

**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
September 4, 2019 – 12:00 p.m. to 1:30 p.m.

MEMBERS:

PRESENT EXCUSED

Judge James Blanch, <i>Chair</i>	•	
Jennifer Andrus	•	
Melinda Bowen		•
Mark Field	•	
Jessica Jacobs		•
Sandi Johnson	•	
Judge Linda Jones, <i>Emeritus (joined at 1:00 p.m.)</i>	•	
Karen Klucznik	•	
Elise Lockwood		•
Judge Brendan McCullagh	•	
Stephen Nelson	•	
Nathan Phelps	•	
Judge Michael Westfall		•
Scott Young		•

GUESTS:

None

STAFF:

Michael Drechsel
Minhvan Brimhall (recording secretary)

(1) WELCOME AND APPROVAL OF MINUTES:

After approximately 10 minutes of preliminary conversation on the second agenda item, Judge Blanch welcomed the committee to the meeting.

The committee then considered the minutes from the August 7, 2019 meeting.

Mr. Phelps moved to approve the draft minutes, with the previously identified amendment.

Judge McCullagh seconded the motion.

The motion passed.

(2) STATE V. VALLEJO, 2019 UT 38, ¶¶ 90-100 AND USE OF TERM “VICTIM” IN MUJI:

The committee began this conversation as they meeting was beginning as part of casual conversation about the agenda topics. After approving the minutes, the committee continued its conversation about the use of the word “victim” in the MUJI instructions. The committee considered every instance of “victim” currently in the MUJI instructions, including those that are bracketed and intended to be replaced by those using the model instructions with the actual name of the alleged victim.

The committee agreed to the following minor changes to the current instructions / special verdict form:

CR1404 – Aggravated Murder Elements When Extreme Emotional Distress is at Issue

- Change element 5, as follows: “That the defendant did not cause the death of the victim [VICTIM’S NAME] under the influence of extreme emotional distress for which there is a reasonable explanation or excuse.”

CR1601 – Definitions

- Add additional Committee Note, as follows:

In regard to in subpart 2.a. and 2.b. of the definition of “dangerous weapon,” the committee considered the use of the word “victim” in light of State v. Vallejo, 2019 UT 38, ¶¶ 99-102, but chose to preserve the language set forth in the statute. Any attempt to alter the instruction in an effort to avoid the use of the word “victim” appears to impermissibly change the meaning of the statute.

CR1613 – Aggravated Sexual Abuse of a Child

- Add additional Committee Note, as follows:

In regard to subpart 5.f., the committee considered the use of the word “victims” in light of State v. Vallejo, 2019 UT 38, ¶¶ 99-102, but chose to preserve the language set forth in the statute. Any attempt to alter the instruction in an effort to avoid the use of the word “victims” appears to impermissibly change the meaning of the statute.

CR1615 – Consent

- Change the instruction, as follows:

"[(DEFENDANT’S NAME) overcame the victim [VICTIM’S NAME][MINOR’S INITIALS] through concealment or by the element of surprise];” and

"[(DEFENDANT’S NAME) coerced the victim [VICTIM’S NAME][MINOR’S INITIALS] to submit by threatening immediate or future retaliation against [(VICTIM’S NAME)][(MINOR’S INITIALS)] or any person, and [(VICTIM’S NAME)][(MINOR’S INITIALS)] thought at the time that (DEFENDANT’S NAME) had the ability to carry out the threat];”

SVF1613 – Aggravated Sexual Abuse of a Child

- Add additional Committee Note, as follows:

In regard to the ninth aggravating factor (“similar sexual act upon two or more victims”), the committee considered the use of the word “victims” in light of State v. Vallejo, 2019 UT 38, ¶¶ 99-102, but chose to preserve the language set forth in the statute. Any attempt to alter the instruction in an effort to avoid the use of the word “victims” appears to impermissibly change the meaning of the statute.

Ms. Klucznik moved to approved these changes. Judge McCullagh seconded the motion. The motion passed unanimously.

(3) DUI AND RELATED TRAFFIC INSTRUCTIONS:

Judge Blanch turned the time over to Judge McCullagh to explain an overview of the materials he prepared in connection with this agenda item. Judge McCullagh began by stating that he had not included a mens rea as an element of the DUI instructions. The reason for that is because Utah Code § 76-2-101(2) states: “These standards of criminal responsibility do not apply to the violations set forth in Title 41, Chapter 6a, Traffic Code, unless specifically provided by law.” Ms. Klucznik raised the case State v. Bird, 2015 UT 7. The committee discussed the implications of that case, including the terms “attempt” and “receive” at issue in the case and whether those terms are sufficiently similar to words in the DUI statutes to warrant similar concerns regarding mens rea in these instructions. Committee members mentioned various experiences where mens rea was required or not required in different contexts related to instructions similar to those at issue in this agenda item.

Judge Jones joined the meeting and noted that she requires a mens rea in her instructions in relation to the “operate or actual physical control” element. She noted that State v. Vialpando, 2004 UT App 95 is, in part, what prompts her to draw this conclusion. Judge Blanch asked that the committee table this particular issue until the

next meeting so that the various materials can be adequately digested by the committee members. Ms. Klucznik proposed that the instructions should be drafted consistent with the statutory language, with a committee note to flag the issue for practitioners. The committee agreed that this issue is unresolved in the case law and the committee is not in a position to definitively resolve the matter. Judge McCullagh offered to draft a committee note on this issue and have it provided to the committee for the next meeting. Judge Blanch made the assignment.

Judge McCullagh then continued his explanation of the materials he had prepared for this agenda item, including a detailed description of the DUI instruction located in the meeting materials. Judge McCullagh then explained that his preferred approach has been to use this DUI instruction and then use special verdict forms for any MA or F3 version of DUI that builds off of this initial instruction. The committee discussed the general structure of the DUI instruction and specific language for the various elements. The committee then returned to the perennial question of whether to structure the instructions with the aggravating factors that dictate the different levels of offense as bracketed options in a single elements instruction or whether these instructions should rely upon special verdict forms for the higher degree varieties of DUI. Ms. Johnson encouraged the committee to use the method employed in the assault instructions. Judge Blanch instructed staff to draft up the DUI instruction in that way for the next meeting.

The committee then discussed the remaining instructions that Judge McCullagh had included in the meeting materials. Several committee members explained that most of the remaining instructions were not advisable in their opinions because they tend to either tell the jury how to interpret evidence; are geared only toward sufficiency of the evidence; or are cherry-picked statements of case law that are used for argument purposes. Ms. Johnson suggested that a refusal instruction may be appropriate to include. Judge Blanch suggested that "actual physical control" also may lend itself to an instruction because it has become a legal term of art based on case law (including State v. Barnhart, 850 P.2d 473 (Utah App. 1993)).

(4) ADJOURN

The meeting adjourned at approximately 1:30 p.m. The next meeting will be held on October 2nd, 2019, starting at 12:00 noon.