

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

Via WebEx  
August 5, 2020 – 12:00 p.m. to 1:30 p.m.

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

**(1) WELCOME AND APPROVAL OF MINUTES:**

Judge Blanch welcomed the committee to the meeting. The committee considered the minutes from the June 3, 2020 meeting. Mr. Nelson moved to approve the draft minutes, with the previously identified amendment. Ms. Johnson seconded the motion. The motion passed and the minutes are approved.

**(2) JURY UNANIMITY:**

The committee resumed its discussion of jury unanimity, which had originally been raised by the committee at the January 2020 meeting, with subsequent consideration in February 2020. Ms. Klucznik reintroduced the topic by briefly explaining that recent appellate cases has made efforts to differentiate between elements of the offense and the means for committing those elements, specifically identifying *State v. Hummel*, 2017 UT 19. Previously, Ms. Klucznik and Ms. Nelson had provided some materials for the committee's consideration. Since that time, they have come to realization that there is a more advisable approach, which is to include a committee note in the MUJI instructions. Proposed language prepared by Ms. Klucznik and Ms. Nelson was outlined in the meeting materials on page 11. Ms. Klucznik described some of the challenges that have been encountered in trying to draft jury instructions on the unanimity requirement. She summarized the *State v. Alires* case (2019 UT App 206).

Judge Blanch discussed his experience with the issue of unanimity, explaining that his initial thought would be to require that the jury instructions / special verdict forms in each case be crafted to identify and match to specific charges / alleged criminal acts.

Ms. Johnson explained that Judge Blanch's approach might work in many cases, but not all. There is not a jury instruction that can be drafted to cover all of the various possibilities. She explained her experience in a specific case where she learned that such an approach (associating an act with a charge) doesn't work. For instance, where the case involves many different criminal acts spanning a long period of time (i.e., sexual abuse), victims won't remember specific dates or date ranges. And even if you could dial in on a time, the jury would have to unanimously find that the same act occurred during that specific time / time period, AND that the defendant had the correct mens rea at that specific time. One of the challenges with *Alires* is that there were possible innocent explanations for some of the alleged criminal conduct. Ultimately, she believes a committee note is a great start and that the best solution is that prosecutors need to be wise in how the charges are filed in a case.

Ms. Klucznik and Ms. Nelson reaffirmed that the previous materials from February 2020 do not represent the best approach. Ms. Klucznik described why her thinking has changed over time, highlighting the challenge posed by various types of cases (homicide vs. sexual assault).

Judge Blanch acknowledged the challenges that arise in various cases. A theft case is simple because you can simply identify the stolen item(s) in each elements instruction. But in sexual assault cases, it is not as simple as that.

After discussion, the committee membership agreed that the best approach would be to pursue a general committee note (similar to meeting materials page 11) rather than to create instructions (like those found on meeting materials page 12). The primary reason is because to draft such instructions in a way that might address all of the various permutations would be so complicated as to render the instructions very difficult to use.

With agreement that a "committee note approach" was the correct path forward, the committee turned to wordsmithing the proposed committee note language on meeting materials page 11. The starting point language was as follows:

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#### **Committee Note**

Jury unanimity is required under the Utah constitution. However, what jury unanimity means appears to depend on the statutory definition of the crime. In particular, Utah's appellate courts have tried to distinguish between elements of a crime--on which a jury must be unanimous as to time, place, and act--and theories of a crime--the means of committing a crime, on which a jury does not have to be unanimous.

The line between elements and theories, however, is not clearly defined in the case law. Furthermore, no case has addressed how the unanimity requirement applies to charges that allow juries to consider whether the aggregate of a defendant's conduct proves a crime. For these reasons, the Committee has not adopted any set unanimity instructions. Rather, the Committee encourages the parties to refer to case law on the matter.

#### **Relevant cases:**

*State v. Hummel*, 2017 UT 19, 393 P.3d 314 (elements vs. theories);  
*State v. Whytock*, 2020 UT App 107, \_\_\_\_ P.3d \_\_\_\_  
*State v. Case*, 2020 UT App 81, \_\_\_\_ P.3d \_\_\_\_  
*State v. Alires*, 2019 UT App 206, 455 P.3d 636

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The committee had a detailed discussion of each line in the committee note language. After significant discussion, the committee crafted the following language:

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**Committee Note**

Utah's courts have directed that, under certain circumstances, juries must be instructed on something more than simply being unanimous as to the verdict. In cases where different acts and mental states can satisfy the same element, practitioners should add or amend proposed jury instructions and verdict forms to address unanimity concerns.

Utah's appellate courts have tried to distinguish between elements of a crime—on which a jury must be unanimous—and theories of a crime—on which a jury does not have to be unanimous. The line between elements and theories, however, is not clearly defined in the case law. Thus, the nature of the additional required instruction will vary depending upon the crimes charged and the facts and circumstances of a particular case. For these reasons, the Committee has not adopted any specific model unanimity instructions beyond the general instruction in CR216 and CR218. Rather, the Committee encourages the parties to refer to case law on the matter.

**Relevant cases:**

*State v. Hummel*, 2017 UT 19, 393 P.3d 314 (elements vs. theories);

*State v. Whytock*, 2020 UT App 107, \_\_\_\_ P.3d \_\_\_\_

*State v. Case*, 2020 UT App 81, \_\_\_\_ P.3d \_\_\_\_

*State v. Alires*, 2019 UT App 206, 455 P.3d 636

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The committee discussed the location for this committee note within the MUJI instructions. By reviewing the various existing instructions, the committee identified and agreed that it would be appropriate and most useful to include the committee note in CR2016 and CR2018. With that, Ms. Klucznik made motion to adopt this language. Mr. Field seconded the motion. The committee voted unanimously in support of the motion.

**(3) DUI AND RELATED TRAFFIC INSTRUCTIONS:**

This matter was not addressed by the committee at this meeting. It will be addressed at a future meeting.

**(4) BATTERED PERSON MITIGATION:**

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

**(5) REVIEW PUBLIC COMMENTS ON PUBLISHED INSTRUCTIONS:**

The committee had received many public comments on the large number of instructions and verdict forms that had been published for public comment on June 3, 2020. The comment period had closed on July 19, 2020. The comments were organized by instruction area in the meeting materials.

***"Indecent Liberties" Definition***

Judge Blanch first turned the committee's attention to the comments regarding CR1601 Definitions (for "Sexual Offenses"). The committee had previously adopted a definition for "indecent liberties." That definition was

derived from case law. Since that time, the legislature has enacted a statutory definition of “indecent liberties” in Utah Code § 76-5-416. Ms. Klucznik provided the statutory language to the committee. Ms. Johnson asked whether there is a need to preserve the old definition for those cases that arose before the statutory definition was enacted. The committee briefly discussed the previous general decision to only maintain the current version of instructions, without maintaining prior instructions that have since been superseded. Because the MUJI jury instruction system is not currently geared to provide an archive of prior instructions, the committee would continue to only provide current instructions.

Ms. Johnson and Ms. Klucznik suggested that because indecent liberties is such a common factor in many sexual offenses that predate the statutory definition, the committee should consider adding a committee note to the statutory definitional instruction that flags for practitioners the statutory enactment date and the prior key cases relevant to the previous definition. The committee agreed that would be the best course of action under these specific circumstances. The committee drafted language for the explanatory committee note, as follows:

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**Committee Note:**

The legislature enacted the above definition, effective May 14, 2019. Before that date, the definition was based upon case law. See, e.g., *State v. Lewis*, 2014 UT App 241, 337 P.3d 1053; *State v. Peters*, 796 P.2d 708 (Utah App. 1990)

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The committee then instructed staff to make any necessary stylistic changes to the statutory definition so that it is harmonious with the styles of the other definitions in this section of the MUJI instructions. Ms. Johnson made motion to adopt the statutory definition for purposes of the MUJI instructions; Ms. Klucznik seconded the motion. The motion passed, subject to the committee’s final approval of the requested stylistic edits.

### ***Other Public Comment Review Assignments***

Judge Blanch then assigned the following committee members to make review of the public comments in the meeting materials:

- DUI instructions – Judge McCullagh
- assault instructions – Ms. Johnson
- homicide instructions – Ms. Klucznik and Mr. Field
- sexual offenses – Ms. Johnson
- defense of habitation – Ms. Klucznik
- miscellaneous instructions – reviewed by committee at future meeting

The assigned committee member will review the relevant public comments in Tab 5 of the meeting materials and recommend to the full committee how to proceed. Judge Blanch noted that the level of feedback from the public is impressive and helpful. Judge Blanch wanted it to be clear to those who took time to comment that their feedback is very appreciated. Staff will ensure that those who commented are aware of the committee’s gratitude for their participation in the public comment process.

### **(7) ADJOURN**

The meeting adjourned at approximately 1:30 p.m. The next meeting will be held on September 2, 2020, starting at 12:00 noon, via WebEx.