.” Judge McCullaugh suggested “for any reason, including mental illness or defect, was incapable.” Judge Blanch asked if it was implicit that the defect had to actually exist.

Ms. Klucznik asked why the instruction was formatted differently than other instructions. Ms. Jones suggested adding bullets to the instruction. Ms. Klucznik suggested organizing it using a, b, c, etc. She stated that it should be clear that the jury should choose one or more of the options. Judge Blanch stated that the list was a non-exhaustive list of examples of lack of consent. Ms. Adams-Perlac suggested indenting the list. Ms. Jones stated that the instruction covers what *Barela* anticipated, specifically that the jury can find a lack of consent when any of the enumerated circumstances are present.

Judge Blanch asked if the committee had further changes to the instruction. The committee decided that the instructions are correct as the law presently is stated.

Ms. Jones moved to approve the instruction. Mr. Field seconded the motion and it passed unanimously.

5. Future Action by Committee

Committee

Judge Blanch suggested the committee create jury instructions for crimes that most often go to trial. He stated that it would help practitioners in their actual practice and would help practitioners use more of the committee’s instructions. He stated that the committee should start on the most common drug offenses in September.

6. Adjourn

Committee

The meeting was adjourned at 1:08 p.m. The next meeting is Wednesday, June 3, 2015.

Tab 2

CR 1601 Definitions.

“Bodily injury” means physical pain, illness, or any impairment of physical condition. Utah Code § 76-1-601.

“Buttocks” does not include the “anus”. *State v. Pullman*, 2013 UT App 168, ¶ 16, 306 P.3d 827.

“Dangerous weapon” means any item capable of causing death or serious bodily injury; or a facsimile or representation of the item, if: 1. the actor's use or apparent intended use of the item leads the victim to reasonably believe the item is likely to cause death or serious bodily injury; or 2. the actor represents to the victim verbally or in any other manner that he is in control of such an item. Utah Code § 76-1-601.

“Grievous sexual offense” means rape; rape of a child; object rape; object rape of a child; forcible sodomy; sodomy on a child; aggravated sexual abuse of a child; aggravated sexual assault; any felony attempt to commit one of the above offenses; or an offense in another state, territory, or district of the United States that, if committed in Utah, would constitute one of the above offenses. Utah Code § 76-1-601.

“Health professional” means an individual who is licensed or who holds himself or herself out to be licensed, or who otherwise provides professional physical or mental health services, diagnosis, treatment, or counseling including, but not limited to, a physician, osteopathic physician, nurse, dentist, physical therapist, chiropractor, mental health therapist, social service worker, clinical social worker, certified social worker, marriage and family therapist, professional counselor, psychiatrist, psychologist, psychiatric mental health nurse specialist, or substance abuse counselor. Utah Code § 76-5-406(12)(b).

“Indecent liberties” means conduct that is as serious as touching the anus, buttocks, or genitals of a person, or the breast of a female. In deciding whether conduct amounts to indecent liberties, use your judgment and common sense. You may consider factors such as:

1. the duration of the conduct,
2. the intrusiveness of the conduct against (VICTIM'S INITIALS)'s person,
3. whether (VICTIM'S INITIALS) requested that the conduct stop,
4. whether the conduct stopped upon request,

5. the relationship between (VICTIM'S INITIALS) and the defendant,
6. (VICTIM'S INITIALS)'s age,
7. whether (VICTIM'S INITIALS) was forced or coerced to participate, and
8. any other factors you consider relevant.

State v. Lewis, 2014 UT App 241, 337 P.3d 1053.

“Position of special trust” means an adoptive parent; an adult athletic manager; an aunt; a babysitter; a coach; an adult cohabitant of a parent; a counselor; a doctor or physician; an employer; a foster parent; a grandparent; a legal guardian; a natural parent; an adult recreational leader; a religious leader; an adult sibling or stepsibling; an adult scout leader; a stepparent; a teacher or any other person employed by or volunteering at a public or private elementary school or secondary school, and who is 18 years of age or older; an uncle; an adult youth leader; any other person in a position of authority that enables the person to exercise undue influence over the child. Utah Code § 76-5-404.1(1).

“Religious counselor” mean a minister, priest, rabbi, bishop, or other recognized member of the clergy. Utah Code § 76-5-406(12)(b).

“Retaliation” means threatening physical force, kidnapping, or extortion. Utah Code § 76-5-406(4)(b).

“Serious bodily injury” means bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death. Utah Code § 76-1-601.

Committee Notes

The committee has chosen not to provide a definition for some terms because the terms have not been defined by Utah law. Practitioners and judges should work together to define these terms using their ordinary and accepted meanings.

For offenses committed on or after May 13, 2014, the above definition of “position of special trust” applies.

For offenses committed from May 4, 1998 and May 12, 2014, “position of special trust” means that position occupied by a person in a position of authority, who, by reason of that position is able to exercise undue influence over the victim, and includes, but is not limited to, an adult youth leader or recreational leader, an adult athletic manager, an adult coach, a teacher, a counselor, a religious leader, a doctor, an employer, a foster parent, a babysitter, an adult scout leader, a natural parent, a stepparent, an adoptive parent, a legal guardian, a grandparent, an aunt, an uncle, or an adult cohabitant of a parent. Utah Code § 76-5-404.1(4)(h)(West 2013).

For offenses committed prior to May 4, 1998, “position of special trust” means that position occupied by a person in a position of authority, who, by reason of that position is able to exercise undue influence over the victim, and includes, but is not limited to, an adult youth leader or recreational leader, an adult athletic manager, an adult coach, a teacher, a counselor, a religious leader, a doctor, an employer, a foster parent, a babysitter, or an adult scout leader. A natural parent, a stepparent, an adoptive parent, or other legal guardian, not including a foster parent, who has been living in the household, is not a person occupying a position of special trust.