

**UTAH JUDICIAL COUNCIL
STANDING COMMITTEE ON MODEL UTAH CRIMINAL JURY INSTRUCTIONS
MEETING MINUTES**

Judicial Council Room (N301), Matheson Courthouse
450 South State Street, Salt Lake City, Utah 84114
March 6, 2019 – 12:00 p.m. to 1:30 p.m.

MEMBERS:

PRESENT EXCUSED

MEMBERS:	PRESENT	EXCUSED
Judge James Blanch, <i>Chair</i>	•	
Jennifer Andrus		•
Mark Field		•
Sandi Johnson	•	
Judge Linda Jones		•
Karen Klucznik	•	
Judge Brendan McCullagh	•	
Stephen Nelson		•
Nathan Phelps	•	
Judge Michael Westfall		•
Scott Young	•	
Jessica Jacobs	•	
Elise Lockwood	•	
Melinda Bowen	•	

GUESTS:

None

STAFF:

Keisa Williams
Jiro Johnson (minutes)

(1) WELCOME AND APPROVAL OF MINUTES:

Judge Blanch welcomed the committee to the meeting.

The committee considered the minutes from the January 9, 2019 meeting. With no amendments to the draft minutes, a motion was made and seconded to approve the draft minutes. The motion passed unanimously.

(2) IMPERFECT SELF-DEFENSE INSTRUCTION:

The committee discussed recent case law related to the issue of imperfect self-defense. There appears to be a defective form of an instruction in use around the state that continues to crop up in cases (at least four times over the last few years). The use of that instruction (or variation of the same) is creating issues on appeal. Judge Blanch believes the committee needs to focus its efforts on providing a solid instruction that can be used by practitioners to avoid the appellate issues.

Ms. Klucznik noted that at least four different attorneys at the Attorney General’s office have faced this issue on appeal. They worked together to figure out a method of using an imperfect self-defense instruction that will

hopefully avoid future appellate issues. That group believes that the imperfect self-defense instruction should be used in conjunction with the murder instruction. There are two ways to accomplish that (outlined in the meeting materials): 1) the first option is found on pages 25-26 of 89 and is titled "MURDER under § 76-5-203, with imperfect self defense"; 2) the second option is found on page 27-28 of 89 and is titled "Murder Instruction when imperfect self-defense instruction given." Ms. Klucznik noted that the second option is quite complicated. She encouraged the committee to consider the first option.

Ms. Johnson stated that she has concerns about the first option. She noted that the bracketed element #3 on page 25 doesn't require the jury to make a specific finding that imperfect self-defense does not apply. Ms. Klucznik noted that #3 isn't about imperfect self-defense; that is covered later in the instruction. Ms. Johnson understood that, but noted that on appeal someone will argue that the jury didn't get to the bottom of that instruction. Ms. Johnson stated that a special verdict form is a clearer approach in her mind for that reason. The committee considered the special verdict form on page 24 of 89. Judge McCullagh stated that he prefers the SVF method as well. Ms. Johnson stated that a murder instruction, a supplemental instruction defining imperfect self-defense (á la page 26 of 89, and a SVF is the clearest method because it requires the jury to specifically address each issue in the case.

Ms. Klucznik is concerned about the SVF method because she is concerned that the jury won't actually address the SVF and will end up only finding the person guilty of murder. Judge McCullagh noted that a judge shouldn't allow that to happen. If a person is found guilty of murder, but the SVF is blank, a judge should send the jury back to address the SVF.

The committee moved the discussion to the final paragraph on page 25. Ms. Johnson stated she wanted that final paragraph to be the standard paragraph without telling the jury that they must find the defendant guilty of manslaughter, because that is simply operation of law if imperfect self-defense is found by the jury. Ms. Johnson stated that the murder elements instruction should be focused on MURDER and PERFECT SELF-DEFENSE. If, an only if, the jury resolves those issues and finds guilt, then the jury should be required to deal with the imperfect self-defense SVF.

Ms. Klucznik asked if this raises "order of deliberations" issues. The committee discussed that issue and determined that order of deliberations shouldn't be a concern with the SVF approach.

Ms. Johnson noted that the SVF method is appropriate when the alternative being considered by the jury is not an independent crime. For instance, in a murder case, a defense attorney may request a lesser included offense instruction for manslaughter, which is an independent crime with its own elements. The same approach could not be taken with imperfect self-defense, cohabitant, position of trust, etc., because those aren't independent crimes. Thus a SVF would be the appropriate method for introducing those issues into the jury's deliberation process. Ms. Klucznik agreed with that approach.

The committee discussed what transition language should be used to guide the jury's deliberations. Ms. Klucznik noted that there is language in CR1410 that attempts to accomplish that very thing. She noted that she used that current instruction as a base for her instruction on page 26 of 89. Judge Blanch noted that the language could still describe the effect of a finding of imperfect self-defense (i.e., that the conviction is reduced to manslaughter), but the language should not say that the jury is required to make a finding about that reduction. Rather, the jury should stay focused on addressing the elements and the SVF about whether the defense applies. It is for the judge to apply those jury findings to the ultimate legal outcome. Judge Blanch also believes that the SVF option is more advisable especially in situations where there is actually a lesser included offense instruction in addition to the imperfect self-defense issues because that approach, again, promotes clarity in the jury process. Ms. Johnson noted that she has no issue with the "partial defense" and "reduce the crime" language, but is concerned about including the actual word "manslaughter" because that imports into the imperfect self-defense determination a separate lesser included offense (which may have an instruction of its own, as noted by Judge Blanch). Judge Blanch and other committee members agreed with that concern.

Judge Blanch then focused the committee on the high-level decision of which approach is better: SVF or including in the elements instruction (à la Ms. Klucznik's first and second options noted above). The committee discussed how case law has addressed the issue in order to determine if there was language or a method that has actually been approved by the appellate courts. Judge Blanch described in greater detail the two approaches by referencing specific pages and paragraphs in the meeting materials (primarily page 25 of 89). Everyone on the committee ultimately agreed that the SVF method is the preferred approach.

Having made that decision, Judge Blanch turned the committee's attention to specific language issues, starting with the murder instruction. The committee used as its template the version included in the meeting materials on page 25 of 89. After spending some time on the murder instruction, Judge Blanch concluded that it would be advisable to not attempt to create the instruction on the fly and instead move consideration of a murder instruction to the next meeting. This would provide time to Ms. Klucznik to prepare a draft version for the committee's continued and more careful consideration. Ms. Klucznik agreed to incorporate the feedback already provided by the committee and will prepare a draft in advance of the next meeting.

Judge Blanch then turned the committee's attention to the supplemental instruction for imperfect self-defense (presently contained in CR1410, with Ms. Klucznik's slightly modified version included on page 26 of 89 in the meeting materials). During this discussion, the committee spent time exploring the effect of a jury which finds a defendant guilty of murder, but is hung on the issue of whether the State had proven that the imperfect self-defense did not apply. Some committee members believed this would result in double jeopardy barring a renewed prosecution. Other members believed the matter, including the murder case, would have to be retried. The committee discussed what order these various instructions should be presented to the jury. They discussed the possibility of creating a roadmap instruction for the process, which would describe the initial process of finding guilty or not guilty for the murder charge as a first step, followed by the additional steps of considering lesser included offenses (if any), and ultimately if any affirmative defenses like imperfect self-defense apply. Ms. Johnson outlined how that might work in practice.

Ms. Johnson cited to State v. Campos, 2013 UT App 213, for the proposition that "once a defendant—or even the prosecution for that matter—has produced enough evidence to warrant the giving of an instruction on an affirmative defense, the defendant is entitled to acquittal or, as in the case of imperfect self-defense, reduction of the charge unless the prosecution carries its burden of disproving the defense beyond a reasonable doubt (State v. Campos, 2013 UT App 213, ¶ 41, 309 P.3d 1160, 1172). She interprets this as meaning there would be no hung jury for failure to be unanimous on the special verdict form. Judge Blanch stated that for purposes of appeal, he would prefer to require unanimity (even if that might end up being wrong on appeal because at least everyone would know specifically what the jury had decided. To do otherwise leaves the jury process in a black box of uncertainty for after the fact review. Judge Blanch believes it is better to know what the issues actually are so that a better decision can be made by the judge regarding the legal ramifications of the jury's findings.

The committee then circled back around to the idea of perhaps not using a SVF and including imperfect self-defense in the elements instruction. It then avoids the unanimity issue that the committee had been discussing. Ultimately, the committee did not reach consensus on the issue during this meeting. Instead, the committee members received the following assignments:

- all committee members will continue to consider the issues discussed during this meeting and map out their thoughts on what the right approach is to adequately instruct a jury in these situations;
- Ms. Klucznik, Ms. Johnson, and Ms. Jacobs will, as a subcommittee, revise the various instructions / SVF / roadmap in light of the discussion that the committee had during the meeting; and
- provide those materials in a packet (via Mr. Drechsel) to the committee for consideration prior to the next meeting.

This matter will be addressed as the first agenda item during the next meeting.

(3) ASSAULT INSTRUCTIONS:

These materials were not addressed by the committee at this meeting. They will be considered on a future agenda.

(7) ADJOURN

The meeting adjourned at approximately 1:30 p.m. The next meeting will be held on April 3, 2019, starting at 12:00 noon.