

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

Judicial Council Room (Executive Dining Room), Matheson Courthouse
450 South State Street, Salt Lake City, Utah 84114
October 2, 2019 – 12:00 p.m. to 1:30 p.m.

MEMBERS:	PRESENT	EXCUSED	GUESTS:
Judge James Blanch, <i>chair</i>	•		None STAFF: Michael Drechsel Jiro Johnson (minutes) Minhvan Brimhall (recording secretary)
Jennifer Andrus	•		
Mark Field	•		
Sandi Johnson	•		
Judge Linda Jones, <i>emeritus</i>	•		
Karen Klucznik	•		
Judge Brendan McCullagh	•		
Stephen Nelson		•	
Nathan Phelps	•		
Judge Michael Westfall		•	
Scott Young		•	
Elise Lockwood	•		
Melinda Bowen (<i>via phone</i>)	•		

(1) WELCOME AND APPROVAL OF MINUTES:

Judge Blanch welcomed the committee.
 Judge Blanch asked for a motion to approve the minutes.
 Mr. Field made the motion. Judge McCullagh seconded. The motion carried unanimously.
 As an introductory matter, Judge Blanch and Judge Jones discussed with other judges the need to look at the instructions the Committee has propounded to the courts.

(2) REVIEW OF AGGRAVATED ASSAULT INSTRUCTIONS:

Judge Blanch then turned the Committee’s attention to the recently approved aggravated assault instruction (CR1320) and whether the aggravating factors found in element 3 require a mental state. Judge Jones cited *State v. Jimenez*, 2012 UT 41, 284 P.3d 640, for the proposition that aggravated assault requires a mental state for use of a dangerous weapon. Ms. Klucznik, recalling a footnote in that case, asked whether that was in relation to an accomplice. Upon review of that case the committee determined that the case language was in regard to accomplice liability. Ms. Johnson joined the Committee at 12:16pm. After discussion, the committee proposed the following language to resolve the issue:

CR ____ Aggravated Assault

(DEFENDANT'S NAME) is charged [in Count ____] with committing Aggravated Assault [on or about (DATE)]. You cannot convict [him] [her] of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

- 1. ~~(DEFENDANT'S NAME);~~
- 1. (DEFENDANT'S NAME) intentionally, knowingly, or recklessly
 - a. Attempted, with unlawful force or violence, to do bodily injury to (VICTIM'S NAME); or
 - b. Made a threat, accompanied by a show of immediate force or violence, to do bodily injury to (VICTIM'S NAME); or
 - c. Committed an act with unlawful force or violence that
 - i. caused bodily injury to (VICTIM'S NAME); or
 - ii. created a substantial risk of bodily injury to (VICTIM'S NAME); and
- 2. (DEFENDANT'S NAME) intentionally, knowingly, or recklessly
 - a. [Used a dangerous weapon; or]
 - b. [Committed an act that interfered with the breathing or the circulation of blood of (VICTIM'S NAME) by use of unlawful force or violence that was likely to produce a loss of consciousness by:
 - i. applying pressure to the neck or throat of (VICTIM'S NAME); or
 - ii. obstructing the nose, mouth, or airway of (VICTIM'S NAME); or]
 - c. [Used other means or force likely to produce death or serious bodily injury];
- 3. [(DEFENDANT'S NAME)'s actions
 - a. [Resulted in serious bodily injury; or]
 - b. [produced a loss of conscious by impeding the breathing or circulation of blood of (VICTIM'S NAME) ~~produced a loss of consciousness; or and~~]
 - c. ~~[intentionally, knowingly, or recklessly targeted a law enforcement officer and resulted in serious bodily injury]; and~~
- 4. [The defense of _____ does not apply.]

Ms. Johnson explained that the legislature eliminated the need for a mental state regarding the ultimate result of a defendant's conduct. The committee agreed that there is no need for a mental state for the elements in section 3, except as it relates to 3.c. (targeting a law enforcement officer). Ms. Lockwood and Mr. Phelps identified that the language involving "targeting a law enforcement officer" requires a separate intent requirement based on the definition in statute (Utah Code § 76-5-210). The committee agreed that the committee should create a separate instruction for "targeting an officer." Ms. Johnson volunteered to write a separate instruction for such cases, which will be presented for committee consideration at the next meeting.

Judge McCullagh moved to approve the above changes to the Aggravated Assault instruction. Ms. Johnson seconded. The motion was unanimously approved.

(3) DUI AND RELATED TRAFFIC INSTRUCTIONS:

Judge Blanch then turned the committee's attention to the instructions regarding DUI and Related Traffic Instructions. The focus of the conversation commenced in regard to whether a mental state is required for these instructions. Judge Blanch noted that is an open question, given State v. Bird, 2015 UT 7, and State v. Vialpando, 2004 UT App 95, about whether there is a required mental state at all. Vialpando does not even mention that traffic offenses are strict liability, but it does flat out say there is a mental state requirement (though the legal foundation for that assertion is suspect. Judge McCullagh stated he reviewed the case and it cites the general mens rea statute, but it cites subparagraph 1, not subparagraph 2, which would apply to this particular charge

(DUI). Judge Jones recommends that there should be a committee note referencing Vialpando and Bird. The committee paused its consideration of that issue and turned to the actual language of the elements in the DUI instruction.

Judge McCullagh felt that intentionally, knowingly, or recklessly applies to only “actual physical control,” and not “operated.” Judge Jones felt that the mens rea requirements apply to both. Judge Blanch stated that as long as Vialpando has precedential value, he would be including a mental state for each option.

Judge Jones’ calendar then required that she leave the meeting at 12:50pm.

Judge Blanch queried whether element 2 needed a mens rea requirement. The committee agreed that mens rea elements were not necessary for element 2, but preferred to write a note about the potential for voluntary intoxication, involuntary intoxication (affirmative defenses and justifications). Judge Blanch was concerned that a mens rea element may be needed based on the definition of “drug” which has a catchall provision for knowing, intentionally, or recklessly ingesting any substance that could impair an individual (see Utah Code §41-6a-501(1)(c)(iii)). After the discussion, the committee agreed that no mental state was required for element 2.

Judge McCullagh then explained that the proposed instruction was designed to give a practitioner the many variants of DUIs and their severity. For a basic MB DUI, a practitioner can simply delete everything after 2.c. The elements in 3 describe the various higher-level DUIs. Ms. Klucznik noted that sub-elements 3.f. and 3.g. should be removed because practitioners will be required to bifurcate those issues. Therefore, in crafting this language, the committee specifically omitted the language in current Utah Code § 41-6a-503(2)(b) and (c) because it has to do with prior offenses, which would be handled in a bifurcated manner (with a special verdict form or decision by the judge). The committee agreed that two special verdict forms should be created: one for priors and one for aggravating factors.

Ms. Johnson asked the committee to go back and discuss Vialpando in light of its reference to Utah Code § 76-2-101 and raised the concern that the case was decided prior to amendments to the statute. After review of the history of the code, it appeared to the committee that strict liability applying to traffic offenses was in the code at the time Vialpando was decided. As a result, Vialpando simply didn’t address the existing law at the time that made traffic offenses strict liability. Under those circumstances, Judge Blanch preferred to keep the mens rea requirement. Ms. Lockwood explained that several courts deny her requests to include a mens rea requirement despite the language in Vialpando. Drafting the instruction in this way will assist in making arguments.

The committee discussed how legislation could resolve the tension between current Utah Code and the Vialpando decision.

After these discussions, the committee created the following language for a DUI instruction:

CR _____ DRIVING UNDER THE INFLUENCE OF ALCOHOL, DRUGS, OR COMBINATION.

(DEFENDANT’S NAME) is charged [in Count _____] with committing Driving Under the Influence of [Alcohol][Any Drug][the Combined Influence of Alcohol and Any Drug] [on or about (DATE)]. You cannot convict [him] [her] of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. (DEFENDANT’S NAME) intentionally, knowingly, or recklessly
 - a. operated a vehicle; or
 - b. was in actual physical control of a vehicle; and

2. (DEFENDANT'S NAME):
 - a. [had sufficient alcohol in [his][her] body that a subsequent chemical test showed that [he][she] had a blood or breath alcohol concentration of [.05][.08] grams or greater at the time of the test;]
 - b. [was under the influence of [alcohol][any drug][the combined influence of alcohol and any drug] to a degree that rendered [him][her] incapable of safely operating a vehicle; or]
 - c. [had a blood or breath alcohol concentration of [.05][.08] grams or greater at the time of operation or actual physical control][.]; and]
3. [(DEFENDANT'S NAME):]
 - a. [inflicted bodily injury upon [VICTIM'S NAME] as a proximate result of having operated the vehicle in a negligent manner;]
 - b. [had a passenger under 16 years of age in the vehicle at the time of the offense;]
 - c. [was 21 years of age or older and had a passenger under 18 years of age in the vehicle at the time of the offense;]
 - d. [at the time of this offense, also violated Section 41-6a-714 (entering/leaving highway at location other than entrance/exit);]
 - e. [inflicted serious bodily injury upon [VICTIM'S NAME] as a proximate result of having operated the vehicle in a negligent manner.]
4. [That the defense of _____ does not apply.]

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

Judge McCullagh moved to approve the substance of the rule (as quoted above); Ms. Klucznik seconded. The committee unanimously approved the rule. The committee determined it would address necessary Committee Notes at the next meeting. Judge McCullagh agreed to prepare revised Committee Notes for the DUI instruction (above), as well as a version of 41-6a-517 and a version of automobile homicide for the next meeting.

(4) ADJOURN

The Committee then concluded its business at 1:21 pm. The next meeting will be held on November 6, 2019, starting at 12:00 noon.