

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

Judicial Council Room (Executive Dining Room), Matheson Courthouse
450 South State Street, Salt Lake City, Utah 84114
February 5, 2020 – 12:00 p.m. to 1:30 p.m.

MEMBERS:	PRESENT	EXCUSED	GUESTS:
Judge James Blanch, <i>Chair</i>	•		None
Jennifer Andrus		•	
Mark Field	•		STAFF: Michael Drechsel Jiro Johnson (minutes) Minhvan Brimhall (recording secretary)
Sandi Johnson	•		
Judge Linda Jones		•	
Karen Klucznik	•		
Judge Brendan McCullagh		•	
Stephen Nelson		•	
Nathan Phelps	•		
Judge Michael Westfall		•	
Scott Young	•		
Elise Lockwood	•		
Debra Nelson	•		
Melinda Bowen		•	

(1) WELCOME AND APPROVAL OF MINUTES:

Judge Blanch welcomed the committee. Ms. Johnson moved to approve the minutes and Ms. Nelson seconded. The committee unanimously approved the minutes from the January 2020 meeting.

(2) DUI AND RELATED TRAFFIC INSTRUCTIONS:

The committee briefly discussed this agenda item, but decided to wait until after the legislative session to continue consideration of instructions in this area due to pending legislation. This agenda item was therefore moved to a future agenda.

(3) STATE V. ALIRES, 2019 UT APP 206:

On December 19, 2019, the Utah Court of Appeals issued a decision in *State v. Alires*, 2019 UT App 206. The decision addressed the need for jury unanimity and the jury instructions used in the case. The committee had

discussed this case briefly at the January 2020 meeting. Ms. Klucznik indicated that the State may seek *cert* for this case before the Utah Supreme Court to resolve how unanimity should be handled for jury instructions.

Ms. Nelson and Ms. Klucznik worked together to draft possible jury instructions (having looked to other states for guidance). Ms. Nelson and Ms. Klucznik handed out their preliminary thoughts to the committee which discussed three hypothetical scenarios where the specificity required by *Alires* would be helpful:

- 1) unanimity with multiple acts are offered to support one offense and each of those acts could be charged separately;
- 2) unanimity when multiple acts are offered to support multiple offenses; and
- 3) unanimity when multiple acts or mental states support one offense and the acts/mental state could not have been charged separately.

Ms. Klucznik raised a problem with sex based crimes which are punished based on the types of touching a defendant engaged in, but “indecent liberties” is less specific and could be an alternative theory of the defendant’s guilt. Judge Blanch felt that the instructions just need to clarify that there must be unanimity with the act. Ms. Johnson indicated that with indecent liberties, and similar course of conduct crimes, multiple touches could be an indecent liberty, but the jurors could potentially not agree as to all of the touches yet still convict for indecent liberties. This type of situation could be a problem under *Alires*.

Mr. Young left the meeting at 12:55pm and the committee lost its quorum.

The committee then questioned the scope of *Alires* and whether it is only constrained to sex offenses and Ms. Klucznik identified multiple categories of crimes where *Alires* might apply. Ms. Johnson also raised concern that these jury instructions could result in prosecutors filing additional charges for all the crimes. Ms. Klucznik wanted to make sure that murder and theft were excepted because of the way the statutes are drafted. Mr. Phelps felt that we should draft general instructions or a committee note that is instructive but preferred not to try and draft instructions tied to specific crimes.

Because there was no quorum available, no action was taken on this matter at this time. Instead, the matter will be considered by the committee members and will be addressed at the next meeting.

(4) SEXUAL INTERCOURSE:

Judge Blanch turned to the definition of sexual intercourse that states:

You are instructed that any sexual penetration of the penis between the outer folds of the labia, however slight, is sufficient to constitute ‘sexual intercourse’ for purposes of the offense of rape.”

Judge Blanch was concerned with what the term “penetration” means in the context of the rape statute. Ms. Johnson made clear that this definition only applies to rape, unlawful sexual activity with a minor, and sexual conduct with a 16 or 17 year old. Judge Blanch felt he should write something up for the next committee meeting and asked Mr. Drechsel to send him the underlying materials.

Judge Jones joined the meeting at 1:30 p.m. (she had a court matter that prevented her joining sooner).

The committee adjourned at 1:40 p.m.

(5) ENTRAPMENT:

This item was not addressed at the meeting

(6) ADJOURN

The committee then concluded its business at 1:37 pm. The next meeting will be held on February 5, 2020, starting at 12:00 noon.