

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

Via Webex
June 1, 2022 – 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		•	
<i>vacant</i>	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	•		
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 April 6, 2022 meeting.
Mr. Mann moved to approve the draft minutes; Judge Welch seconded the motion.
The committee voted unanimously in support of the motion. The motion passed.

The committee discussed whether to have a July meeting. With the unanimous support of the committee, Judge Blanch determined that there would not be a MUJI Criminal Committee meeting in July. The next committee meeting will be on August 3, 2022.

(2) JURY UNANIMITY:

Judge Blanch turned the committee’s attention to the jury unanimity agenda item. Since the last meeting in April, Ms. Lawrence and Ms. Johnson worked on some revisions to the committee’s recently approved jury unanimity instructions (CR216, CR430, and CR431). In addition, they provided a new proposed jury unanimity instruction for circumstances where there is evidence of more occurrences presented to the jury than there are charges (proposed CR432). Ms. Lawrence was not able to attend the meeting today. Ms. Johnson presented to the committee the work that had been accomplished (as outlined in the meeting materials pages 11-22). Ms.

Johnson outlined the different approaches she and Ms. Lawrence see for use of these jury unanimity instructions. One option (Ms. Lawrence's view) is to have the jury unanimity language **incorporated** into the elements instruction for each offense. The other option (Ms. Johnson's view) is to have the jury unanimity instruction be a **standalone** (but tailored) instruction that accompanies the elements instruction(s) as a separate instruction. Ms. Johnson proposed that the committee first needs to decide on which approach is best. The committee discussed the pros and cons of the **incorporated** and **standalone** approaches. Judge Blanch indicated a preference for a standalone instruction that practitioners may modify with case-specific details. Ms. Johnson spent additional time walking the committee through the examples of how each of the three jury unanimity instructions might be used in conjunction with an elements instruction (meeting materials pages 19-22). After further discussion, Mr. Mann indicated support for the standalone instruction option. Judge Welch also expressed support for the standalone approach. Judge Blanch called for a committee vote on this issue and the committee unanimously preferred the standalone approach.

Ms. Johnson had to temporarily step away from the meeting. Judge Blanch asked staff to walk the committee through the specific changes outlined in proposed CR216 (meeting materials pages 12-13). Staff identified for the committee the proposed changes. The first was a proposal to add "you may not speculate" to the fourth sentence of CR216. Staff reminded the committee that this very language had been in Judge Jones' proposed revisions that the committee discussed in March 2022. At that time, the committee had discussed this language and had rejected adding it. The committee agreed that the prior decision should stand and that "you may not speculate" language will not be added to CR216 (for the same reasons articulated in the March meeting). The committee then turned its attention to the revised committee note in CR216. The committee first reviewed the existing CR216 committee note and then reviewed the proposed new version of the committee note. After making that review, the committee discussed the committee note. The committee was very pleased with the revised language. Mr. Mann asked about the language spread through the committee note that indicates that the elements instruction should be modified. He wondered whether that language was in conflict with the committee's decision to adopt the standalone approach to these unanimity instructions. The committee discussed Mr. Mann's concerns. Judge Welch and Judge Blanch noted that the elements instructions may have some modification to tailor those to the facts of the case for each unique count, while the jury unanimity component of the instructions can still be presented to the jury as standalone instructions.

Judge Blanch then asked the committee to direct its attention to the proposed changes in each of the three standalone specific jury unanimity instructions (CR430, CR431, and CR432). Staff reviewed with the committee the proposed changes to existing CR430 (meeting materials page 14). Judge Blanch noted that the modifications to CR430 would result in the instruction needing to be modified in each case with case-specific details. In his view this should help to avoid reversible error. Staff pointed out that the changes to each of the three instructions (CR430, CR431, and CR432) appear to have that same intended purpose. Ms. Johnson returned to the meeting and the committee continued its discussion of CR430. The committee expressed approval of the proposed changes; the committee did not suggest any modifications to the proposed language. The committee then turned its attention to CR431. The committee had no concerns with the proposed changes to CR431. The committee then turned its attention to CR432. Ms. Johnson noted that the final section of the proposed instruction language (starting with "In this case...") should not be included in the instruction because it will often not be possible to tie each count to specific details. From committee discussion, this is what separates the use of CR431 from CR432:

- CR431 can be used where there are sufficient specific details to associate and differentiate each count; and
- CR432 can be used in circumstances where the evidence can't be matched up to specific counts due to similarity of the criminal act over the course of time (i.e., a child sex offense that happened each week in the same room over the course of a year resulting in 50+ nearly identical criminal acts, but where the prosecution files only five counts).

The committee agreed that the language Ms. Johnson identified should be omitted from CR432.

After an opportunity for further committee discussion, Judge Blanch asked if anyone on the committee was in a position to make a motion to approve the instructions that the committee had reviewed and discussed during the meeting today (CR216, CR430, CR431, and CR432). Judge Welch made a motion to approve the four instructions; Ms. Johnson seconded the motion, as follows:

CR216 JURY UNANIMITY AND DELIBERATIONS.

Because this is a criminal case, every single juror must agree with the verdict before the defendant can be found “guilty” or “not guilty.” That is, you must be unanimous in your verdict for each count charged.

To help you in reaching unanimous agreement, I recommend that you not commit yourselves to a particular verdict before discussing all the evidence. In addition, you may not use methods of chance, such as drawing straws or flipping a coin.

Rather, in the jury room, consider the evidence and speak your minds with each other. Listen carefully and respectfully to each other’s views and keep an open mind about what others have to say. If there is a difference of opinion about the evidence or the verdict, do not hesitate to change your mind if you become convinced that your position is wrong. On the other hand, do not give up your honestly held views about the evidence simply to agree on a verdict, to give in to pressure from other jurors, or just to get the case over with.

In the end, your vote must be your own. A unanimous verdict must reflect the individual, careful, and conscientious judgment of each juror as to whether the defendant is guilty or not guilty.

REFERENCES

Utah Const. Art. I, § 10
Utah R. Crim. P. 21(b)
Utah R. Civ. P. 59(a)(2)
Burroughs v. United States, 365 F.2d 431, 434 (10th Cir. 1966)
State v. Lactod, 761 P.2d 23, 30-31 (Utah Ct. App. 1988)
[*State v. Russell*, 733 P.2d 162 \(Utah 1987\)](#)
[*State v. Tillman*, 750 P.2d 546 \(Utah 1987\)](#)
[*State v. Johnson*, 821 P.2d 1150 \(Utah 1991\)](#)
[*State v. Saunders*, 1999 UT 59](#)
State v. Hummel, 2017 UT 19
State v. Alires, 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](#)
[*State v. Baugh*, 2022 UT App 3](#)
75 Am. Jur.2d Trial §§ 1647, 1753, 1781

COMMITTEE NOTES

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. Refer to CR430 and CR431 for model instructions regarding specific jury unanimity requirements in particular types of cases:

Increasingly, Utah's appellate courts are identifying circumstances where it is not clear that the jury was adequately instructed on the constitutional requirement that a jury's verdict be unanimous. See the references above for examples. In cases where different alleged acts can satisfy the same element, practitioners should add or amend proposed jury instructions and verdict forms to address unanimity concerns.

Because different facts and circumstances will require case-specific unanimity instructions, practitioners should tailor elements instructions and use CR430, CR431, and CR432 where appropriate to meet Utah's constitutional requirement that a jury's verdict be unanimous.

- CR430 should be used in circumstances where the prosecution presents evidence that, if believed, could support a finding that the defendant committed two or more acts that could have been charged as separate offenses, but were not. See, e.g., *State v. Paule*, 2021 UT App 120. For example, the prosecution presents evidence that the defendant obstructed justice by attempting to dispose of a weapon, disposing of his phone, and fleeing the state, but the defendant was charged with only one count of obstruction of justice. In addition to CR430, the committee encourages practitioners to use a special verdict form or forms to confirm that the jury reached a unanimous verdict.
- CR431 should be used in circumstances where multiple counts have identical elements but are alleged to have occurred on different occasions or are different acts allegedly committed on the same occasion. See, e.g., *State v. Alires*, 2019 UT App 206. For example, the prosecutor presents evidence of sexual abuse of a child on multiple occasions over time or different acts of touching on the same occasion. In addition to CR431, the committee encourages practitioners to specify in the elements instruction the particular act that is the basis for the charge and to use a special verdict form or forms where appropriate to confirm that the jury reached a unanimous verdict.
- CR432 should be used in circumstances where the prosecution has presented evidence that the offense may have occurred more times than the prosecution has charged. See, e.g., *State v. Alires*, 2019 UT App 206. For example, an alleged victim testifies that sexual abuse happened on five occasions and the prosecution charges only three counts of sexual abuse. In addition to CR432, the committee encourages practitioners to specify in the elements instruction the particular act that is the basis for the charge and to use a special verdict form or forms where appropriate to confirm that the jury reached a unanimous verdict.

The committee cautions against relying exclusively on the model instructions to ensure unanimity. Practitioners should amend the language of particular elements instructions and verdict forms to clarify which specific acts relate to which charged offenses. The instructions must instruct the jury that it must unanimously agree that all elements have been proven beyond a reasonable doubt for each count. The use

of special verdict forms is also encouraged. The committee recommends that practitioners employ additional approaches where needed to confirm that jury verdicts are unanimous.

Last Revised - 06/01/2022

CR430 JURY UNANIMITY – SINGLE OFFENSE IN MORE THAN ONE WAY.

Count (#) charges (DEFENDANT’S NAME) with (CRIME). Evidence was introduced that the defendant may have committed this offense either by [WAY 1] [WAY 2] [WAY 3].The prosecution has charged that the defendant committed [Count ____] in more than one way.

You may not find (DEFENDANT’S NAME)the defendant guilty of that offense on this count unless you unanimously agree that the prosecution has proven that (DEFENDANT’S NAME)the defendant committed the offense (CRIME) in at least one of those specific ways AND you unanimously agree on the specific way(s) in which the defendant committed the offense.

REFERENCES

- State v. Russell, 733 P.2d 162 (Utah 1987)
- State v. Tillman, 750 P.2d 546 (Utah 1987)
- State v. Johnson, 821 P.2d 1150 (Utah 1991)
- State v. Saunders, 1999 UT 59
- State v. Hummel, 2017 UT 19
- State v. Alires, 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
- State v. Baugh, 2022 UT App 3

COMMITTEE NOTES

CR430 should be used in circumstances where the prosecution presents evidence that, if believed, could support a finding that the defendant committed two or more acts that could have been charged as separate offenses, but were not. See, e.g., State v. Paule, 2021 UT App 120. For example, the prosecution presents evidence that the defendant obstructed justice by attempting to dispose of a weapon, disposing of his phone, and fleeing the state, but the defendant was charged with only one count of obstruction of justice. In addition to CR430, the committee encourages practitioners to use a special verdict form or forms to confirm that the jury reached a unanimous verdict.

Counsel and trial courts should consider the use of either CR430 or CR431 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.

CR430 is meant for use in circumstances in which the prosecution has alleged the defendant committed a particular crime in more than one way, 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.

CR431 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 CR430 or CR431, 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 instructions must instruct the jury it must unanimously agree that the applicable mental state(s) and other essential elements have been proven for each count. 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 - 06/01/2022

CR431 JURY UNANIMITY – MULTIPLE OFFENSES WITH IDENTICAL ELEMENTS.

The prosecution has charged in Count _____(##) through Count _____(##) that ~~the defendant~~(DEFENDANT'S NAME) committed ~~[INSERT NAME OF OFFENSE](CRIME)~~ multiple times. Although each of these counts has similar or identical elements, you must consider each count separately and reach unanimous agreement ~~as to~~ on whether ~~the defendant~~ (DEFENDANT'S NAME) is guilty or not guilty of each ~~specific individual~~ count. You may not find the defendant guilty of any ~~one of these counts~~ unless you unanimously agree the prosecution has proven ~~on~~ the specific act ~~the prosecution has proven that is with~~ in the elements of the offense for each count AND you unanimously agree the prosecution has proven all other elements of the count. You may find the defendant guilty of all of these counts, none of these counts, or only some of these counts; but for each count your decision must be unanimous.

In this case:

- Count (##) is based on the alleged conduct of (INSERT SPECIFIC CONDUCT AND OCCASION).
- Count (##) is based on the alleged conduct of (INSERT SPECIFIC CONDUCT AND OCCASION).
- [Count (##) is based on the alleged conduct of (INSERT SPECIFIC CONDUCT AND OCCASION).]

REFERENCES

State v. Russell, 733 P.2d 162 (Utah 1987)

[State v. Tillman, 750 P.2d 546 \(Utah 1987\)](#)
[State v. Johnson, 821 P.2d 1150 \(Utah 1991\)](#)
State v. Saunders, 1999 UT 59
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State v. Baugh, 2022 UT App 3

COMMITTEE NOTES

CR431 should be used in circumstances where multiple counts have identical elements but are alleged to have occurred on different occasions or are different acts allegedly committed on the same occasion. See, e.g., *State v. Alires*, 2019 UT App 206. For example, the prosecutor presents evidence of sexual abuse of a child on multiple occasions over time or different acts of touching on the same occasion. In addition to **CR431**, the committee encourages practitioners to specify in the elements instruction the particular act that is the basis for the charge and to use a special verdict form or forms where appropriate to confirm that the jury reached a unanimous verdict.

Counsel and trial courts should consider the use of either **CR430** or **CR431** 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.

CR430 is meant for use in circumstances in which the prosecution has alleged the defendant committed a particular crime in more than one way, 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.

CR431 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 **CR430** or **CR431**, 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 instructions must instruct the jury it must unanimously agree that the applicable mental state(s) and other essential elements have been proven for each count. 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 - 06/01/2022

CR432 JURY UNANIMITY – EVIDENCE OF MORE OCCURRENCES THAN CHARGES.

The prosecution has charged in Count (#) through Count (#) that (DEFENDANT’S NAME) committed (CRIME). Evidence was introduced that (DEFENDANT’S NAME) may have committed (CRIME) more times than the number of charged counts. When determining whether (DEFENDANT’S NAME) committed (CRIME), you must be unanimous as to which occasion and which act (DEFENDANT’S NAME) committed for each count, and that the prosecution has proven all the elements for that count. You may find (DEFENDANT’S NAME) guilty of all these counts, none of these counts, or only some of these counts; but for each count your decision must be unanimous.

REFERENCES

State v. Russell, 733 P.2d 162 (Utah 1987)
State v. Tillman, 750 P.2d 546 (Utah 1987)
State v. Johnson, 821 P.2d 1150 (Utah 1991)
State v. Saunders, 1999 UT 59
State v. Hummel, 2017 UT 19
State v. Alires, 2019 UT App 206
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COMMITTEE NOTES

CR432 should be used in circumstances where the prosecution has presented evidence that the offense may have occurred more times than the prosecution has charged. See, e.g., *State v. Alires*, 2019 UT App 206. For example, an alleged victim testifies that sexual abuse happened on five occasions and the prosecution charges only three counts of sexual abuse. In addition to CR432, the committee encourages practitioners to specify in the elements instruction the particular act that is the basis for the charge and to use a special verdict form or forms where appropriate to confirm that the jury reached a unanimous verdict.

Adopted - 06/01/2022

The committee voted unanimously in favor of the motion. Judge Blanch expressed gratitude to Ms. Lawrence and Ms. Johnson for the excellent work putting these revisions and additions together for the committee’s consideration. Judge Blanch instructed staff to update the versions of these instructions online so that practitioners can begin using the new material immediately.

Judge Blanch informed the committee that it will resume its work at the August meeting with consideration of the partial defense materials included in the meeting materials today. Judge Blanch also asked staff to prepare a draft instruction related to entrapment. He will send staff some materials to form the basis of that effort.

(3) PARTIAL DEFENSE INSTRUCTIONS:

This agenda item was not discussed by the committee at this meeting.

(4) ADJOURN

The meeting adjourned at approximately 1:30 p.m. The next meeting will be held on August 3, 2022, starting at 12:00 noon via Webex.