

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

Judicial Council Room (N301), Matheson Courthouse  
450 South State Street, Salt Lake City, Utah 84114  
September 12, 2018 – 12:00 p.m. to 2:00 p.m.

**MEMBERS:**

PRESENT    EXCUSED

	PRESENT	EXCUSED
Judge James Blanch, <i>Chair</i>	•	
Jennifer Andrus	•	
Mark Field	•	
Sandi Johnson	•	
Judge Linda Jones	•	
Karen Klucznik		•
Judge Brendan McCullagh		•
Stephen Nelson		•
Nathan Phelps	•	
Judge Michael Westfall		•
Scott Young	•	
VACANT – Criminal Defense Attorney		
VACANT – Criminal Defense Attorney		
VACANT – Criminal Law Professor		

**GUESTS:**

None

**STAFF:**

Michael Drechsel  
Minhvan Brimhall (recording secretary)

**(1) WELCOME AND APPROVAL OF MINUTES:**

Judge Blanch welcomed the committee to the meeting. Michael Drechsel was introduced to the committee as the new staff attorney from the AOC.

The committee considered the minutes from the June 6, 2018 meeting. It was proposed that the draft minutes be amended to show that Judge Linda Jones was present at that meeting. Nathan Phelps moved to approve the draft minutes, with the previously identified amendment. Sandi Johnson seconded the motion. The motion passed unanimously.

**(1A) COMMITTEE NOTE RE: CONTROLLED SUBSTANCE INSTRUCTIONS**

Judge Blanch entertained a request from a committee member to consider an issue that was not on the agenda for today’s meeting. Nathan Phelps introduced a proposed committee note regarding the MUJI instructions related to controlled substances (found in the 1200-series of the MUJI Criminal Instructions), as follows:

The MUJI committees are charged with creating jury instructions that are accessible to lay jurors while also accurately stating the law. Consistent with that charge, the Criminal Jury Instruction Committee drafted this

instruction so that a jury is asked to find whether the defendant possessed (or distributed) the specific controlled substance at issue in his case rather than any controlled substance. While the law does not require this specificity and so the drafted instruction increases the prosecution's burden, the Committee believed that in the mine run of cases this higher burden would be insignificant because generally defendants do not contest the identity of the controlled substance involved or their knowledge of the identity of the controlled substance.

If, however, a defendant contested the identity of the controlled substance or his knowledge of its identity (e.g. he believed it was heroin and not fentanyl), it would be appropriate to change this instruction so that it requires that jury only to find that the defendant possessed (or distributed) a controlled substance, and then separately instruct the jury that whatever substance is at issue in the case is a controlled substance as appropriate. See CR1201.

After introducing the proposed committee note, Nathan explained that, apparently, in federal immigration proceedings (both in Utah and out of Utah), some of the MUJI criminal instructions regarding controlled substances are being referenced as authority related to what state-court convictions may have entered against a federal defendant. Nathan explained that the proposed committee note would seek to clarify that these MUJI criminal instructions were designed to require the prosecution to prove the actual controlled substance at issue in that particular charge (i.e., heroin, hydrocodone, etc.) in addition to the category of the controlled substance (i.e., Schedule II, Schedule IV, etc.). This level of proof (regarding the specific substance), as outlined in the MUJI instructions, is not legally required in order to sustain a conviction.

The committee discussed the reasons weighing for and against the proposed committee note. Of particular importance to members of the committee was that the model instructions are not intended to have any effect on outcomes, collateral or otherwise, in unrelated matters. The committee experimented with language for a revised proposed committee note, including the following:

The MUJI committees are charged with creating jury instructions that are accessible to lay jurors while also accurately stating the law. Consistent with that charge, the Criminal Jury Instruction Committee drafted this instruction so that a jury is asked to find whether the defendant possessed (or distributed) the specific controlled substance at issue in his case rather than any controlled substance. The law does not require this specificity.

After significant discussion, the committee was unable to settle on any particular form of the committee note. The committee, therefore, took no action on the matter at this meeting. The matter will be considered again at the October meeting. Between now and then, committee members will spend additional time considering the need to include a clarifying committee note to the relevant MUJI instructions.

## **(2) ASSAULT INSTRUCTIONS:**

The committee resumed discussion regarding the mens rea, if any, that should be included for the cohabitant relationship involved in MUJI instructions related to domestic violence offenses. Sandi Johnson presented her efforts to address this question. The committee had lengthy discussion regarding proposed language, and even whether such mens rea proof was required for the cohabitant component of the domestic violence instructions. The committee discussed State v. Barela, 2015 UT 22. The committee also analyzed other types of enhancing components of cases, such as drug-free zone enhancements, offenses the level of which hinge on the age of the victim (i.e., sexual offenses against children), and other similar offenses. The committee discussed whether, in those types of cases, the prosecution needs to prove a mens rea beyond a reasonable doubt. The committee was unable to arrive at a consensus on that question.

During the meeting, the committee attempted to draft language that would address a mens rea requirement for the cohabitant component of the case (highlighted):

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CR\_\_\_\_. Simple Assault [DV]. Draft 9/12/18

(DEFENDANT'S NAME) is charged [in Count \_\_\_\_] with committing 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);
2. Intentionally, knowingly, or recklessly;
  - a. Attempted, with unlawful force or violence, to do bodily injury to (VICTIM'S NAME); or
  - b. 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).
3. REGARDING THE COHABITANT STATUS:
  - a. [(DEFENDANT'S NAME) intended, knew, or was reckless that (VICTIM'S NAME) was a cohabitant at the time of the offense;] **OR ALTERNATIVELY (WITHOUT MENS REA)**
  - b. [(DEFENDANT'S NAME) and (VICTIM'S NAME) were cohabitants at the time of this offense;]
4. [That the prosecution has proven beyond a reasonable doubt 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.

**References**

Utah Code §76-5-102  
Utah Code §77-36-1  
Utah Code §77-36-1.1

**Committee Note(s)**

In domestic violence cases, practitioners should decide whether to include element #3 in this instruction or to use a special verdict form.

Utah law has not clearly articulated whether the cohabitant relationship between the defendant and the alleged victim requires proof of an associated *mens rea* (intentional, knowing, or reckless). Practitioners should review *State v. Barela*, 2015 UT 22, and other related caselaw when preparing this jury instruction.

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After significant discussion, the committee agreed to spend additional time considering how to address this situation in the instructions. This matter will be addressed again at the October meeting.

**(3) USE OF FORCE AMENDMENTS:**

This matter was not considered by the committee during the meeting. It is anticipated that this matter will be addressed at the October meeting.

**(4) OBJECT RAPE / DEFINITION OF PENETRATION:**

This matter was not considered by the committee during the meeting. It is anticipated that this matter will be addressed at the October meeting.

**(5) IMPERFECT SELF-DEFENSE INSTRUCTION:**

This matter was not considered by the committee during the meeting. It is anticipated that this matter will be addressed at the October meeting.

**(6) REVIEW 2019 MEETING DATES:**

Mr. Drechsel reviewed committee meeting dates for the 2019 calendar year. The committee determined that the January 2, 2019 meeting would be moved to January 9, 2019. In addition, the meetings for July 3, 2019, and August 7, 2019, are canceled by the committee. Jennifer Andrus made motion, which was seconded by Mark Field. The motion passed unanimously.

**(7) ADJOURN**

The meeting adjourned at approximately 1:35 p.m. The next meeting will be held on October 3, 2018, starting at 12:00 noon.