

**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  
October 3, 2018 – 12:00 p.m. to 1:30 p.m.

**MEMBERS:**

**PRESENT    EXCUSED**

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

**GUESTS:**

None

**STAFF:**

Mr. Drechsel Drechsel  
Jiro Johnson (minutes)  
Minhvan Brimhall (recording secretary)

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

Briefly, Mr. Drechsel discussed vacancies on the committee. Mr. Drechsel discussed the difficulty of finding a Criminal Law Professor to take the position allocated to a professor. During this discussion the committee did not have a quorum. No action was proposed or taken in connection with this discussion.

Judge Blanch welcomed the committee to the meeting. Judge Westfall participated by conference line. Judge Blanch welcomed a new assistant to the committee, Jiro Johnson, to record the minutes. Mr. Johnson gave a brief background for those who did not know him.

The committee considered the minutes from the September 12, 2018 meeting.  
Mr. Phelps moved to approve the draft minutes.  
Judge Jones seconded the motion.  
The motion passed unanimously.

## **(2) PROPOSED COMMITTEE NOTE RE: CONTROLLED SUBSTANCE INSTRUCTIONS:**

Mr. Phelps discussed the materials that he provided to the committee via email prior to the meeting. Mr. Drechsel added those additional materials to the materials made available on the website. The committee continued its discussion from the prior committee meeting regarding Mr. Phelps' proposed committee note. Particularly, Mr. Phelps highlighted recent INS and other cases where federal courts have looked to the MUJI instructions as part of the decision-making process for removal. Judge Blanch raised concerns about whether they looked at the instructions for elements or for an understanding of the law. Mr. Drechsel commented that the Mathis case (U.S. Supreme Court) stated that a federal court could, under appropriate circumstances, reference the instructions used in a particular case. Judge Blanch raised the concern that the federal courts appear to be using our jury instructions inappropriately and raised an issue whether it is the Committee's duty to correct another courts' improper use of our instructions.

Mr. Phelps discussed the need to provide clarifying guidance to practitioners so that they understand unique circumstances that arise when an individual has a substance with a mixture of controlled substances. Judge Blanch asked if having a controlled substance in the federal schedule of controlled substances would result mandatory immigration consequences. Mr. Phelps clarified that if the substance is not on the federal schedule it is not likely to result in deportation. Judge Blanch felt that the statute only requires proof of a controlled substance (not necessarily by name) but our instructions might benefit from the proposed comment from Mr. Phelps.

Ms. Johnson explained that under Utah law a jury has to make a determination of what schedule is involved with the underlying controlled substance, because it is the schedule that dictates what sentence is appropriate for the crime (particularly as it relates to marijuana because it is a Schedule I controlled substance with a different sentencing structure from other Schedule I drugs). Ms. Johnson stated that she believes the instruction is fine as written and that the committee should not clarify the instructions with a committee note in an attempt to have some impact in other areas / jurisdictions. Ms. Johnson objected to the comment in its entirety because the instructions work and accurately state the law in Utah, pointing out that the committee's role is to craft model instructions to assist juries in Utah (which the current versions of the controlled substance instructions were designed to accomplish without any need for a committee note).

Judge Blanch focused on whether this same problem (federal reference to Utah's model instructions) exists where a case involves a plea versus jury verdict (the plea case wouldn't have actual jury instructions on record since the case never involves a jury). Mr. Field wondered why this shouldn't just be argued at the federal sentencing hearings (as opposed to preemptively crafting a committee note in Utah). Judge Blanch raised his preference not to intervene in affairs that don't concern criminal law in Utah, but, contrary to the committee's intentions, it appears that the committee's choice to incorporate the specific name of the controlled substance as an element of the offense in the model instructions has raised consequences in other jurisdictions.

Ms. Johnson stated that she might support a note indicating that the parties may not want the name of the controlled substance named in the elements instruction.

Judge Blanch tabled this matter until the next meeting so the committee can receive input from committee members who were not in attendance today. Mr. Drechsel was assigned to find and provide the information previously considered by the committee when considering making the specific controlled substance an element of the offense (which is not technically required by Utah law).

## **(3) ASSAULT INSTRUCTIONS:**

Judge Blanch then turned the committee's attention back to the assault instructions that were a topic at the last meeting. In particular, the committee resumed its consideration of whether there is a required mens rea as to cohabitant status between the defendant and alleged victim. Judge Blanch argued that a mistake of law would not exonerate you if you mistook someone as being a cohabitant. Judge Jones said there would likely be a cohabitant definition instruction that explains what a cohabitant is. Ms. Johnson stated that these sorts of status relationships

do not require a mental state because they are not acts or conduct. Judge Jones said that parties are not raising whether there should be a mental status on their own and that she, as judge, is often having to raise the issue. Several of the committee members were concerned about the language from State v. Barela and how to square that with cohabitant status component in the proposed instructions. The committee reviewed the language in Barela.

As an analytical exercise, Mr. Phelps raised the example of having an item that is seemingly valueless (a lunch box) that, after the theft occurred it was found the item was valued much higher. Would the law require proof that the individual intended, knew, or was reckless regarding the ultimate value of the item. The committee discussed this example. Judge Jones, reading Barela aloud, reminded the committee that "After all, our criminal code requires proof of mens rea for each element of a non-strict liability crime" (citing Utah Code § 76-2-101). Ms. Johnson argued there is no crime of "domestic violence" or "cohabitant status," therefore it is not an element of assault or similar crimes. Judge Blanch stated that Ms. Klucznik had emailed prior to the meeting with a few comments (even though she wasn't able to attend today) and that she was not convinced cohabitant does require an associated mens rea. Mr. Field's opinion was that if cohabitant is a status then it probably shouldn't be in the elements instruction. Judge Blanch said we could include a committee note clarifying this issue. Judges Jones said maybe it would be good to highlight the issue, say that Utah law has not clearly addressed the issue, and leave it open for argument. Mr. Field argued that if cohabitant is not an element then it should not be in any element instruction and should instead be covered in a special verdict form. Ms. Johnson also expressed her preference to eliminate section 3 (re: cohabitant status) of the proposed instruction entirely and to include a committee note. As the committee reviewed the draft document displayed on the screen, Judge Blanch then verbally stated the proposed instruction as amended. Judge Blanch then asked the committee to consider the main assault instruction for any other amendments. There was some discussion regarding the rules and stylistic conventions.

Judge Jones moved to approve the following simple assault instruction and note:

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**CR\_\_\_\_\_ SIMPLE ASSAULT [DV].**

(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. [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 NOTES**

In cases involving domestic violence, practitioners should include a special verdict form and instructions defining cohabitant.

Utah appellate courts have not decided whether the cohabitant relationship between the defendant and the alleged victim is an element of the offense requiring proof of an associated *mens rea* (intentional, knowing, or reckless). Practitioners should review *State v. Barela*, 2015 UT 22.

Last Revised – 10/03/2018

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Mr. Field seconded that motion.  
The motion carried unanimously.

Judge Blanch then asked for discussion regarding the special verdict definitions and special verdict instructions related to cohabitant status. Stylistic changes were proposed by Ms. Johnson and Mr. Phelps to the special verdict instruction. The committee then turned to the special verdict definitions. Ms. Johnson commented that the list of factors for residence were from case law. There was discussion about how to make sure the language makes it explicit.

Judge Jones moved to approve the following two instructions:

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**CR\_\_\_\_\_ DV SPECIAL VERDICT DEFINITIONS.**

“Reside” means to dwell permanently or for a length of time; to have a settled abode for a time; to dwell permanently or continuously.

“Residence” is defined as “a temporary or permanent dwelling place, abode, or habitation to which one intends to return as distinguished from a place of temporary sojourn or transient visit.” It does not require an intention to make the place one’s home. It is possible that a person may have more than one residence at a time.

When determining whether (DEFENDANT’S NAME) and (VICTIM’S NAME) resided in the same residence, factors to consider include the following:

- the amount of time one spends at the shared abode and the amount of effort expended in its upkeep;
- whether a person is free to come and go as he pleases, treating the place as if it were his own home;
- whether there has been a sharing of living expenses or sharing of financial obligations for the maintenance of a household;
- whether there has been sexual contact evidencing a conjugal association;
- whether furniture or personal items have been moved into a purported residence;
- voting, owning property, paying taxes, having family in the area, maintaining a mailing address, being born or raised in the area, working or operating a business, and having children attend school in the forum.

In deciding whether (DEFENDANT’S NAME) and (VICTIM’S NAME) were residing in the same residence, you are not limited to the factors listed above, but you may also apply the common, ordinary meaning of the definition to all of the facts and circumstances of this case.

**REFERENCES**

*Keene v. Bonser*, 2005 UT App 37  
*State v. Salt*, 2015 UT App 72

**COMMITTEE NOTES**

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**AND**

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**CR\_\_\_\_\_ DV SPECIAL VERDICT INSTRUCTIONS.**

If you find (DEFENDANT’S NAME) guilty of [CRIME], you must determine whether (DEFENDANT’S NAME) and (VICTIM’S NAME) were cohabitants at the time of this offense. To find (DEFENDANT’S NAME) was a cohabitant with (VICTIM’S NAME), you must find beyond a reasonable doubt, that (DEFENDANT’S NAME) and (VICTIM’S NAME) were 16 years of age or older, and at the time of the offense, (DEFENDANT’S NAME):

- [Is or was a spouse of (VICTIM’S NAME);]
- [Is or was living as if a spouse of (VICTIM’S NAME);]
- [Is related by blood or marriage to (VICTIM’S NAME) as (VICTIM’S NAME)'s parent, grandparent, sibling, or any other person related to (VICTIM’S NAME) by consanguinity or affinity to the second degree;]
- [Has or had one or more children in common with (VICTIM’S NAME);]
- [Is the biological parent of (VICTIM’S NAME)'s unborn child;]
- [Resides or has resided in the same residence as (VICTIM’S NAME);] or
- [Is or was in a consensual sexual relationship with (VICTIM’S NAME)].

The State must prove beyond a reasonable doubt that (DEFENDANT’S NAME) and (VICTIM’S NAME) were cohabitants at the time of this offense. Your decision must be unanimous and should be reflected on the special verdict form.

**REFERENCES**

Utah Code § 77-36-1

Utah Code § 78B-7-102

**COMMITTEE NOTES**

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Ms. Johnson seconded the motion.  
Six voted in favor (Judge Westfall was not available for the vote). The motion carried.

The committee then turned to the special verdict form. Judge Jones felt the first sentence of the special verdict form telegraphs to the jury and Ms. Johnson pointed out that all the special verdict forms are structured this way. Judge Blanch asked that the committee maybe consider the issue Judge Jones raised at a future meeting.

Mr. Young moved to approve the following special verdict form language:

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**CR\_\_\_\_\_ DV SPECIAL VERDICT FORM.**

(CAPTION INFORMATION  
with document title being:  
“SPECIAL VERDICT  
Count(s) \_\_\_\_\_”)

We, the jury, have found the defendant, (DEFENDANT'S NAME), guilty of [CRIME(S)]. We also unanimously find the State:

\_\_\_\_\_ Has  
\_\_\_\_\_ Has Not

proven beyond a reasonable doubt (DEFENDANT'S NAME) and (VICTIM'S NAME) were cohabitants at the time of this offense.

DATED this \_\_\_\_\_ day of (MONTH), (YEAR).

\_\_\_\_\_  
Foreperson

**REFERENCES**

None.

**COMMITTEE NOTES**

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Ms. Johnson seconded the motion.  
The motion carried unanimously.

The committee membership determined and agreed that this would be the same approach that will be employed in relation to other assault (dv) instructions, including:

- aggravated assault
- assault involving substantial injury
- assault of pregnant person

The actual language of those instructions has not been addressed yet by the committee, but will be at the next meeting.

**(4) HB 102 – 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 a future meeting.

**(5) 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 a future meeting.

**(6) 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 a future meeting.

**(7) ADJOURN**

The meeting adjourned at approximately 1:35 p.m. The next meeting will be held on November 7, 2018, starting at 12:00 noon.