

## 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 7, 2014  
12:00 p.m. to 1:30 p.m.  
Judicial Council Room

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#### **PRESENT**

Judge Denise Lindberg, Chair  
Alison Adams-Perlac, Staff  
Jennifer Andrus  
Mark Field  
Sandi Johnson  
Linda Jones  
Karen Klucznik  
Judge Brendan McCullagh  
Jesse Nix, Recording Secretary  
John West  
Judge Michael Westfall  
Scott Young

#### **EXCUSED**

Judge James Blanch  
Professor Jensie Anderson  
Thomas Pedersen, Intern

#### **1. Welcome and Approval of Minutes**

**Judge Denise Lindberg**

Judge Lindberg welcomed everyone to the meeting. She introduced Jesse Nix, the committee's new recording secretary.

The committee discussed the previous meeting's minutes. Ms. Johnson stated that she was present and should be removed from the excused list. Ms. Andrus stated that she was not present and she should be on the excused list.

*Ms. Johnson moved to approve the minutes from the previous meeting as amended. Mr. Young seconded the motion and it passed unanimously.*

#### **2. Sexual Offense Instructions**

**Committee**

Ms. Adams-Perlac informed the committee that most of the special verdict forms for sexual offense statutes have been drafted but not published. Ms. Adams-Perlac asked the committee if any members had a special verdict form for prior convictions and serious bodily injury. Ms. Johnson stated that she has a prior conviction instruction that she can submit to the committee. Ms. Adams-

Perlac stated that after the instructions have been drafted, the committee will publish them all together. She said all instructions will be published in the next few months.

The committee discussed instruction 1614.

Ms. Klucznik stated that element 5 is cumbersome. She suggested “and the offense was committed under one or more of the following circumstances.” Judge Lindberg suggested “use of a dangerous weapon.” She suggested that element 5 should have a transition. Ms. Klucznik suggested using “one or more of the following.”

Ms. Johnson asked if the jury must agree on all the factors. Ms. Adams-Perlac stated that the instruction is drafted so the practitioner would use the relevant parts. Ms. Johnson stated that the instruction should indicate that a special verdict form is needed if the jury is going to pick more than one aggravating circumstance. Judge Lindberg suggested adding “if more than one aggravating circumstance applies, then the possible aggravating circumstances should be listed.” Ms. Klucznik stated that the committee should be clear that if multiple aggravating circumstances apply, practitioners also need a special verdict form. Ms. Adams-Perlac stated that the committee notes will say, “if more than one applies, a special verdict form should be used.”

Mr. Field asked why element 5 does not state, “one or more.” Ms. Klucznik stated that all of the aggravating circumstances should be in the instruction and the special verdict form. She suggested leaving “you find that at least one of the following circumstances applies” in brackets. Mr. Field reiterated that the instruction should state, “one or more.” Judge Westfall agreed.

Mr. Klucznik stated that it may be problematic if the element instruction includes the prior conviction aggravator. Judge Lindberg agreed because information about a prior conviction would be bifurcated at trial. Ms. Johnson stated that because bifurcation does not always occur, the prior conviction aggravator should stay and the parties can remove it from the element instruction when necessary. Judge Westfall stated that this would be plain error. Ms. Klucznik suggested addressing this in the committee note. Judge McCullagh suggested addressing it within brackets.

Ms. Klucznik suggested stating, “In most cases, the prior conviction aggravators will not be in the elements instruction because bifurcation is normal. However, if circumstances warrant introduction of that information at trial...” Ms. Klucznik reiterated her concern that practitioners will leave the prior conviction aggravator in the element instruction. Ms. Andrus suggested language directing the practitioner to remove the aggravator. Judge McCullagh stated that this language is not necessary because lawyers will be careful about the jury instructions because these charges are first-degree felonies.

Mr. Field stated that the committee must decide whether we should let practitioners do the right thing on their own. Ms. Adams-Perlac stated that the instruction should encompass all possible scenarios and practitioners must do their job. Judge McCullagh stated that the committee should put directions in the committee notes. Judge Lindberg stated the committee must be clear about what elements are applicable.

Ms. Johnson suggested stating, “one of the following aggravating circumstances applies.” She explained that “one or more” is unnecessary because the aggravating circumstances will be on a special verdict form. Ms. Klucznik stated that the elements instruction should include the aggravating circumstances and the special verdict form will indicate what specific aggravating circumstance the jury found applicable. Judge McCullagh suggested using language that states, “an aggravating circumstance applies as we have found on the attached special verdict form.” Ms. Johnson stated that she is concerned that the elements form and special verdict form could conflict. She suggested stating in the elements form, “an aggravating circumstance applies” and give the jury a special verdict form with a list of aggravating circumstances.

Mr. Young stated that the potential circumstances that apply should be listed in the elements instruction to decrease confusion. Judge McCullagh stated that if the aggravating factors are not listed on the elements instruction, then the jury may convict on the lesser included charge of “Sexual Abuse of a Child” without aggravating factors. Ms. Klucznik stated that she agreed and that attorneys should choose whether to go forward on lesser included charges. She stated that separating the factors could defeat a defense strategy. Mr. West stated that lesser included charges should be a strategic decision.

Ms. Johnson reiterated her concern that jury unanimity on the aggravating circumstance may not occur if they are listed in the elements instruction. Ms. Klucznik asked if it is established that the jury must be unanimous on the various specific elements within each aggravating factor. Ms. Johnson stated that there is no case law on this issue. Mr. Field stated that all the elements should be in the elements instruction. Judge Lindberg suggested stating, “and an aggravating circumstance applies as reflected in the special verdict form.” Ms. Johnson suggested stating, “and an aggravating circumstance is present” on the elements instruction and then including the aggravating circumstances on the next jury instruction.

To address concerns of unanimity, Judge McCullagh suggested stating, “you must find,unanimously and beyond a reasonable doubt, that one or more of the aggravating circumstances apply as indicated on the special verdict form \_\_\_\_.” Ms. Jones stated that she thought the unanimity issue had been resolved by the committee and the best course was to include all elements in the instruction, including aggravating circumstances, because repetition makes the elements more clear. She stated that the jury would expect a definitional instruction on the element.

Ms. Johnson stated that she was not concerned with including aggravating circumstances on the elements instruction. She stated that when “one or more” is used on the elements instruction, it contradicts the unanimity in the special verdict form.

Ms. Jones stated that the special verdict form should be clear on the unanimity requirement. She stated that the standard for reviewing jury instructions for error is looking at instructions as a whole. She stated that she does not see a potential for reversible error when using “one or more” in the elements instruction. Judge McCullagh stated that he disagreed that reversible error would not be a concern based on recent appellate court rulings. Ms. Andrus suggested using, “at least one of the following.” Judge McCullagh stated that he agreed with Ms. Andrus. Ms. Adams-Perlac suggested removing, “you must find unanimously.” Judge Lindberg stated that the definitional instructions should appear after the elements instruction.

Ms. Klucznik asked if we should address unanimity in the elements instruction. Judge McCullagh stated that the jury is given an instruction that says the verdict must be unanimous. Ms. Klucznik stated that the jury unanimity instruction does not address the elements of the aggravating circumstances. She stated that when cases are appealed, it is sometimes difficult to determine what aggravating factor the jury used.

Ms. Jones stated that we need an instruction that explains “special trust” as in *State v. Watkins*, 2013 UT 28.

Mr. Field asked why the committee does not include “you must unanimously find beyond a reasonable doubt...” in the elements instruction. Judge McCullagh again stated that the jury is given an instruction that says the verdict must be unanimous. Judge Lindberg stated that the exclusion was not a conscious decision. Ms. Klucznik stated that unanimity may not be required in these circumstances. Ms. Johnson stated that there is a difference between unanimous and unanimity on specific elements. She explained that a jury can convict someone of a DUI in three ways, but the jury

can convict without unanimity on the specific element. Ms. Andrus stated that a jury will understand the facts of a case in different ways and the committee should satisfy different listeners.

Ms. Klucznik states that unanimity is not required for element 2. Ms. Johnson stated that the only reason the committee uses the special verdict form is to clarify the jury's intention if the case is appealed. Ms. Klucznik suggested using the special verdict form as an option. She stated that attorneys should be made aware that a special verdict form is available but not required because that is the current law. Judge Lindberg stated that judges should use a special verdict form. Ms. Johnson agreed that if there is more than one aggravating circumstance, prosecutors usually use a special verdict form. Ms. Johnson suggested stating, "You find that at least one of the following aggravating circumstances applies."

*Mr. Field asked if the committee consents on the introductory language to element 5. The committee consented.*

The committee discussed the specific language for the various aggravating circumstances in element 5. On 5a, Judge Lindberg suggested stating, "A dangerous weapon was used." Judge McCullagh stated that codefendants are not addressed in the instruction. Ms. Klucznik suggested, "The offense involved use of a dangerous weapon." Ms. Johnson stated that these changes did not make the instructions clearer. Ms. Andrus stated that including "the offense involved" is problematic because a list would be necessary.

Ms. Klucznik stated that using the defendant's name does not address party liability. Ms. Johnson recommended using the statutory language. Ms. Klucznik stated that if the committee was concerned with party liability, the language on all of the aggravating circumstances elements must be changed. Judge Lindberg suggested, "bodily injury or severe psychological injury to the minor was caused during or as a result of the offense." Judge McCullagh stated that party liability should be addressed by the lawyers and not the committee. Ms. Adams-Perlac suggested using the defendant's name. Ms. Andrus suggested stating, "or the offenses committed during the course of a kidnapping." Ms. Klucznik suggested stating, "committed the offense during the course of a kidnapping." Ms. Andrus suggested putting "the offense" at the end to conform with the other listed aggravating circumstances.

*Ms. Adams-Perlac says she will look at Watkins and the definition of special trust.*

### **3. Other Business**

### **Judge Denise Lindberg**

Judge Lindberg stated that there is an issue of "committee member fatigue" because terms of service are not defined. She asked the committee for their thoughts on term limits and length of term limits. Ms. Adams-Perlac explained how the Supreme Court committee term limits work. Ms. Jones stated she was concerned with the importance of the institutional knowledge of long-serving members. Mr. Young agreed that institutional knowledge is important and staggered terms could be a way to address this concern. Ms. Adams-Perlac also recommends staggered terms. Mr. Field asked if the presumption is leaving after four years or two four-year terms. Ms. Klucznik likes term limits of eight years. Judge Lindberg suggested one four-year term with an option to serve two terms. Judge McCullagh suggests that we make the committee's terms identical to other Supreme Court committees.

#### **4. Adjourn**

*The meeting was adjourned at 1:30 p.m.* The next meeting will be held on Wednesday, June 4, 2014 at 12:00 p.m.