

**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, October 7, 2015  
12:00 p.m. to 1:30 p.m.  
Judicial Council Room

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**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  
David Perry  
Nathan Phelps  
Scott Young

**EXCUSED**

Jennifer Andrus  
Jesse Nix  
Judge Michael Westfall

**1. Welcome, Approval of Minutes**

**Judge Blanch**

Judge James Blanch welcomed everyone to the meeting. Judge Blanch welcomed Scott Young and Dave Perry to the committee. Mr. Young stated that he works for Snow, Christensen and Martineau doing primarily 1983 defense. Mr. Perry stated that he works for the Cache County Public Defender’s Office.

*Mr. Phelps moved to approve the minutes from the September 2, 2015 meeting. Mr. Nelson seconded the motion and it passed unanimously.*

**2. Drug Offenses**

**Judge Blanch**

Judge Blanch stated the committee is moving on from sex offenses to drug offenses. Judge Blanch thanked Ms. Klucznik and her subcommittee for their efforts putting the initial drug offense instructions together.

**3. Drug Offense Definitions**

**Committee**

Judge Blanch asked for discussion on the following instructions.

(a) Miscellaneous

Ms. Klucznik suggested that this be a separate instruction. Ms. Jones suggested calling it something other than “miscellaneous” to avoid confusion. Ms. Johnson suggested calling it “controlled substance defined.” After brief discussion it was agreed to call it “Controlled Substance.” A member stated he only saw this being an issue over analog. It was noted that there is concern about the instruction stating the schedules as well as “controlled substance” because someone could be charged with multiple different drugs, with different schedules.

The schedules were discussed as to whether they would be removed and if so, was that taking away the jury’s obligation to find this or should it be an issue that counsel would stipulate to. It was agreed that the schedules are a matter of law and not subject to the jury. It was further agreed to add schedules IV and V to the instruction.

The changes to the instruction are as follows: 1) change title from Miscellaneous to Controlled Substance; 2) remove the word “listed”; 3) put “controlled substance” in brackets; 4) add schedules IV and V in brackets; and 5) add “controlled substance analog” in brackets.

*Ms. Jones moved to approve the instruction with the changes agreed to by the committee. Ms. Klucznik seconded the motion and it passed unanimously.*

(b) Distribution of a Controlled Substance

Mr. Young questioned the counterfeit element. Ms. Klucznik stated that the subcommittee did not address counterfeit substances since they are used so rarely used. The committee asked for clarification of element 3 which reads “the defense of \_\_\_\_\_ does not apply.” Ms. Klucznik stated the “innocent possession” defense is the primary one used in these circumstances. If the jury finds reasonable doubt then innocent possession could apply. Therefore, element 3 could mean lawfully or unlawfully. The committee discussed “innocently possessed” and whether this is a valid defense. Ms. Klucznik stated this is a valid defense under *State v. Miller*.

Ms. Johnson stated that an “affirmative defense” means everything that is in the elements might be true but there is a separate reason as to why someone should be acquitted. It was noted, however, that “alibi” is not an affirmative defense. If it is a regular defense then the State does not have to prove beyond a reasonable doubt, but if it is an affirmative defense then the State does have to prove it. *State v. Jeffs* was discussed to show the State’s burden of proof.

The committee discussed that the defense “valid prescription” is an intentional possession. The committee noted that the constructive possessions are valid prescription and innocent possession. Ms. Jones asked whether a committee note was needed to address what an affirmative defense is. Ms. Johnson agreed that a committee note would be helpful. Judge Blanch noted that the most useful committee note could be that the kind of offenses in relation to element 4 are the affirmative defenses as the Utah Supreme Court has discussed and then cite to the most leading case. It was noted that the drug offenses should reference *State v. Miller*. The committee agreed that entrapment is an affirmative defense.

After brief discussion the committee agreed to approve the instruction as written, with the following committee note: “The defenses referenced in paragraph 3 of the instruction are affirmative defenses as defined by Utah law or case law.”

Ms. Johnson asked if the language is “intentionally and knowingly.” Ms. Jones said the language in the statute is “intentionally and knowingly.”

The committee discussed the formatting of the instruction to change it to 1, 2, 2a, 2b, and 3. The committee made other formatting changes to the instruction.

*Ms. Johnson moved to approve the definition. Mr. Nelson seconded the motion and it passed unanimously.*

(c) Possession with Intent to Distribute

The committee briefly discussed the formatting of the instruction. The committee agreed to combine “intentionally and knowingly” with “(NAME of CONTROLLED/COUNTERFEIT SUBSTANCE),” and to add a committee note addressing the affirmative defenses and listing *State v. Ireland*. After brief discussion the committee agreed to approve the instruction as written.

*Ms. Johnson moved to approve the definition. Mr. Field seconded the motion and it passed unanimously.*

(d) Possession of a Controlled Substance

The committee briefly discussed the formatting of the instruction. The committee agreed not to address the controlled substance analog because it is rarely used. The committee discussed removing marijuana and making it a separate instruction. The committee agreed to add a committee note addressing the affirmative defenses and listing *State v. Ireland*. After brief discussion the committee agreed to approve the instruction as written.

*Ms. Johnson moved to approve the definition. Ms. Jones seconded the motion and it passed unanimously.*

(e) Possession of Marijuana

The committee briefly discussed this proposed instruction. Ms. Johnson suggested that an instruction on marijuana was not required, but there should be a special verdict form for marijuana that is 100 lbs or more.

*Ms. Adams-Perlac agreed to draft a relevant special verdict form.*

**4. Adjourn**

**Committee**

*The meeting was adjourned at 1:37 p.m.* The next meeting is Wednesday, December 2, 2015.