

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

Via Webex
December 1, 2021 – 12:00 p.m. to 1:30 p.m.

| COMMITTEE MEMBER: | ROLE: | PRESENT | EXCUSED | GUESTS: |
|------------------------|------------------------------|---------|---------|-----------------------------------|
| Hon. James Blanch | District Court Judge [Chair] | • | | None |
| Jennifer Andrus | Linguist / Communications | | • | |
| Sharla Dunroe | Defense Counsel | • | | STAFF: Michael Drechsel |
| Sandi Johnson | Prosecutor | | • | |
| Janet Lawrence | Defense Counsel | • | | |
| Elise Lockwood | Defense Counsel | | • | |
| Jeffrey Mann | Prosecutor | • | | |
| Hon. Brendan McCullagh | Justice Court Judge | • | | |
| Debra Nelson | Defense Counsel | • | | |
| Stephen Nelson | Prosecutor | | • | |
| Richard Pehrson | Prosecutor | • | | |
| Hon. Teresa Welch | District Court Judge | • | | |
| <i>vacant</i> | Criminal Law Professor | --- | --- | |
| Hon. Linda Jones | <i>Emeritus</i> | • | | |

(1) WELCOME AND APPROVAL OF MINUTES:

Judge Blanch welcomed the committee to the meeting.
The committee considered the minutes from the November 3, 2021 meeting.
Mr. Pehrson moved to approve the draft minutes; Judge Welch seconded the motion.
The committee voted unanimously in support of the motion. The motion passed.

(2) COURT OF APPEALS INVITATION: A SPECIFIC JURY UNANIMITY INSTRUCTION

Judge Blanch turned the committee's attention to the court of appeals' invitation in *State v. Paule*, 2021 UT App 120 to explore creation of a specific jury unanimity instruction. Judge Blanch reminded the committee that this had been a topic of significant committee inquiry in the last year. Judge Blanch reviewed with the committee an overview of recent appellate opinions that have addressed jury unanimity, including: *State v. Alires*, 2019 UT App 206; *State v. Mendoza*, 2021 UT App 79; and *State v. Paule*, 2021 UT App 120. In Judge Blanch's view, three possible solutions exist to the unanimity issues raised in these cases: a) instructing the jury generally regarding the specific jury unanimity requirement; b) relying on the prosecuting attorney to argue to the jury which specific acts relate to which specific count(s); or c) ensuring that elements instructions are specifically tailored to a particular act, clearly identifying date / location / other relevant factual detail(s) to orient the jurors to the connection between each count and the specific alleged criminal offense.

The committee then turned its attention to the proposed draft provide in the meeting materials (see page 9 of the meeting materials). Judge Jones pointed out that each of the two paragraphs are possible alternatives to an instruction. The committee reviewed the language of each paragraph and discussed issues in the proposed language. After initial discussion, the committee agreed that the second paragraph is the preferable starting point and that the first paragraph should not be pursued.

The committee discussed revisions to the second paragraph / alternative. Mr. Mann and Judge McCullagh each noted there is a need for two types of unanimity instruction: a single offense that has multiple alternatives (later identified as a *Mendoza*-type instruction) AND multiple offenses / multiple acts (often at different times) with multiple alternatives (later identified an *Alires*-type instruction). Judge McCullagh offered to create the *Alires*-type instruction for the next meeting, and suggested that the committee focus its efforts today on the *Mendoza*-type instruction, using the second paragraph / alternative as a starting point. The committee revised the language in the second alternative / *Mendoza*-type instruction. Judge McCullagh proposed that this instruction remain as generic as possible without actually listing the alternative ways to commit the offense in the instruction. Ms. Lawrence noted that there is another case relevant in this context: *State v. Covington*, 2020 UT App 110. Judge Welch noted that regardless of which instruction is used, the committee should include cautionary language in a committee note, describing some of the limitations inherent in this instruction because of case law; although the instruction might be a good starting point, it will need to be adjusted on a case-by-case basis to adequately address the factually unique circumstances of each case.

Judge Blanch will make further refinements to the *Alires*-type instruction and Judge McCullagh will prepare a draft *Mendoza*-type instruction in advance of the next meeting. Mr. Drechsel will send Judge Blanch and Judge McCullagh the revised materials from today's meeting as the launch points for their respective efforts.

(3) CONTINUED CONSIDERATION OF CR1402B, CR1403B, AND CR1411B REVISIONS IN LIGHT OF PROPOSED CRIMINAL RECODIFICATION:

Judge Blanch turned the time over to Mr. Mann to explain his proposed language for CR1402B, CR1403B, and CR1411B. Mr. Mann reiterated his concern that these instructions (particularly the last line of the paragraph after the elements, and the first line of the following paragraph where the language tells the jury that it must "find the Defendant guilty") is misleading considering the additional burden on the state to disprove imperfect self-defense. Mr. Mann noted that he had made some investigation about the effect of the forthcoming criminal recodification which includes revisions to the criminal code sections regarding extreme emotional distress, but doesn't currently propose any change to the imperfect self-defense statutes. Mr. Drechsel proposed that Mr. Mann and Mr. Pehrson could reach out to Will Carlson (who is involved with the recodification effort) to explore the viability of making changes to the imperfect self-defense statute resulting in the charged offense not changing because of the application of the mitigation defense.

Mr. Mann had proposed some language (emailed to committee members as a memo in advance of the meeting) to address his concerns. The committee didn't review that proposed language in detail during the meeting, instead opting to get additional information about the possibility that the recodification could result in relevant changes that would impact the direction the committee takes these instructions. Mr. Mann, Mr. Pehrson, and Ms. Johnson (who wasn't present at the meeting today, but who had previously worked on this very issue) will meet with Mr. Carlson to discuss possible legislative changes and then report back to the committee.

(4) ADJOURN

The meeting adjourned at approximately 1:20 p.m. The next meeting will be held on January 5, 2022, starting at 12:00 noon.