

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

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

DRAFT

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 December 1, 2021 meeting.
Mr. Pehrson moved to approve the draft minutes; Ms. Andrus seconded the motion.
The committee voted unanimously in support of the motion. The motion passed.

(2) JURY UNANIMITY INSTRUCTION:

Judge Blanch began the meeting by updating the committee on his efforts to craft a jury unanimity instruction and committee note for the situation where there is a single offense that has multiple alternatives (as a shorthand referred to as a *Mendoza*-type instruction). Judge Blanch explained that in a recent trial he had presented a jury with the instructions located on pages 7-9 of the meeting materials. He noted that those instructions clearly noted a concrete fact (in this instance, locations described as “Hotel” and “West Jordan house”) which allowed the parties and jury to understand which specific event was being addressed in each respective instruction and on the verdict form. This method of ascertaining jury unanimity did not require the use of a special verdict form. Judge Blanch noted that these materials are illustrative of the language he was

proposing in the final paragraph of the committee note for the *Mendoza*-type jury unanimity instruction (meeting materials, page 6).

The committee considered that proposed instruction and its committee note, making suggestions for revisions to the existing language. The committee explored various formulations for the instruction language, including breaking the instructions sentences into bullet points, to assist in jury understanding and compliance with case law. After significant discussion, the committee agrees upon, and approved the following instruction language (see below) for the “single offense committed by multiple alternative methods” scenario (Judge McCullagh motion, Mr. Mann second). The committee also discussed the committee note proposed to accompany this instruction. After discussion and refinement, the committee approved the following committee note (Judge Welch motion; Mr. Pehrson second). The final, approved instruction, references, and committee note is as follows:

CR _____ JURY UNANIMITY (SINGLE OFFENSE BY MULTIPLE ALTERNATIVE METHODS).

The prosecution has presented evidence that the defendant may have committed [Count _____] by multiple alternative methods. You may not find the defendant guilty of that offense unless you unanimously agree that the prosecution has proved that the defendant committed the offense by at least one of the methods AND you unanimously agree on the specific method(s) by which the defendant committed the offense.

REFERENCES

State v. Saunders, 1999 UT 59
State v. Hummel, 2017 UT 19
State v. Aires, 2019 UT App 206
State v. Case, 2020 UT App 81
State v. Whytock, 2020 UT App 107
State v. Covington, 2020 UT App 110
State v. Mendoza, 2021 UT App 79
State v. Paule, 2021 UT App 120

COMMITTEE NOTES

Counsel and trial courts should consider the use of either CR _____ or CR _____ in certain cases to help eliminate confusion or ambiguity about whether the jury has reached a unanimous conclusion regarding a defendant’s guilt. When appropriate, these instructions should be included in addition to the general unanimity principles contained within instructions CR216 and CR218.

Increasingly, Utah’s appellate courts are identifying circumstances in which it is not clear, based on instructions given, that juries necessarily reached unanimous agreement as to all elements of a particular charged crime. Examples of such case law are set forth in the references above.

CR _____ is meant for use in circumstances in which the prosecution has alleged the defendant committed a particular crime in two or more alternative methods, such as asserting the defendant committed two or more acts that each would constitute a charged offense of obstruction of justice. See, e.g., *State v. Mendoza*, 2021 UT App 79. The committee encourages the use of a special verdict form or forms to reduce further the possibility of confusion in this context.

CR _____ is meant for use in circumstances in which the prosecution has alleged the defendant committed multiple crimes consisting of identical elements on separate occasions, such as asserting the defendant committed multiple acts constituting separate instances of aggravated sexual abuse of a child over a period of

time. See, e.g., State v. Alires, 2019 UT App 206. In circumstances such as these, use of CR _____ or CR _____, in addition to the unanimity language in CR216 and CR218, should help reduce confusion or ambiguity over whether the jury has reached unanimous agreement as to whether the defendant committed a particular specific criminal act.

The committee cautions counsel and trial courts against relying exclusively on these instructions to ensure it is clear a jury's verdict is unanimous. To remove ambiguity, it may also be advisable to amend the language of particular elements instructions and verdict forms to ensure it is clear which specific acts relate to which charged offenses. The use of special verdict forms is also encouraged. The appellate courts have further encouraged counsel to explain clearly to jurors in closing arguments which specific acts relate to which charged offenses. The committee recommends to counsel and trial courts that they employ such approaches, in addition to use of the instructions described above, to ensure it is sufficiently clear that jury verdicts are unanimous.

Last Revised - 00/00/0000

Judge McCullagh then addressed his efforts to work through a proposed jury unanimity instruction for the scenario where there are multiple acts that might be committed by multiple alternative methods (what the committee has previously referred to in shorthand as an *Alires*-type instruction). He noted that this type of instruction will be most useful in sexual abuse scenarios and other scenarios where there are fewer charges than acts. The committee discussed how an *Alires*-type instruction would be drafted. Some committee members expressed the opinion that the solution to this is for practitioners to do their jobs by clearly identifying the relevant facts in their charging documents, jury instructions, verdict forms, presentation of the evidence, and arguments to the jury. Judge Blanch noted that well-crafted jury instructions on the elements identifying specific acts and verdict forms that reflect those specifics are more likely to be successful than any stock instruction that might be crafted by the committee. After the discussion, Judge McCullagh agrees to make an effort to create some stock instruction that will be useful in these circumstances.

(3) UPDATE ON CRIMINAL RECODIFICATION EFFECT ON CR1402B, CR1403B, AND CR1411B:

Mr. Mann and Mr. Pehrson updated the committee regarding their inquiries about the criminal code recodification that is anticipated to be introduced during the coming legislative session [*N.B. ultimately, the criminal code recodification bill was numbered SB0123*] and the proposed revisions to statutes that address partial mitigation instructions at issue in the following proposed instructions that the committee has been working on for several months: CR1402B, CR1403B, and CR1411B. Mr. Pehrson described a memo that he and Mr. Mann circulated to committee members via email directly before the meeting (thus not included in the meeting materials) that read, as follows:

Current Proposal:

(f) (i) If the trier of fact finds the elements of aggravated murder, or alternatively, attempted aggravated murder, as described in this section are proved beyond a reasonable doubt, and also finds that the existence of special mitigation is established by a preponderance of the evidence and in accordance with Section 76-5-205.5, the actor:

(A) is guilty of a first degree felony; and

(B) shall be sentenced in accordance with the sentencing provisions of Subsection 76-5- 203(3)(b).

(ii) If the trier of fact finds that special mitigation is not established in accordance with Section 76-5-205.5, the trier of fact shall convict the defendant of aggravated murder or attempted aggravated murder, respectively.

Defense Proposal:

(f) (i) If the trier of fact finds the elements of aggravated murder, or alternatively, attempted aggravated murder, as described in this section are proved beyond a reasonable doubt, and also finds that the existence of special mitigation is established by a preponderance of the evidence and in accordance with Section 76-5-205.5, the court shall enter a judgment of conviction as follows:

(A) if the trier of fact finds defendant guilty of aggravated murder, the court shall enter a judgment of conviction for murder; or

(B) if the trier of fact finds defendant guilty of attempted aggravated murder, the court shall enter a judgment of conviction for attempted murder.

Notes:

Our proposal addresses the concern about the current code raised by the Criminal Model Jury Instructions Committee, because it no longer requires juries to be instructed as to the effect of special mitigation on the ultimate conviction. Under our proposed language, the jury need only find the defendant guilty or not guilty of (attempted) aggravated murder, and then separately find whether special mitigation has been established by a preponderance of the evidence. The trial judge will then enter the appropriate judgment of conviction.

Our proposal addresses this concern without making the substantive change to the law contemplated by the current proposal, i.e., changing the ultimate conviction under special mitigation from murder to aggravated murder with a sentence of 15-to-life. While the current proposal results in the same sentence of 15-to-life, it has significant substantive effects on the sentence. For example, the Utah Adult Sentencing Guidelines classify aggravated murder higher than murder, with a resulting matrix recommendation 25-55% higher for aggravated murder than for murder depending on criminal history.

Mr. Pehrson noted that those he spoke with indicated that the “Defense Proposal” is what will likely be included in SB0123. Considering these proposed legislative changes, the committee agreed that it should pause on further work with CR1402B, CR1403B, and CR1411B until after the legislative session concludes.

(4) ADJOURN

The committee agreed that, at the next meeting, it would resume its consideration of the DUI instructions which were partially addressed nearly a year ago. Judge McCullagh agreed to assemble relevant materials in advance of the next meeting.

The meeting adjourned at approximately 2:00 p.m. The next meeting will be held on [month] [day], 20__, starting at 12:00 noon.