

MINUTES

**SUPREME COURT’S ADVISORY COMMITTEE ON THE
MODEL UTAH JURY INSTRUCTIONS – CRIMINAL**

Administrative Office of the Courts
450 South State Street
Salt Lake City, Utah 84114

Wednesday, May 6, 2015
12:00 p.m. to 1:30 p.m.
Judicial Council Room

PRESENT

Judge James Blanch, Chair
Alison Adams-Perlac, Staff
Mark Field
Professor Carissa Byrne Hessick
Sandi Johnson
Linda Jones
Karen Klucznik
Judge Brendon McCullagh
Steve Nelson
Jesse Nix
Nathan Phelps
Judge Michael Westfall (remotely via Vidyo)

EXCUSED

Jennifer Andrus
David Perry
Thomas Pedersen, Intern
Scott Young

1. Welcome, Approval of Minutes

Judge Blanch

Judge Blanch welcomed everyone to the meeting. Because the committee recently appointed new members, each member introduced themselves to each other.

Ms. Johnson moved to approve the minutes from the April 1 meeting. Judge McCullagh seconded the motion and it passed unanimously.

2. CR 1613 Sexual Abuse of a Child

Committee

Judge Blanch asked the committee for comment on the proposed instruction.

Judge McCullagh moved to approve the instruction. Ms. Klucznik seconded the motion and it passed unanimously.

3. CR 1614 Aggravated Sexual Abuse of a Child.

Committee

Ms. Klucznik asked if an intent element was needed for part 5. Ms. Jones stated that *Barela* requires an intent element for every act of the crime. Ms. Klucznik agreed. Ms. Johnson stated that *Barela* requires an intent element for each act, but not necessarily every element such

as age. Ms. Johnson stated that an intent element was not necessary for part H (position of special trust). Ms. Klucznik suggested adding an intent element to part A, B, D, I, and J. Mr. Phelps suggested dividing part 5 into two groups, one with the intent element and one without the intent element. Ms. Johnson suggested putting the intent element before the parts that require it.

Mr. Field asked if the intent element was necessary for F. Ms. Johnson stated that F refers to a previous act. Judge Blanch stated that intent does not matter for previous acts.

Judge Blanch asked whether a statute or case law prevented a defendant from using ignorance to the age of the victim as a defense. Ms. Jones stated that the court in *Martinez* limited the strict liability aspect of the crime to the age. Ms. Klucznik stated that the limitation is from case law. Judge Blanch asked if *Barela* and *Martinez* conflict with each other. Ms. Jones stated that they are not in conflict because the referenced statute for each case is different.

Ms. Jones asked if the committee created a definition for “position of special trust” to comply with *Watkins*. Ms. Klucznik asked if the statute was amended to use the pre-*Watkins* definition for “special trust.” Ms. Johnson stated that *Watkins* said that the reason for the aggravating factor of “special trust” is that the person is using their position to facilitate the crime. She stated that if a person is not using their position to facilitate the crime, it would not be an aggravating factor. She stated that *Watkins* narrowed the definition. Ms. Klucznik stated that the *Watkins* instruction would apply to the catch-all definition. Ms. Jones stated that crimes before 2013 are governed by *Watkins* and crimes after 2013 are governed by statute. Ms. Johnson stated that “position of special trust” should have two definitions: crimes prior to 2013 and crimes after 2013.

Judge Blanch asked if anyone on the committee thought that the mens rea requirement should apply to “position of special trust.” Ms. Jones stated that *Watkins* required the defendant to be in the position for the purposes of accomplishing the act and there could possibly be a mens rea component. Ms. Klucznik stated that this instruction needs a supplemental instruction. Ms. Adams-Perlac stated that this will be discussed at the next meeting. Judge Blanch suggested including a committee note that references *Watkins*.

Ms. Jones agreed that the instruction should include a committee note with an alternative subpart H for crimes pre-*Watkins* and crimes post-*Watkins*. Ms. Klucznik stated that the catch-all definition of “position of special trust” includes the position of authority and use of that authority. Judge McCullagh agreed that the position must enable the defendant. Ms. Johnson stated that the position of special trust must be from the perspective of the victim.

Ms. Jones moved to moved to approve the instruction. Ms. Kluznick seconded the motion and it passed unanimously.

4. CR 1620 Consent

Committee

Ms. Johnson stated that *Barela* requires prosecutor to prove two things: (1) that the victim did not consent and (2) the defendant must have known the victim did not consent. She stated that the prosecution must still prove the victim did not consent. Ms. Johnson asked Ms. Jones if the instruction was based on the recently amended statute. Ms. Jones said it was not.

Ms. Klucznik asked if the committee should amend statute-based instructions after the Legislature amends the statute. Judge McCullagh stated that sexual offense statutes frequently change. Judge Blanch stated that it could be an overwhelming task for the committee to create alternative instructions each time a statute is amended. He stated that instructions for recently

amended statutes should include a committee note cautioning practitioners to ensure that the instruction is appropriate to the amended statute.

Judge Blanch asked if CR1620 is correct with the amended statute. Ms. Jones suggested changing the sixth paragraph to reflect the amended statute.

Ms. Johnson stated that the statute changed regarding paragraph seven (mental illness or defect) and added catch-all language. Professor Hessick suggested “the defendant knew the victim was incapable of consenting because of mental illness, defect, or any other reason.” Ms. Jones stated that “any reason” modifies incapability. She stated that if it stands alone, it becomes an unintentional catch-all. She suggested “for any other reason was incapable.” Judge McCullaugh suggested “for any reason, including mental illness or defect, was incapable.” Judge Blanch asked if it was implicit that the defect had to actually exist.

Ms. Klucznik asked why the instruction was formatted differently than other instructions. Ms. Jones suggested adding bullets to the instruction. Ms. Klucznik suggested organizing it using a, b, c, etc. She stated that it should be clear that the jury should choose one or more of the options. Judge Blanch stated that the list was a non-exhaustive list of examples of lack of consent. Ms. Adams-Perlac suggested indenting the list. Ms. Jones stated that the instruction covers what *Barela* anticipated, specifically that the jury can find a lack of consent when any of the enumerated circumstances are present.

Judge Blanch asked if the committee had further changes to the instruction. The committee decided that the instructions are correct as the law presently is stated.

Ms. Jones moved to approve the instruction. Mr. Field seconded the motion and it passed unanimously.

5. Future Action by Committee

Committee

Judge Blanch suggested the committee create jury instructions for crimes that most often go to trial. He stated that it would help practitioners in their actual practice and would help practitioners use more of the committee’s instructions. He stated that the committee should start on the most common drug offenses in September.

6. Adjourn

Committee

The meeting was adjourned at 1:08 p.m. The next meeting is Wednesday, June 3, 2015.