

# MINUTES

## STANDING COMMITTEE ON THE MODEL UTAH CRIMINAL JURY INSTRUCTIONS

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

Wednesday, September 7, 2016  
12:00 p.m. to 1:30 p.m.  
Judicial Council Room

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### PRESENT

Judge James Blanch, Chair  
Keisa Williams, Staff  
Jennifer Andrus  
Mark Field  
Sandi Johnson  
Scott Young  
Karen Klucznik  
Judge Brendon McCullagh  
Nathan Phelps  
Jesse Nix

### EXCUSED

Steve Nelson  
Judge Michael Westfall  
Linda Jones

## 1. Welcome

**Judge Blanch**

Judge Blanch welcomed everyone to the meeting and each member introduced themselves.

*Ms. Klucznik moved to approve the minutes from the June 2016 meeting. Judge McCullagh seconded the motion and it passed unanimously.*

Judge Blanch asked the committee to discuss priorities for creating jury instructions. He stated that the committee does not have instructions on justification defenses. He stated that he asked Judge Taylor (4th District) to provide those instructions because they often go to trial.

Judge McCullagh stated that in the past, the committee has not created instructions for capital cases because they are rare. He stated that the committee decided that it would be best for capital attorneys to create those jury instructions themselves.

## 2. Drug Offense Instructions

**Committee**

### (a) Constructive Possession

Ms. Johnson stated that “sufficient nexus” and “reasonable inference” should not be used in a jury instruction. Mr. Young stated that those terms are not simple for a jury to understand. Ms. Johnson stated that she is not aware of a jury instruction that contains “reasonable inference” and the phrase decreases the burden of reasonable doubt. She stated that an elements instruction, with intentionally or knowingly, would be better to determine actual possession or constructive possession.

Mr. Field stated that he was concerned with the title of “construction possession” because the phrase could confuse the jury. Professor Andrus suggested two possession instructions: one for actual possession and one for constructive possession. Ms. Kluznik asked if the instructions could mirror the instruction on direct/circumstantial evidence. She stated that actual possession is direct evidence and constructive possession is circumstantial evidence. Ms. Johnson stated that the examples are not parallel.

Ms. Johnson suggested providing a list of factors to determine possession that included “actual possession.” Judge Blanch stated that while some cases would require a list of factors, cases with simple facts would not require a list. He stated that simple possession cases that go to trial usually involve constructive possession. Ms. Johnson stated that she was concerned that the language of the definition instruction was becoming similar to the elements instruction.

Ms. Kluznik agreed that the constructive possession definition would only be used if constructive possession was applicable and not for all possession cases. Judge Blanch stated that one possession instruction for the jury to consider, that included constructive possession, would be preferable.

Mr. Young asked why reasonable doubt language should be removed. Ms. Johnson answered that this instruction was only definitional. Mr. Young asked if the jury would conclude possession at a different evidentiary standard.

Professor Andrus stated that “dominion” could be removed because it is redundant to control and originates from religious text.

Judge Blanch asked if possession cases would be less likely to be reversed based on jury instructions instead of the sufficiency of the evidence. Ms. Kluznik agreed. Judge Blanch stated that deviating from the statutory language would be appropriate because the appellate courts would overturn a jury verdict based on the quantum of evidence rather than jury instructions.

Mr. Field asked the committee to distinguish “special control” from “control.” Mr. Phelps stated that roommates could have “special control” over their own room in a house. Mr. Young suggested using “exclusive control,” but stated that “special control” may appear in case law. Mr. Phelps quoted *State v. Fox*, 709 P.2d 316 (1985), that used “special control.” Professor Andrus stated that “special” is not a meaningful word. Judge Blanch asked if “special” included “exclusive.” He stated that he did not believe that a person must be the *only* person to use or access a location for it to be called “special.”

Ms. Kluznik stated that the list of factors relevant to determining possession should be prefaced with a “may” instead of “must.” She stated that the jury should not view the factors as a checklist. Ms. Johnson suggested including language at the end of the instruction indicating that the jury may choose some or all of the factors. The committee discussed language to inform the jury that the list is not exclusive or exhaustive. Judge Blanch stated that “may include the following” was sufficient for a jury to understand that the factors are not exclusive or exhaustive.

Judge Blanch stated that the instruction should be titled “Definition of Possession” because the instruction now refers to actual and constructive possession. Mr. Young stated that the title should include “constructive possession” because practitioners would search for

“constructive possession.” Judge Blanch stated that practitioners would only use this instruction for a case involving “constructive possession” so “Definition of Possession” would be sufficient.

The committee proposed the following language:

**CR \_\_\_\_. Definition of Possession.**

A person “possesses” [a controlled substance] [drug paraphernalia] when the person has the ability and the intent to exercise control over it. Factors relevant to deciding possession may include the following:

- ownership and/or occupancy of the [residence] [vehicle] [property] [personal effects] where the [controlled substance] [drug paraphernalia] was found;
- whether that ownership or occupancy was exclusive;
- presence of the [controlled substance] [drug paraphernalia] in a location where (DEFENDANT’S NAME) had special control;
- whether other people also had access to the location of the drugs;
- presence of (DEFENDANT’S NAME) at the time the [controlled substance] [drug paraphernalia] was found;
- (DEFENDANT’S NAME) proximity to the [controlled substance] [drug paraphernalia];
- previous drug use;
- incriminating statements or behavior; or
- any other factor related to whether (DEFENDANT’S NAME) had the ability and intent to exercise control over the [controlled substance] [drug paraphernalia].

**References**

Utah Code § 58-37-2

*State v. Lucero*, 350 P.3d 237 (2015)

*Mr. Young moved to approve the instruction. Professor Andrus seconded the motion and it passed unanimously.*

**3. Adjourn**

**Committee**

*The meeting was adjourned at 1:26 p.m.* The next meeting is Wednesday, November 2, 2016.