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, June 4, 2014
12:00 p.m. to 1:30 p.m.
Judicial Council Room

PRESENT	**EXCUSED**
Judge Denise Lindberg, Chair	Karen Klucznik
Alison Adams-Perlac, Staff	Judge Brendan McCullagh
Professor Jensie Anderson	John West
Jennifer Andrus	
Judge James Blanch	
Mark Field	
Sandi Johnson	
Linda Jones	
Jesse Nix	
Dillon Olson, Guest	
Thomas Pedersen, Intern	
Judge Michael Westfall (remotely via VIAC)	
Scott Young	

1. Welcome and Approval of Minutes **Judge Denise Lindberg**

Judge Lindberg welcomed everyone to the meeting. She introduced Dillon Olson, her summer semester intern.

The committee discussed the previous meeting's minutes. Ms. Jones stated that a correction needed to be made on page 3, paragraph 5: "Ms. Jones stated that the special verdict form should be clear on the unanimity requirement." Mr. Field stated a correction needed to be made on page 3, paragraph 5: "Ms. Klucznik…"

Ms. Jones moved to approve the minutes from the previous meeting as amended. Mr. Field seconded the motion and it passed unanimously.

2. Instruction 1614 Committee

2.1. Discussion of 5(a)

Judge Lindberg stated that the committee's goal should be to simplify and clarify language, not to adopt the statutory language every time. She stated that the committee should translate the statute into plain language.

Judge Lindberg stated that the list in 5(a) should remain because of potential scenarios that may apply, but suggested stating, "while committing the offense" rather than "during the commission of the offense." Ms. Johnson stated that "during the commission of" is defined elsewhere as either "attempting while actually committing" or "during the flight thereof." She stated that "while committing" could be contrary to the normal definition of "during the commission of." Ms. Perlac-Adams stated that she believed this phrasing was discussed at the committee's last meeting. She stated that "while committing the offense" is clearer. Mr. Field asked if "while committing" has the same meaning as "during the commission." He asked if the judge could define "while committing." Ms. Johnson stated that either statement requires a definition for the jury. Mr. Field stated that because a definition would be required, either phrase could be used.

Ms. Andrus suggested "before, during, or fleeing from the act" to reduce complexity because it has a clearer meaning. Mr. Field stated that the phrase would still need to be defined to explain how much before or how much after. Ms. Anderson suggested removing "during the commission of the offense" after the list of aggravating circumstances. Judge Lindberg stated that a possible alternative basis would be "during the course of a kidnapping." Ms. Adams-Perlac suggested "during the offense." Judge Lindberg suggested, "as part of the offense" and define "as part of" by applying "during the commission of" language.

Ms. Johnson stated that "during the course" language is only a part of the kidnapping and does not apply to any of the other listed aggravating circumstances. Ms. Jones suggested individually bracketing the list of aggravating circumstances. Mr. Field stated that the force does not need to be with a dangerous weapon. Ms. Johnson stated that there are three different situations: [a defendant used a dangerous weapon], [a defendant used force, duress, violence, intimidation, coercion, menace, or threat of harm], or [a defendant committed the offense during the course of a kidnapping]. Judge Lindberg stated that she agreed.

Judge Lindberg stated that the committee notes should be clear that attorneys should only choose the option that is applicable and not use all of them. Ms. Adams-Perlac reminded the committee that the first note clarifies that brackets suggest optional language and that attorneys must review and edit their own instructions.

2.2. Discussion of 2(c)

Judge Blanch asked the committee if there should be an "or" after 2(c) to be consistent with 3 and 5 by listing the alternative options. He stated that section 3 uses an "or," as does section 5(i). Judge Lindberg agreed.

2.3. Discussion of 5(d)

Judge Lindberg asked the committee what the difference was between "showed and displayed" and questioned the necessity of both words that she admitted were in the statute. Ms. Andrus stated there is a technical difference. Mr. Young stated that "display" could be a photo on a computer monitor and "showed" as a more purposeful action. Ms. Andrus stated there should only be one. She stated that she liked "showed" because "display" could mean a lack of intention or accidental. Judge Lindberg suggested removing "displayed." Ms. Johnson suggested "used or showed pornography."

Mr. Field presented hypothetical situation:

> What if somebody has pornography displayed in their home on their living room table and a child walks in. You don't actually show it to the child, but it's displayed there for the child to see and the child sees it. The accused could say, 'I mean it was there, I didn't show it to him or her.'"

Ms. Perlac stated that this could be criminal under the statute. Judge Blanch asked Mr. Field if this situation should be an aggravator. Mr. Field asked if a crime is committed when a defendant allows a child to walk around in a house displaying pornography and the defendant is not actively showing it to them. Ms. Johnson stated that it would not be a crime. Ms. Andrus asked if the defendant wanted the child to see the pornography. Judge Lindberg stated that 5(d) is a list of aggravators for further action and stated that a person must use pornography to accomplish their goal. Mr. Field presented another hypothetical situation:

> Somebody is downstairs, watching pornography and upstairs, there is a family party, and then the guy or woman goes to the restroom, and while the movie is playing, a child comes down and sees the pornography. Is that a crime?

Ms. Andrus stated that 5(d) is about purposeful action. Mr. Field and Judge Lindberg stated that there must be intent.

2.4. Discussion of 5(c)

Professor Anderson stated the language suggests that an aggravator includes a person who is a stranger or not a stranger, which means everyone.

2.5. Further discussion of 5(d)

Ms. Johnson stated that removing "displayed" and using "showed" is best because the aggravators must occur during the course of the actual act by the defendant. She stated that pornography on a coffee table would be another charge.

Judge Lindberg asked if brackets should be around ["used" or "showed" pornography] and [caused (MINOR'S INITIALS) to be photographed in a lewd condition during the course of the offense]. Mr. Field asked if "during the course of the offense" modifies all three phrases.

Judge Lindberg stated yes and suggested that brackets should not be around "during the course of the offense" because the defendant must use pornography as part of the act of molesting the child. Ms. Johnson stated that section 4 specifies that the aggravator must be committed in conjunction with an act. She stated that she believes the Legislature intended "during the course of the offense" to modify "photographed in a lewd condition."

2.6. Discussion of 5(e)

Ms. Jones stated that "prior to sentencing for this offense" is unnecessary because it is obvious. She stated it is a direction for prosecutors, defense attorneys, and judges. Judge Lindberg questioned if this aggravator would be presented without bifurcation. Ms. Johnson stated that the committee should create jury instructions and leave bifurcation to the judge and attorneys. She stated that there could be strategic reasons not to bifurcate, such as 404(c) evidence, and the committee should not go beyond the scope of creating jury instructions.

Judge Lindberg agreed that "prior to sentencing for this offense" should be removed.

2.7. Discussion of 5(g)

Judge Lindberg suggested changing the language to "committed more than five separate acts that would constitute an offense described in this chapter." She stated that she does not understand why timing is important to this aggravator. Ms. Jones asked if it was necessary to have "described in this chapter." Mr. Field stated that (g) is not a jury instruction, but rather actual instructions to practitioners.

2.8. Further discussion of 5(e)

Judge Blanch stated that if "prior to sentencing for this offense" is removed, it would not be an aggravating factor. He stated that a conviction that occurs between the facts at issue and sentencing would not count as an aggravator. Ms. Jones stated that an assumption of sentencing should not be in a jury instruction. Mr. Field agreed. Ms. Johnson suggested stating, "prior to trial." Judge Blanch agreed. Judge Lindberg suggested using "a sexual offense" instead of "any sexual offense." Ms. Jones suggested using "(DEFENDANT'S NAME) was convicted of a sexual offense prior to this trial" to eliminate phrases in the middle of the sentence.

2.9. Further discussion of 5(e)

Judge Lindberg asked if the language could be changed to "committed similar sexual acts." Ms. Andrus stated that "similar" would be sufficient.

2.10. Further discussion of 5(g)

On (G), Judge Lindberg asked if the timing language at the end was necessary. Ms. Adams-Perlac suggested "committed more than five separate acts which would constitution a sexual offense." Judge Blanch suggested "has committed more than five separate acts." Mr. Field asked if this meant "six or more." Judge Lindberg stated yes. Ms. Johnson stated that the statute means six or more.

Judge Blanch asked if "which" or "that" should be used.

2.11. Further discussion of 5(e)

Judge Blanch suggested using "sexual offenses" instead of "a sexual offense" because each charge must be separate.

2.12. Discussion of 5(i)

Judge Lindberg suggested bracketing [acts of prostitution or sexual acts by (MINOR'S INITIALS) with any other person] and [sexual performance by (MINOR'S INITIALS) before any other person, human trafficking, or human smuggling]. Mr. Field asked if "encouraged, aided, allowed, or benefited from" modifies human trafficking and human smuggling. Judge Lindberg stated yes.

2.13. Discussion of 5(h)

Ms. Adams-Perlac suggested "was in a position of special trust."

2.14. Discussion of 5(j)

Ms. Anderson suggested "Defendant penetrated, however slightly, the (MINOR'S INITIALS)'s genital or anal opening with any part of the human body other than the genitals or mouth." Judge Lindberg suggested removing "or parts" because it is redundant. Judge Blanch stated that genitals or mouth are a different offense so it is not necessary to include in this instruction. Ms. Johnson stated that it might be necessary because a child victim may not understand penetration. She stated that the prosecution could charge a defendant under this statute and use this aggravator. She stated that if the jury does not find actual penetration, it would still include sex abuse of a child.

Mr. Young asked if the instruction included a situation where a defendant orders a child to penetrate another child. He stated that this is the difference between "caused the penetration" and "penetration." Ms. Adams-Perlac suggested "caused the penetration, however slight."

Ms. Johnson moved to approve the changes. Judge Blanch seconded the motion. The committee unanimously approved the motion.

3. Discussion of Special Verdict Form for Instruction 1614 — Committee

Ms. Jones moved that the committee modify the special verdict form. Judge Blanch seconded the motion and moved that Ms. Adams-Perlac make the necessary corrections on the special verdict form.

Ms. Johnson asked if the three separate brackets in 5(a) should remain bracketed on the special verdict form. Judge Lindberg stated that practitioners should remove the extraneous information. Ms. Johnson presented a hypothetical: "A child says [the defendant] had a gun. Officers go in and don't find the gun. As a prosecutor, I'm going to go [to trial] and say 'Look, you can find that this is an aggravating factor because you believe the child that there was

actually a gun, or if you don't believe there actually was a gun, [the defendant] threatened the use of a gun." Judge Lindberg stated that any changes to the elements instruction would be reflected on the special verdict form. She stated that the jury instruction would include both aspects. Ms. Johnson stated that the special verdict form requires that the jury unanimously decide. Mr. Field stated that as a prosecutor, he would break them out and we should leave it to the practitioner to separate them. He stated that each could be a separate aggravator. Ms. Jones stated that this situation is likely to occur. Judge Lindberg stated that she preferred to break them out on the special verdict form. Mr. Field agreed.

Professor Anderson moved to accept the special verdict form as amended. Mr. Field seconded the motion. The committee unanimously approved the motion.

4. Discussion of Special Verdict Form for Sexual Offense Prior Conviction — **Committee**

Ms. Johnson suggested "We, the jury, having found the defendant…" Ms. Adams-Perlac stated that "have found" conforms to the other special verdict forms that were previously approved. Mr. Field asked if it is strange for the form to say the defendant is guilty. Ms. Jones stated that this special verdict form serves every purpose and asked if the jury would receive a general verdict form. She asked if the jury needs both forms because the jury would choose among different forms.

Ms. Johnson stated that this form is given to the jury after the jury has found the defendant guilty and chosen the aggravating factors. She stated this form is to decide whether the defendant has been previously convicted of a sexual offense. She stated that this special verdict form could be used for all the crimes listed, not just aggravated sexual abuse of a child.

Judge Blanch asked if "grievous sexual offense" is defined. Ms. Johnson stated yes. Ms. Adams-Perlac stated that it is defined in Utah Code § 76-1-601. Ms. Jones asked if the committee should work on the definition. Ms. Adams-Perlac stated that the committee would work on definitions at a later time because they can apply to multiple jury instructions.

Ms. Johnson stated that if the jury convicts the defendant, then the jury receives the instruction on sexual offense prior conviction. Judge Blanch asked if this form could be used for other sexual offenses. Judge Lindberg and Ms. Johnson stated yes.

Mr. Field asked Ms. Johnson if, on aggravated sex abuse of child, the jury is given a general verdict form and then, if the jury find the defendant guilty, the jury completes the special verdict form. He asked if the jury then completes another special verdict form for aggravated sexual abuse of a child. Ms. Johnson stated that the jury is typically given a general verdict form for aggravated sex abuse of a child. She stated that the aggravating circumstance is not usually in dispute. She stated that she usually gives the jury one verdict form that includes the aggravator. She stated that the defense may ask for a lesser included offense that requires two general elements instructions.

Mr. Field stated that the special verdict form for aggravated sexual abuse of a child should read, "We, the jury, have found the defendant, (DEFENDANT'S NAME), guilty of Aggravated Sexual Abuse of a Child." Judge Lindberg stated that this form is used to determine whether it will become an aggravator. Ms. Johnson stated that the difference is a practical dispute. Mr. Field asked who makes the determination that an aggravator could be applied. He asked if the jury is given a general verdict form for "Aggravated Sexual Abuse of a Child" or if

the jury is given a general verdict form for "Sexual Abuse of a Child" and then a special verdict form for the aggravating factors.

Ms. Johnson stated that there is not a typical way to use the verdict forms. She stated that different situations would require different presentations of the verdict forms. Mr. Field stated that it could be problematic to not have a verdict form that stated, "aggravated sexual abuse of a child." Judge Blanch stated that the verdict form would say "Aggravated Sexual Abuse of a Child" with options for guilty and not-guilty. Mr. Field stated that the jury should be given verdict forms that both include "Aggravated Sexual Abuse of a Child." Judge Lindberg suggested using brackets around [Aggravated Sexual Abuse of a Child] and [Sexual Abuse of a Child] on the special verdict form for sexual abuse of a child. Mr. Field agreed.

Ms. Johnson moved to approve. Judge Blanch seconded the motion. The committee unanimously approved the motion.

5. Sexual Offense Prior Conviction Instruction Committee

Ms. Johnson stated that section 1 should be removed because it is redundant. Mr. Young suggested eliminating a duplicate "at the time." Ms. Johnson suggested using the definition of "previous grievous offense" and not use it as an elements instruction. Ms. Jones asked where the legal grounding for the instruction comes from. Judge Lindberg suggested that this instruction should be simple and agreed that the definition of a grievous offense should be included. The definition of grievous sexual offense was included as the second paragraph.

Judge Lindberg reminded the committee that this is a jury instruction, not a verdict form. Judge Blanch clarified that this instruction is for the judge for sentencing purposes, not for conviction.

Judge Lindberg asked if the last paragraph was necessary because it is not an elements instruction. Ms. Johnson stated that "beyond a reasonable doubt" should appear on the instruction. Judge Lindberg stated that the language should be on the verdict form. Ms. Jones stated that the language should be on the special verdict form. Judge Blanch stated that a jury cannot be told too many times that they must find unanimously and beyond a reasonable doubt. He stated that this language should not be deleted from the jury instruction. Judge Lindberg stated she disagreed. Ms. Adams-Perlac stated that this is not an elements instruction and the jury should not be instructed on elements in this instruction. Judge Lindberg agreed. Judge Blanch stated the language is necessary because the jury must make the determination unanimously beyond a reasonable doubt. Ms. Johnson suggested using, "if you are convinced that the State has proven the defendant committed a previous grievous sexual offense, then you must find it unanimously beyond a reasonable doubt."

Ms. Jones asked why it was necessary to include "…when the defendant committed Count (COUNT NUMBER)." She stated that this is repetitive.

Ms. Jones suggested removing semicolons in the second paragraph (the definition of grievous sexual offense) and rewording the last two lines about locations. Ms. Johnson suggested using brackets around the locations.

Ms. Johnson suggested that the last paragraph should state, "The State must prove this beyond a reasonable doubt. Your decision must be unanimous and it should be reflected on special verdict form (NUMBER)." She suggested stating "any attempt to commit" one of the offenses listed in Utah Code § 76-1-601.

Ms. Johnson suggested using brackets around [in another state, territory, or district of the United States]. She stated that the attorneys must correctly create the instruction. She stated that the elements of offenses in other jurisdictions would have to be listed in the instruction.

Judge Westfall asked how an attorney would prove the law in other jurisdictions. Judge Blanch stated that there is a rule of civil procedure that describes the process of proving the law in foreign jurisdictions. Judge Lindberg stated that this could be decided in a motion in limine. Judge Westfall asked why the jury is asked to determine if the offense in another jurisdiction is an offense in Utah if the judge instructs the jury on this. Judge Blanch stated that the brackets would be replaced by the elements from the foreign jurisdiction based on the legal finding by the judge.

Judge Westfall asked who would make the finding. Ms. Johnson stated that the jury would make the determination of whether the elements in the foreign jurisdiction match the elements in Utah. Judge Lindberg asked if the committee should include a committee note that there is a process of determining the law in other jurisdictions. Judge Westfall is concerned that an attorney preparing the instruction would select from the bracketed alternatives. He asked what the jury is to decide if the judge instructs them that rape in another jurisdiction constitutes rape in Utah. Judge Lindberg stated that this would be a previous legal determination. Judge Blanch statds that the judge should decide rather than the jury. Ms. Adams-Perlac stated that the prosecution must still prove the elements of the crime. Judge Westfall stated that the offenses in foreign jurisdictions should be removed from this instruction and left to the judge to make the determination. He stated that this would make it clearer for the jury.

Judge Blanch stated that Rule 44(f) of Rules of Civil Procedure outlines how to determine the law in other jurisdictions. He stated that rule 44 does not clear up the question of who determines the law of the foreign jurisdiction.

Judge Westfall suggested, “The State must prove the defendant was previously convicted of a grievous sexual offense.” Judge Blanch suggested adding, “beyond a reasonable doubt.” Judge Lindberg suggested adding, in the second paragraph, “or any attempt to commit the offense.”

Ms. Johnson suggested that the intern research the issue of what the jury should decide when the law of a foreign jurisdiction should be used in Utah.

6. Adjourn **Committee**

Judge Lindberg reminded the committee that the next meeting is September 3, 2014.