

# AGENDA

## COMMITTEE ON THE MODEL UTAH CRIMINAL JURY INSTRUCTIONS

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

Wednesday, January 6, 2016  
12:00 p.m. to 1:30 p.m.  
Judicial Council Room

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12:00	Welcome and Approval of Minutes (Tab 1)	Judge James Blanch
12:05	Drug Offense Instructions (Tab 2) Utah Code 58-37-2 (Tab 3) Utah Code 58-37-8 (Tab 4)	Karen Klucznik
1:25	Other Business	
1:30	Adjourn	

### Upcoming Meetings (held on the 1st Wednesday of each month unless otherwise noted)

February 3, 2016

March 2, 2016

April 6, 2016

# Tab 1

## 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.

## 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, November 4, 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  
Sandi Johnson  
Linda Jones  
Karen Klucznik  
Judge Brendon McCullagh  
Jesse Nix  
Nathan Phelps  
Judge Michael Westfall  
Scott Young

#### **EXCUSED**

Jennifer Andrus  
Professor Carissa Byrne Hessick  
Steve Nelson  
David Perry

#### **1. Welcome**

**Judge Blanch**

Judge Blanch welcomed everyone to the meeting. Ms. Adams-Perlac stated that the minutes from the October meeting were not ready to be approved. She stated that the minutes would be ready by the December meeting.

#### **2. Drug Offense Instructions**

**Committee**

Judge Blanch asked for the discussion on the following definitions.

##### **(a) Possession of an altered or forged prescription**

Ms. Johnson asked if the exclusion of “written order” from the statute was intentional. The committee discussed the meaning of “written order,” concluded that an order could be written by a doctor to a nurse, and included it in the instruction.

Judge McCullagh asked if the committee should include the element of non-innocent possession. Ms. Jones stated that non-innocent possession would be element 5. Ms. Klucznik asked how a forged prescription could be innocently possessed. She

asked if a person had to know a prescription was forged. Ms. Jones and Judge McCullagh stated that the person must know that it was altered or forged AND possess it. Ms. Johnson and Judge McCullaugh agreed that the defense should apply.

Ms. Jones asked if knowingly and intentionally applied just to possession, or to knowledge of the forged prescription and knowledge that it was for a controlled substance. She stated that based on State v. Bird, *mens rea* applies to every element of the offense. The committee agreed that knowingly and intentionally applied to both possession and knowledge of the forgery. Judge Blanch asked if ignorance of whether a substance is a controlled substance is a valid defense. Ms. Klucznik and Ms. Jones stated that it was not. Ms. Jones said that this defense would fall under ignorance of fact. Judge Blanch stated that the defense may argue, based on Bird, that knowledge of a controlled substance is an element. However, he stated that he would not be inclined to let the defense make this argument.

Ms. Jones asked if *mens rea* could include reckless (“reckless to whether it was altered or forged”). Judge McCullagh stated that the person must knowingly and intentionally possess an altered prescription. Judge Blanch suggested placing them both on the same line to avoid applying *mens rea* to knowledge of the controlled substance. Judge McCullagh suggested separating each element to ensure that jurors understand.

Ms. Johnson asked if *mens rea* for possession of the forged prescription included reckless. Ms. Jones stated that it would be hard to argue recklessness. She stated that it would be an argument of mistake of law because drugs are defined as controlled substances. Judge Blanch stated that recklessness would mean that person did not know it was forged, but should have known it was forged. Ms. Johnson suggested only using “knowingly” regarding knowledge that a prescription was forged. Judge McCullagh agreed and stated that although the legislature used “intentionally and knowingly,” they should have only used “knowingly” for knowledge that a prescription was forged. He noted that “intentionally” was neither grammatically correct nor logical. He suggested, “knowing it was altered or forged.”

The committee proposed this language:

(DEFENDANT’S NAME) is charged [in Count \_\_\_\_] with committing Possession of an Altered or Forged [Prescription] [Written Order [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 and knowingly possessed an altered or forged [prescription] [written order];
3. knowing the altered or forged [prescription] [written order] is for a controlled substance [; and]
- [4. 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 § 58-37-8(2)(a)(iii)

*Ms. Johnson moved to approve the instruction. Judge McCullagh seconded the motion and it passed unanimously.*

#### (b) Possession of Marijuana – Second Degree Felony

Judge Blanch asked if possession of 100 pounds is a question of fact. He stated that if a defendant can convince a jury that they did not know they had 100 pounds, the prosecution could not prove that element. Judge McCullagh suggested using a special verdict form for the 100 pounds. He stated that the jury would first decide possession and then use a special verdict form to decide if the amount is 100 pounds. Ms. Johnson stated that the jury still must find that it was 100 pounds.

Ms. Klucznik stated that the defense would want 100 pounds to be an element of possession. Judge McCullagh and Ms. Johnson stated that it is not an element to prove possession, but rather an element for sentencing. Ms. Jones asked if the jury must still find possession of 100 pounds beyond a reasonable doubt. Judge McCullagh and Ms. Johnson answered yes. Ms. Johnson said that 100 pounds is not an element of possession, but a sentencing determination. Ms. Klucznik agreed.

Ms. Jones stated that the *mens rea* language should be applied to the 100 pounds. Judge Blanch stated that if a person was charged with possession of over 100 pounds and the person believed that they possessed less than 100 pounds, a jury could acquit. Ms. Johnson asked how this differed from a defendant who claims that he thought the age of consent was 16. Judge Blanch stated that her example is an exception because there is a statute that explicitly excludes this defense.

Ms. Johnson reiterated that 100 pounds is not an element because the statute addresses penalties. Ms. Klucznik agreed. Ms. Jones stated that she could see the court making the distinction between *mens rea* element of possession and sentencing element of the amount. Ms. Klucznik agreed.

Judge Blanch stated that this is similar to DUI and domestic violence statutes. He explained that the defendant's knowledge of prior crimes is not an element of the crime, but rather a sentencing element used for enhancement.

Ms. Adams-Perlac stated that she would prepare a special verdict form for the committee to discuss at the next meeting.

#### (c) Possession of Marijuana – Class B Misdemeanor

Ms. Klucznik stated that this instruction is unnecessary because the possession of controlled substance covers this instruction. The committee agreed.

#### (d) Firearm Enhancement

Ms. Johnson suggested beginning the instruction with defendant's name as the committee has done for other instructions. Ms. Jones asked if this instruction should be a special verdict form. The committee agreed that it should be a special verdict form.

Mr. Phelps asked if a person must know that they possess the firearm. Ms. Johnson asked what the difference was between "during the commission" and "in furtherance of." Judge McCullagh stated that "in furtherance" is passive, while "during the commission" is an active act. Ms. Jones stated that a *mens rea* element is necessary for "in furtherance of." Ms. Klucznik stated that the *mens rea* is implicit because the person used it. She stated that the *mens rea* for possession is more difficult. Ms. Jones stated that if the statute does not contain a *mens rea*, but is implicit, it has to be recklessly, knowingly, or intentional. Ms. Klucznik stated that because this is a sentencing enhancement, not an element of the crime, *mens rea* does not need to be included. Ms. Jones disagreed and stated that it should be included because "in furtherance of" suggests the jury must determine a mental state

Ms. Johnson stated that the *mens rea* depends on what the defendant is doing. If an element does not have to do with a defendant's mental state, it should not be included. Ms. Johnson stated that the *mens rea* should be included to address "used, carried, or possessed." Judge Blanch stated that her distinction made sense.

The committee struggled with the question of whether a *mens rea* element is required for instructions that are sentencing enhancements. Judge Blanch suggested temporarily including the *mens rea* language and stated that he will ask his clerk to research this issue for the committee. He stated that the committee would discuss it at the next meeting.

### 3. Adjourn

### Committee

*The meeting was adjourned at 1:15 p.m.* The next meeting is Wednesday, December 2, 2015.

# Tab 2

**FIREARM ENHANCEMENT**  
(Utah Code Ann. § 58-37-8(1)(c))  
**(effective October 1, 2015)**  
(approved by subcommittee)

**NEEDS SPECIAL VERDICT FORM AND AMENDED INSTRUCTION. Geddis will research the issue of the mens rea required for enhancements.**

If you determine beyond a reasonable doubt that (DEFENDANT'S NAME) committed [Distribution of a [Controlled Substance][Counterfeit Substance]] [Possession of a [Controlled Substance][Counterfeit Substance] with Intent to Distribute], you must decide whether (DEFENDANT'S NAME) used a firearm during the commission of that crime. You cannot find that [he] [she] used a firearm during the commission of the crime 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] used, carried or possessed on his person or in his immediate possession a firearm
  - a. During the commission or in furtherance of [distributing a [controlled substance][counterfeit substance]] [possessing a [controlled substance][counterfeit substance] with the intent distribute]

USE SPECIAL VERDICT FORM

**MERE PRESENCE**  
(approved by subcommittee)

You are instructed that standing alone, the mere presence of a defendant at the location in which [controlled substance] [counterfeit substance] [paraphernalia] is found is not sufficient to prove that the defendant was in possession of the [controlled substance] [counterfeit substance] [paraphernalia].

## SPECIAL ENHANCEMENTS

(Utah Code Ann. § 58-37-8(4))

**(effective October 1, 2015)**

(approved – underlined language deviates from statutory language)

If you determine beyond a reasonable doubt that (DEFENDANT'S NAME) committed (NAME OF RELEVANT OFFENSE), you must determine whether [any of] the following circumstance[s] [applies] [apply]. You must then check the box on the Special Verdict Form for each factor that you as the jury unanimously find the prosecution has proven beyond a reasonable doubt. Do not check the box for any factor the prosecution has failed to prove beyond a reasonable doubt.

Defendant committed (NAME OF RELEVANT OFFENSE)

- [a. in a public or private elementary or secondary school or on the grounds of any of those schools during the hours of 6 a.m. through 10 p.m.]
- [b. within 100 feet of any structure, facility or grounds of a public or private elementary or secondary school during the hours of 6 a.m. through 10 p.m.]
- [c. in a public or private vocational school or postsecondary institution or on the grounds of any of those schools or institutions during the hours of 6 a.m. through 10 p.m.]
- [d. within 100 feet of any structure, facility or grounds of a public or private vocational school or postsecondary institution during the hours of 6 a.m. through 10 p.m.]
- [e. in or on the grounds of a preschool or child-care facility during the preschool's or facility's hours of operation.]
- [f. within 100 feet of any structure, facility or grounds of a preschool or child-care facility during the preschool's or facility's hours of operation.]
- [g. in a [public park][amusement part][arcade][recreation center] when the [public park][amusement park][arcade][recreation center] is open to the public.]

- [h. within 100 feet of any structure, facility or grounds of a [public park][amusement park][arcade][recreation center] when the [public park][amusement park][arcade][recreation center] is open to the public.]
- [i. in or on the grounds of a house of worship.]
- [j. within 100 feet of any structure, facility or grounds of a house of worship.]
- [k. in or on the grounds of a library when the library is open to the public.]
- [l. within 100 feet of any structure, facility or grounds of a library when the library is open to the public.]
- [m. in the presence of a person younger than 18 years of age, regardless of where the act occurs.]
- [n. for the purpose of facilitating, arranging, or causing the transport, delivery, or distribution of a [controlled] [counterfeit] substance to an inmate or on the grounds of any correctional facility.]

[It is not a defense that (DEFENDANT'S NAME) mistakenly believed the individual to be 18 years of age or older at the time of the offense or was unaware of the individual's true age.]

[It is not a defense that (DEFENDANT'S NAME) mistakenly believed that the location where the act occurred was not one of those listed above or was unaware that the location was one of those listed above.]

## **DRUG-RELATED NEGLIGENT DRIVING**

(Utah Code Ann. § 58-37-8(2)(g),(h))

**(effective October 1, 2015)**

(approved by subcommittee)

(DEFENDANT'S NAME) is charged [in Count \_\_\_\_] with committing Drug-Related Negligent Driving [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 and knowingly had any measurable amount of a [marijuana] [tetrahydrocannabinols][a Schedule I controlled substance] [a Schedule II] [a Schedule III controlled substance] [a Schedule IV controlled substance] [a Schedule V controlled substance] [a substance listed as a controlled substance in Utah Code Ann. § 58-37-4.2] in [his][her] body; and
3. operated a motor vehicle in a negligent manner; and
4. caused serious bodily injury or the death of another[; and]
5. 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.

## **RELEVANT DEFINITIONS**

(approved by subcommittee)

A “house of worship” means a church, temple, synagogue, mosque, or other building set apart primarily for the purpose of worship in which religious services are held and the main body of which is kept for that use and not put to any other use inconsistent with its primary purpose. (Utah Code Ann. § 76-10-501)

A “correctional facility” means:

- (i) any facility operated by or contracting with the Department of Corrections to house offenders in either a secure or nonsecure setting;
- (ii) any facility operated by a municipality or a county to house or detain criminal offenders;
- (iii) any juvenile detention facility; and
- (iv) any building or grounds appurtenant to the facility or lands granted to the state, municipality, or county for use as a correctional facility. (Utah Code Ann. § 76-8-311.3).

A “firearm” means a pistol, revolver, shotgun, short barreled shotgun, rifle or short barreled rifle, or a device that could be used as a dangerous weapon from which is expelled a projectile by action of an explosive. (Utah Code Ann. § 76-10-501).

## POSSESSION OF DRUG PARAPHERNALIA

(Utah Code Ann. §58-37a-5)

(approved, but see Karen's alternative to bolded language)

**(consistent with statutory language)**

(DEFENDANT'S NAME) is charged [in Count \_\_\_\_] with committing Possession of Drug Paraphernalia [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 and knowingly
3. used or possessed with intent to use
4. drug paraphernalia
5. **to [plant], [propagate], [cultivate], [grow], [harvest], [manufacture], [compound], [convert], [produce], [process], [prepare], [test], [analyze], [pack], [repack], [store], [contain], [conceal], [inject], [ingest], [inhale] or [otherwise introduce a controlled substance into the human body].**

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.

## POSSESSION OF DRUG PARAPHERNALIA

(Utah Code Ann. §58-37a-5)

**(Karen's alternative - not consistent with exact statutory language but seems more consistent with legislative intent)**

(DEFENDANT'S NAME) is charged [in Count \_\_\_\_] with committing Possession of Drug Paraphernalia [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 and knowingly
3. used or possessed with intent to use
4. drug paraphernalia
- [5. to [plant], [propagate], [cultivate], [grow], [harvest], [manufacture], [compound], [convert], [produce], [process], [prepare], [test], [analyze, [pack], [repack], [store], [contain], or [conceal] a controlled substance] [or]**
- [6. to [inject], [ingest], [inhale] or otherwise introduce a controlled substance into the human body.]**

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.

## DEFINITION OF "DRUG PARAPHERNALIA"

(Utah Code Ann. § 58-37a-3)

(approved – but see Karen's alternative)

**(We discussed trying to simplify some of these alternatives, but committee members were uncomfortable with deviating from statutory language)**

You are instructed that "drug paraphernalia" means any equipment, product, or material used, or intended for use, to [plant], [propagate], [cultivate], [grow], [harvest], [manufacture], [compound], [convert], [produce], [process], [prepare], [test], [analyze], [package], [repackage], [store], [contain], [conceal], [inject], [ingest], [inhale], [or to otherwise introduce a controlled substance into the human body], and that it includes but is not limited to:

[(1) kits used, or intended for use, in planting, propagating, cultivating, growing, or harvesting any species of plant which is a controlled substance or from which a controlled substance can be derived];

[(2) kits used, or intended for use, in manufacturing, compounding, converting, producing, processing, or preparing a controlled substance];

[(3) isomerization devices used, or intended for use, to increase the potency of any species of plant which is a controlled substance];

[(4) testing equipment used, or intended for use, to identify or to analyze the strength, effectiveness, or purity of a controlled substance];

[(5) scales and balances used, or intended for use, in weighing or measuring a controlled substance];

[(6) diluents and adulterants, such as quinine hydrochloride, mannitol, mannited, dextrose and lactose, used, or intended for use to cut a controlled substance];

[(7) separation gins and sifters used, or intended for use to remove twigs, seeds, or other impurities from marihuana];

[(8) blenders, bowls, containers, spoons and mixing devices used, or intended for use to compound a controlled substance];

[(9) capsules, balloons, envelopes, and other containers used, or intended for use to package small quantities of a controlled substance];

[(10) containers and other objects used, or intended for use to store or conceal a controlled substance];

[(11) hypodermic syringes, needles, and other objects used, or intended for use to parenterally inject a controlled substance into the human body, except as provided in Section 58-37a-5]; and

[(12) objects used, or intended for use to ingest, inhale, or otherwise introduce a controlled substance into the human body, including but not limited to]:

[(a) metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls];

[(b) water pipes];

[(c) carburetion tubes and devices];

[(d) smoking and carburetion masks];

[(e) roach clips: meaning objects used to hold burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand];

[(f) miniature cocaine spoons and cocaine vials];

[(g) chamber pipes];

[(h) carburetor pipes];

[(i) electric pipes];

[(j) air-driven pipes];

[(k) chillums];

[(l) bongs]; and

[(m) ice pipes or chillers].

## DEFINITION OF "DRUG PARAPHERNALIA"

(Utah Code Ann. § 58-37a-3)

**(Karen's alternative - I have divided the initial paragraph to take into account missing language from the statute. The bolded language is language that I have added.)**

You are instructed that "drug paraphernalia" means any equipment, product, or material used, or intended for use,

- to[plant], [propagate], [cultivate], [grow], [harvest], [manufacture], [compound], [convert], [produce], [process], [prepare], [test], [analyze], [package], [repackage], [store], [contain], [conceal]a controlled substance; OR  
- **to**[inject, [ingest], [inhale], or to otherwise introduce a controlled substance into the human body.

You are further instructed that "drug paraphernalia" includes but is not limited to:

[(1) kits used, or intended for use, in planting, propagating, cultivating, growing, or harvesting any species of plant which is a controlled substance or from which a controlled substance can be derived];

[(2) kits used, or intended for use, in manufacturing, compounding, converting, producing, processing, or preparing a controlled substance];

[(3) isomerization devices used, or intended for use, to increase the potency of any species of plant which is a controlled substance];

[(4) testing equipment used, or intended for use, to identify or to analyze the strength, effectiveness, or purity of a controlled substance];

[(5) scales and balances used, or intended for use, in weighing or measuring a controlled substance];

[(6) diluents and adulterants, such as quinine hydrochloride, mannitol, mannited, dextrose and lactose, used, or intended for use to cut a controlled substance];

[(7) separation gins and sifters used, or intended for use to remove twigs, seeds, or other impurities from marihuana];

[(8) blenders, bowls, containers, spoons and mixing devices used, or intended for use to compound a controlled substance];

[(9) capsules, balloons, envelopes, and other containers used, or intended for use to package small quantities of a controlled substance];

[(10) containers and other objects used, or intended for use to store or conceal a controlled substance];

[(11) hypodermic syringes, needles, and other objects used, or intended for use to parenterally inject a controlled substance into the human body, except as provided in Section 58-37a-5]; and

[(12) objects used, or intended for use to ingest, inhale, or otherwise introduce a controlled substance into the human body, including but not limited to]:

[(a) metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls];

[(b) water pipes];

[(c) carburetion tubes and devices];

[(d) smoking and carburetion masks];

[(e) roach clips: meaning objects used to hold burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand];

[(f) miniature cocaine spoons and cocaine vials];

[(g) chamber pipes];

[(h) carburetor pipes];

[(i) electric pipes];

[(j) air-driven pipes];

[(k) chillums];

[(l) bong]; and

[(m) ice pipes or chillers].

## FACTORS RELEVANT TO IDENTIFYING DRUG PARAPHERNALIA

(Utah Code Ann. § 58-37a-4)

**(approved-although one committee member suggested not bracketing any of the factors -**

**Also need to replace statutory reference in 13 (see italicized language) -**

**Also see also Karen's short version)**

In determining whether an object is drug paraphernalia, you should consider:

- [(1) statements by an owner or by anyone in control of the object concerning its use;]
- [(2) prior convictions, if any, of an owner, or of anyone in control of the object, under any state or federal law relating to a controlled substance;]
- [(3) the proximity of the object, in time and space, to a direct violation of this chapter;]
- [(4) the proximity of the object to a controlled substance;]
- [(5) the existence of any residue of a controlled substance on the object;]
- [(6) instructions whether oral or written, provided with the object concerning its use;]
- [(7) descriptive materials accompanying the object which explain or depict its use;]
- [(8) national and local advertising concerning its use;]
- [(9) the manner in which the object is displayed for sale;]
- [(10) whether the owner or anyone in control of the object is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;]
- [(11) direct or circumstantial evidence of the ratio of sales of the object to the total sales of the business enterprise;]
- [(12) the existence and scope of legitimate uses of the object in the community;]
- [(13) whether the object is subject to Section 58-37a-5; ]***
- [(14) expert testimony concerning its use; and]
- (15) Any other logically relevant factor.

## **FACTORS RELEVANT TO IDENTIFYING DRUG PARAPHERNALIA**

(Utah Code Ann. § 58-37A-4)

**(Karen's short version - containing what I perceive to be the most common factors considered)**

In determining whether an object is drug paraphernalia, you should consider:

- (1) Statements by an owner or by anyone in control of the object concerning its use;
- (2) The proximity of the object to a controlled substance;
- (3) The existence of any residue of a controlled substance on the object;
- (4) The existence and scope of legitimate uses of the object in the community;
- (5) Expert testimony concerning its use; and
- (6) Any other logically relevant factor.

## CONSTRUCTIVE POSSESSION (Alternative 1)

To prove Possession or Use of [a Controlled Substance] [Paraphernalia], as defined in Instruction \_\_\_, the State must prove that (DEFENDANT'S NAME) possessed the [controlled substance] [paraphernalia]. The State may prove that element by proving constructive possession of the [controlled substance] [paraphernalia].

To find that (DEFENDANT'S NAME) had constructive possession of the [controlled substance] [paraphernalia], you must find that the evidence establishes a sufficient nexus or connection between the accused and the [controlled substance] [paraphernalia] to permit a reasonable inference that (DEFENDANT'S NAME) had both the power and the intent to exercise dominion and control over the [controlled substance] [paraphernalia].

Factors relevant to deciding whether (DEFENDANT'S NAME) constructively possessed the [controlled substance] [paraphernalia], include, but are not limited to:

- ownership and/or occupancy of the [residence] [vehicle] [property] where the [controlled substance] [paraphernalia] was found;
- whether that ownership and/or occupancy was exclusive;
- presence of (DEFENDANT'S NAME) at the time the [controlled substance] [paraphernalia] was found;
- (DEFENDANT'S NAME) proximity to the [controlled substance] [paraphernalia];
- previous drug use;
- incriminating statements or behavior;
- presence of the [controlled substance] [paraphernalia] in a location where (DEFENDANT'S NAME) had control; and
- other people who also had access to the location of the drugs.

**If the evidence does not support a reasonable inference that (DEFENDANT'S NAME) had both the power and intent to exercise dominion and control over the [controlled substance] [paraphernalia], you cannot find constructive possession.**

## CONSTRUCTIVE POSSESSION (Alternative 2)

To prove Possession or Use of a [Controlled Substance] [Paraphernalia], as defined in Instruction \_\_\_\_, the State must prove that (DEFENDANT'S NAME) possessed the [controlled substance] [paraphernalia]. The State may prove this element by proving constructive possession of the [controlled substance] [paraphernalia]. **The State must prove constructive possession beyond a reasonable doubt.**

To find that (DEFENDANT'S NAME) had constructive possession of the [controlled substance] [paraphernalia], you must find that the evidence establishes a sufficient nexus or connection between the accused and the [controlled substance] [paraphernalia] to permit a reasonable inference that (DEFENDANT'S NAME) had both the power and the intent to exercise dominion and control over the [controlled substance] [paraphernalia].

Factors relevant to deciding whether (DEFENDANT'S NAME) constructively possessed the [controlled substance] [paraphernalia], include, but are not limited to:

- ownership and/or occupancy of the [residence] [vehicle] [property] where the [controlled substance] [paraphernalia] was found;
- whether that ownership and/or occupancy was exclusive;
- presence of (DEFENDANT'S NAME) at the time the [controlled substance] [paraphernalia] was found;
- (DEFENDANT'S NAME) proximity to the [controlled substance] [paraphernalia];
- previous drug use;
- incriminating statements or behavior
- presence of the [controlled substance] [paraphernalia] in a location where (DEFENDANT'S NAME) had control; and
- other people who also had access to the location of the drugs.

## CONSTRUCTIVE POSSESSION (Alternative 3)

To prove Possession or Use of a [Controlled Substance] [Paraphernalia], as defined in Instruction \_\_\_\_, the State must prove that (DEFENDANT'S NAME) possessed the [controlled substance] [paraphernalia]. The State may prove this element by proving constructive possession of the [controlled substance][paraphernalia].

To find that (DEFENDANT'S NAME) had constructive possession of the [controlled substance] [paraphernalia], you must find that the evidence establishes a sufficient nexus or connection between the accused and the [controlled substance] [paraphernalia] to permit a reasonable inference that (DEFENDANT'S NAME) had both the power and the intent to exercise dominion and control over the [controlled substance] [paraphernalia].

Factors relevant to deciding whether (DEFENDANT'S NAME) constructively possessed the [controlled substance] [paraphernalia], include, but are not limited to:

- ownership and/or occupancy of the [residence] [vehicle] [property] where the [controlled substance] [paraphernalia] was found;
- whether that ownership and/or occupancy was exclusive;
- presence of (DEFENDANT'S NAME) at the time the [controlled substance] [paraphernalia] was found;
- (DEFENDANT'S NAME) proximity to the [controlled substance] [paraphernalia];
- previous drug use;
- incriminating statements or behavior
- presence of the [controlled substance] [paraphernalia] in a location where (DEFENDANT'S NAME) had control; and
- other people who also had access to the location of the drugs.

**The State has the burden to prove beyond a reasonable doubt that (DEFENDANT'S NAME) had both the power and intent to exercise dominion and control over the [controlled substance] [paraphernalia]. If the State has not met its burden, you cannot find that (DEFENDANT'S NAME) constructively possessed the [controlled substance] [paraphernalia].**

## INNOCENT POSSESSION

You must decide whether the defense of innocent possession applies in this case. The defendant is not guilty of [OFFENSE] if

- (1) the controlled substance [he][she]he possessed was obtained innocently and held with no illicit or illegal purpose, and
- (2) [his][her] possession of the controlled substance was transitory; that is, the defendant took adequate measures to rid him or herself of possession of the controlled substance as promptly as reasonably possible.

## POSSESSION OF MARIJUANA

Needs special verdict form.

# Tab 3

West's Utah Code Annotated

Title 58. Occupations and Professions

Chapter 37. Utah Controlled Substances Act (Refs & Annos)

U.C.A. 1953 § 58-37-2

**§ 58-37-2. Definitions**

Currentness

(1) As used in this chapter:

(a) "Administer" means the direct application of a controlled substance, whether by injection, inhalation, ingestion, or any other means, to the body of a patient or research subject by:

(i) a practitioner or, in the practitioner's presence, by the practitioner's authorized agent; or

(ii) the patient or research subject at the direction and in the presence of the practitioner.

(b) "Agent" means an authorized person who acts on behalf of or at the direction of a manufacturer, distributor, or practitioner but does not include a motor carrier, public warehouseman, or employee of any of them.

(c) "Consumption" means ingesting or having any measurable amount of a controlled substance in a person's body, but this Subsection (1)(c) does not include the metabolite of a controlled substance.

(d) "Continuing criminal enterprise" means any individual, sole proprietorship, partnership, corporation, business trust, association, or other legal entity, and any union or groups of individuals associated in fact although not a legal entity, and includes illicit as well as licit entities created or maintained for the purpose of engaging in conduct which constitutes the commission of episodes of activity made unlawful by Title 58, Chapter 37, Utah Controlled Substances Act, Chapter 37a, Utah Drug Paraphernalia Act, Chapter 37b, Imitation Controlled Substances Act, Chapter 37c, Utah Controlled Substance Precursor Act, or Chapter 37d, Clandestine Drug Lab Act, which episodes are not isolated, but have the same or similar purposes, results, participants, victims, methods of commission, or otherwise are interrelated by distinguishing characteristics. Taken together, the episodes shall demonstrate continuing unlawful conduct and be related either to each other or to the enterprise.

(e) "Control" means to add, remove, or change the placement of a drug, substance, or immediate precursor under Section 58-37-3.

(f)(i) "Controlled substance" means a drug or substance:

(A) included in Schedules I, II, III, IV, or V of Section 58-37-4;

(B) included in Schedules I, II, III, IV, or V of the federal Controlled Substances Act, Title II, P.L. 91-513;<sup>1</sup>

(C) that is a controlled substance analog; or

(D) listed in Section 58-37-4.2.

(ii) "Controlled substance" does not include:

(A) distilled spirits, wine, or malt beverages, as those terms are defined in Title 32B, Alcoholic Beverage Control Act;

(B) any drug intended for lawful use in the diagnosis, cure, mitigation, treatment, or prevention of disease in human or other animals, which contains ephedrine, pseudoephedrine, norpseudoephedrine, or phenylpropanolamine if the drug is lawfully purchased, sold, transferred, or furnished as an over-the-counter medication without prescription; or

(C) dietary supplements, vitamins, minerals, herbs, or other similar substances including concentrates or extracts, which:

(I) are not otherwise regulated by law; and

(II) may contain naturally occurring amounts of chemical or substances listed in this chapter, or in rules adopted pursuant to Title 63G, Chapter 3, Utah Administrative Rulemaking Act.

(g)(i) "Controlled substance analog" means:

(A) a substance the chemical structure of which is substantially similar to the chemical structure of a controlled substance listed in Schedules I and II of Section 58-37-4, a substance listed in Section 58-37-4.2, or in Schedules I and II of the federal Controlled Substances Act, Title II, P.L. 91-513;

(B) a substance which has a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of controlled substances listed in Schedules I and II of Section 58-37-4, substances listed in Section 58-37-4.2, or substances listed in Schedules I and II of the federal Controlled Substances Act, Title II, P.L. 91-513; or

(C) A substance which, with respect to a particular individual, is represented or intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of controlled substances listed in Schedules I and II of Section 58-37-4, substances listed in Section 58-37-4.2, or substances listed in Schedules I and II of the federal Controlled Substances Act, Title II, P.L. 91-513.

(ii) "Controlled substance analog" does not include:

(A) a controlled substance currently scheduled in Schedules I through V of Section 58-37-4;

(B) a substance for which there is an approved new drug application;

(C) a substance with respect to which an exemption is in effect for investigational use by a particular person under Section 505 of the Food, Drug, and Cosmetic Act, 21 U.S.C. 355, to the extent the conduct with respect to the substance is permitted by the exemption;

(D) any substance to the extent not intended for human consumption before an exemption takes effect with respect to the substance;

(E) any drug intended for lawful use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals, which contains ephedrine, pseudoephedrine, norpseudoephedrine, or phenylpropanolamine if the drug is lawfully purchased, sold, transferred, or furnished as an over-the-counter medication without prescription; or

(F) dietary supplements, vitamins, minerals, herbs, or other similar substances including concentrates or extracts, which are not otherwise regulated by law, which may contain naturally occurring amounts of chemical or substances listed in this chapter, or in rules adopted pursuant to Title 63G, Chapter 3, Utah Administrative Rulemaking Act.

(h)(i) “Conviction” means a determination of guilt by verdict, whether jury or bench, or plea, whether guilty or no contest, for any offense proscribed by:

- (A) Chapter 37, Utah Controlled Substances Act;
- (B) Chapter 37a, Utah Drug Paraphernalia Act;
- (C) Chapter 37b, Imitation Controlled Substances Act;
- (D) Chapter 37c, Utah Controlled Substance Precursor Act; or
- (E) Chapter 37d, Clandestine Drug Lab Act; or

(ii) for any offense under the laws of the United States and any other state which, if committed in this state, would be an offense under:

- (A) Chapter 37, Utah Controlled Substances Act;
- (B) Chapter 37a, Utah Drug Paraphernalia Act;
- (C) Chapter 37b, Imitation Controlled Substances Act;
- (D) Chapter 37c, Utah Controlled Substance Precursor Act; or
- (E) Chapter 37d, Clandestine Drug Lab Act.

(i) “Counterfeit substance” means:

(i) any controlled substance or container or labeling of any controlled substance that:

(A) without authorization bears the trademark, trade name, or other identifying mark, imprint, number, device, or any likeness of them, of a manufacturer, distributor, or dispenser other than the person or persons who in fact manufactured, distributed, or dispensed the substance which falsely purports to be a controlled substance distributed by any other manufacturer, distributor, or dispenser; and

(B) a reasonable person would believe to be a controlled substance distributed by an authorized manufacturer, distributor, or dispenser based on the

appearance of the substance as described under Subsection (1)(i)(i)(A) or the appearance of the container of that controlled substance; or

(ii) any substance other than under Subsection (1)(i)(i) that:

(A) is falsely represented to be any legally or illegally manufactured controlled substance; and

(B) a reasonable person would believe to be a legal or illegal controlled substance.

(j) "Deliver" or "delivery" means the actual, constructive, or attempted transfer of a controlled substance or a listed chemical, whether or not an agency relationship exists.

(k) "Department" means the Department of Commerce.

(l) "Depressant or stimulant substance" means:

(i) a drug which contains any quantity of barbituric acid or any of the salts of barbituric acid;

(ii) a drug which contains any quantity of:

(A) amphetamine or any of its optical isomers;

(B) any salt of amphetamine or any salt of an optical isomer of amphetamine;  
or

(C) any substance which the Secretary of Health and Human Services or the Attorney General of the United States after investigation has found and by regulation designated habit-forming because of its stimulant effect on the central nervous system;

(iii) lysergic acid diethylamide; or

(iv) any drug which contains any quantity of a substance which the Secretary of Health and Human Services or the Attorney General of the United States after investigation has found to have, and by regulation designated as having, a potential for abuse because of its depressant or stimulant effect on the central nervous system or its hallucinogenic effect.

(m) "Dispense" means the delivery of a controlled substance by a pharmacist to an ultimate user pursuant to the lawful order or prescription of a practitioner, and includes distributing to, leaving with, giving away, or disposing of that substance as well as the packaging, labeling, or compounding necessary to prepare the substance for delivery.

(n) "Dispenser" means a pharmacist who dispenses a controlled substance.

(o) "Distribute" means to deliver other than by administering or dispensing a controlled substance or a listed chemical.

(p) "Distributor" means a person who distributes controlled substances.

(q) "Division" means the Division of Occupational and Professional Licensing created in Section 58-1-103.

(r)(i) "Drug" means:

(A) a substance recognized in the official United States Pharmacopoeia, Official Homeopathic Pharmacopoeia of the United States, or Official National Formulary, or any supplement to any of them, intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in humans or animals;

(B) a substance that is required by any applicable federal or state law or rule to be dispensed by prescription only or is restricted to administration by practitioners only;

(C) a substance other than food intended to affect the structure or any function of the body of humans or other animals; and

(D) substances intended for use as a component of any substance specified in Subsections (1)(r)(i)(A), (B), and (C).

(ii) "Drug" does not include dietary supplements.

(s) "Drug dependent person" means any individual who unlawfully and habitually uses any controlled substance to endanger the public morals, health, safety, or welfare, or who is so dependent upon the use of controlled substances as to have lost the power of self-control with reference to the individual's dependency.

(t) "Food" means:

(i) any nutrient or substance of plant, mineral, or animal origin other than a drug as specified in this chapter, and normally ingested by human beings; and

(ii) foods for special dietary uses as exist by reason of a physical, physiological, pathological, or other condition including but not limited to the conditions of disease, convalescence, pregnancy, lactation, allergy, hypersensitivity to food, underweight, and overweight; uses for supplying a particular dietary need which exist by reason of age including but not limited to the ages of infancy and childbirth, and also uses for supplementing and for fortifying the ordinary or unusual diet with any vitamin, mineral, or other dietary property for use of a food. Any particular use of a food is a special dietary use regardless of the nutritional purposes.

(u) "Immediate precursor" means a substance which the Attorney General of the United States has found to be, and by regulation designated as being, the principal compound used or produced primarily for use in the manufacture of a controlled substance, or which is an immediate chemical intermediary used or likely to be used in the manufacture of a controlled substance, the control of which is necessary to prevent, curtail, or limit the manufacture of the controlled substance.

(v) "Indian" means a member of an Indian tribe.

(w) "Indian religion" means any religion:

(i) the origin and interpretation of which is from within a traditional Indian culture or community; and

(ii) which is practiced by Indians.

(x) "Indian tribe" means any tribe, band, nation, pueblo, or other organized group or community of Indians, including any Alaska Native village, which is legally recognized as eligible for and is consistent with the special programs, services, and entitlements provided by the United States to Indians because of their status as Indians.

(y) "Manufacture" means the production, preparation, propagation, compounding, or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis.

(z) “Manufacturer” includes any person who packages, repackages, or labels any container of any controlled substance, except pharmacists who dispense or compound prescription orders for delivery to the ultimate consumer.

(aa) “Marijuana” means all species of the genus *cannabis* and all parts of the genus, whether growing or not; the seeds of it; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin. The term does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks, except the resin extracted from them, fiber, oil or cake, or the sterilized seed of the plant which is incapable of germination. Any synthetic equivalents of the substances contained in the plant *cannabis sativa* or any other species of the genus *cannabis* which are chemically indistinguishable and pharmacologically active are also included.

(bb) “Money” means officially issued coin and currency of the United States or any foreign country.

(cc) “Narcotic drug” means any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(i) opium, coca leaves, and opiates;

(ii) a compound, manufacture, salt, derivative, or preparation of opium, coca leaves, or opiates;

(iii) opium poppy and poppy straw; or

(iv) a substance, and any compound, manufacture, salt, derivative, or preparation of the substance, which is chemically identical with any of the substances referred to in Subsection (1)(cc)(i), (ii), or (iii), except narcotic drug does not include decocainized coca leaves or extracts of coca leaves which do not contain cocaine or ecgonine.

(dd) “Negotiable instrument” means documents, containing an unconditional promise to pay a sum of money, which are legally transferable to another party by endorsement or delivery.

(ee) "Opiate" means any drug or other substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having addiction-forming or addiction-sustaining liability.

(ff) "Opium poppy" means the plant of the species *papaver somniferum* L., except the seeds of the plant.

(gg) "Person" means any corporation, association, partnership, trust, other institution or entity or one or more individuals.

(hh) "Poppy straw" means all parts, except the seeds, of the opium poppy, after mowing.

(ii) "Possession" or "use" means the joint or individual ownership, control, occupancy, holding, retaining, belonging, maintaining, or the application, inhalation, swallowing, injection, or consumption, as distinguished from distribution, of controlled substances and includes individual, joint, or group possession or use of controlled substances. For a person to be a possessor or user of a controlled substance, it is not required that the person be shown to have individually possessed, used, or controlled the substance, but it is sufficient if it is shown that the person jointly participated with one or more persons in the use, possession, or control of any substances with knowledge that the activity was occurring, or the controlled substance is found in a place or under circumstances indicating that the person had the ability and the intent to exercise dominion and control over it.

(jj) "Practitioner" means a physician, dentist, naturopathic physician, veterinarian, pharmacist, scientific investigator, pharmacy, hospital, or other person licensed, registered, or otherwise permitted to distribute, dispense, conduct research with respect to, administer, or use in teaching or chemical analysis a controlled substance in the course of professional practice or research in this state.

(kk) "Prescribe" means to issue a prescription:

(i) orally or in writing; or

(ii) by telephone, facsimile transmission, computer, or other electronic means of communication as defined by division rule.

(ll) "Prescription" means an order issued:

(i) by a licensed practitioner, in the course of that practitioner's professional practice or by collaborative pharmacy practice agreement; and

(ii) for a controlled substance or other prescription drug or device for use by a patient or an animal.

(mm) "Production" means the manufacture, planting, cultivation, growing, or harvesting of a controlled substance.

(nn) "Securities" means any stocks, bonds, notes, or other evidences of debt or of property.

(oo) "State" means the state of Utah.

(pp) "Ultimate user" means any person who lawfully possesses a controlled substance for the person's own use, for the use of a member of the person's household, or for administration to an animal owned by the person or a member of the person's household.

(2) If a term used in this chapter is not defined, the definition and terms of Title 76, Utah Criminal Code, shall apply.

# Tab 4

West's Utah Code Annotated

Title 58. Occupations and Professions

Chapter 37. Utah Controlled Substances Act (Refs & Annos)

U.C.A. 1953 § 58-37-8

§ 58-37-8. Prohibited acts—Penalties

<Section effective October 1, 2015. See, also, section effective until October 1, 2015.>

(1) Prohibited acts A--Penalties:

(a) Except as authorized by this chapter, it is unlawful for any person to knowingly and intentionally:

(i) produce, manufacture, or dispense, or to possess with intent to produce, manufacture, or dispense, a controlled or counterfeit substance;

(ii) distribute a controlled or counterfeit substance, or to agree, consent, offer, or arrange to distribute a controlled or counterfeit substance;

(iii) possess a controlled or counterfeit substance with intent to distribute; or

(iv) engage in a continuing criminal enterprise where:

(A) the person participates, directs, or engages in conduct which results in any violation of any provision of Title 58, Chapters 37, 37a, 37b, 37c, or 37d that is a felony; and

(B) the violation is a part of a continuing series of two or more violations of Title 58, Chapters 37, 37a, 37b, 37c, or 37d on separate occasions that are undertaken in concert with five or more persons with respect to whom the person occupies a position of organizer, supervisor, or any other position of management.

(b) Any person convicted of violating Subsection (1)(a) with respect to:

(i) a substance or a counterfeit of a substance classified in Schedule I or II, a controlled substance analog, or gammahydroxybutyric acid as listed in Schedule III is guilty of a second degree felony, punishable by imprisonment for not more than 15 years, and upon a second or subsequent conviction is guilty of a first

degree felony;

(ii) a substance or a counterfeit of a substance classified in Schedule III or IV, or marijuana, or a substance listed in Section 58-37-4.2 is guilty of a third degree felony, and upon a second or subsequent conviction is guilty of a second degree felony; or

(iii) a substance or a counterfeit of a substance classified in Schedule V is guilty of a class A misdemeanor and upon a second or subsequent conviction is guilty of a third degree felony.

(c) Any person who has been convicted of a violation of Subsection (1)(a)(ii) or (iii) may be sentenced to imprisonment for an indeterminate term as provided by law, but if the trier of fact finds a firearm as defined in Section 76-10-501 was used, carried, or possessed on his person or in his immediate possession during the commission or in furtherance of the offense, the court shall additionally sentence the person convicted for a term of one year to run consecutively and not concurrently; and the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently.

(d) Any person convicted of violating Subsection (1)(a)(iv) is guilty of a first degree felony punishable by imprisonment for an indeterminate term of not less than seven years and which may be for life. Imposition or execution of the sentence may not be suspended, and the person is not eligible for probation.

(2) Prohibited acts B--Penalties:

(a) It is unlawful:

(i) for any person knowingly and intentionally to possess or use a controlled substance analog or a controlled substance, unless it was obtained under a valid prescription or order, directly from a practitioner while acting in the course of the person's professional practice, or as otherwise authorized by this chapter;

(ii) for any owner, tenant, licensee, or person in control of any building, room, tenement, vehicle, boat, aircraft, or other place knowingly and intentionally to permit them to be occupied by persons unlawfully possessing, using, or distributing controlled substances in any of those locations; or

(iii) for any person knowingly and intentionally to possess an altered or forged prescription or written order for a controlled substance.

(b) Any person convicted of violating Subsection (2)(a)(i) with respect to:

(i) marijuana, if the amount is 100 pounds or more, is guilty of a second degree felony; or

(ii) a substance classified in Schedule I or II, or a controlled substance analog, is guilty of a class A misdemeanor on a first or second conviction, and on a third or subsequent conviction is guilty of a third degree felony.

(c) Upon a person's conviction of a violation of this Subsection (2) subsequent to a conviction under Subsection (1)(a), that person shall be sentenced to a one degree greater penalty than provided in this Subsection (2).

(d) Any person who violates Subsection (2)(a)(i) with respect to all other controlled substances not included in Subsection (2)(b)(i) or (ii), including a substance listed in Section 58-37-4.2, or marijuana, is guilty of a class B misdemeanor. Upon a third conviction the person is guilty of a class A misdemeanor, and upon a fourth or subsequent conviction the person is guilty of a third degree felony.

(e) Any person convicted of violating Subsection (2)(a)(i) while inside the exterior boundaries of property occupied by any correctional facility as defined in Section 64-13-1 or any public jail or other place of confinement shall be sentenced to a penalty one degree greater than provided in Subsection (2)(b), and if the conviction is with respect to controlled substances as listed in:

(i) Subsection (2)(b), the person may be sentenced to imprisonment for an indeterminate term as provided by law, and:

(A) the court shall additionally sentence the person convicted to a term of one year to run consecutively and not concurrently; and

(B) the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently; and

(ii) Subsection (2)(d), the person may be sentenced to imprisonment for an indeterminate term as provided by law, and the court shall additionally sentence the person convicted to a term of six months to run consecutively and not concurrently.

(f) Any person convicted of violating Subsection (2)(a)(ii) or(iii) is:

- (i) on a first conviction, guilty of a class B misdemeanor;
- (ii) on a second conviction, guilty of a class A misdemeanor; and
- (iii) on a third or subsequent conviction, guilty of a third degree felony.

(g) A person is subject to the penalties under Subsection (2)(h) who, in an offense not amounting to a violation of Section 76-5-207:

- (i) violates Subsection (2)(a)(i) by knowingly and intentionally having in the person's body any measurable amount of a controlled substance; and
- (ii) operates a motor vehicle as defined in Section 76-5-207 in a negligent manner, causing serious bodily injury as defined in Section 76-1-601 or the death of another.

(h) A person who violates Subsection (2)(g) by having in the person's body:

- (i) a controlled substance classified under Schedule I, other than those described in Subsection (2)(h)(ii), or a controlled substance classified under Schedule II is guilty of a second degree felony;
- (ii) marijuana, tetrahydrocannabinols, or equivalents described in Subsection 58-37-4(2)(a)(iii)(S) or (AA), or a substance listed in Section 58-37-4.2 is guilty of a third degree felony; or
- (iii) any controlled substance classified under Schedules III, IV, or V is guilty of a class A misdemeanor.

(i) A person is guilty of a separate offense for each victim suffering serious bodily injury or death as a result of the person's negligent driving in violation of Subsection 58-37-8(2)(g) whether or not the injuries arise from the same episode of driving.

(3) Prohibited acts C--Penalties:

(a) It is unlawful for any person knowingly and intentionally:

- (i) to use in the course of the manufacture or distribution of a controlled substance a license number which is fictitious, revoked, suspended, or issued to

another person or, for the purpose of obtaining a controlled substance, to assume the title of, or represent oneself to be, a manufacturer, wholesaler, apothecary, physician, dentist, veterinarian, or other authorized person;

(ii) to acquire or obtain possession of, to procure or attempt to procure the administration of, to obtain a prescription for, to prescribe or dispense to any person known to be attempting to acquire or obtain possession of, or to procure the administration of any controlled substance by misrepresentation or failure by the person to disclose receiving any controlled substance from another source, fraud, forgery, deception, subterfuge, alteration of a prescription or written order for a controlled substance, or the use of a false name or address;

(iii) to make any false or forged prescription or written order for a controlled substance, or to utter the same, or to alter any prescription or written order issued or written under the terms of this chapter; or

(iv) to make, distribute, or possess any punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon any drug or container or labeling so as to render any drug a counterfeit controlled substance.

(b)(i) A first or second conviction under Subsection (3)(a)(i), (ii), or (iii) is a class A misdemeanor.

(ii) A third or subsequent conviction under Subsection (3)(a)(i), (ii), or (iii) is a third degree felony.

(c) A violation of Subsection (3)(a)(iv) is a third degree felony.

(4) Prohibited acts D--Penalties:

(a) Notwithstanding other provisions of this section, a person not authorized under this chapter who commits any act that is unlawful under Subsection (1)(a), Section 58-37a-5, or Section 58-37b-4 is upon conviction subject to the penalties and classifications under this Subsection (4) if the trier of fact finds the act is committed:

(i) in a public or private elementary or secondary school or on the grounds of any of those schools during the hours of 6 a.m. through 10 p.m.;

(ii) in a public or private vocational school or postsecondary institution or on the grounds of any of those schools or institutions during the hours of 6 a.m. through 10 p.m.;

(iii) in or on the grounds of a preschool or child-care facility during the preschool's or facility's hours of operation;

(iv) in a public park, amusement park, arcade, or recreation center when the public or amusement park, arcade, or recreation center is open to the public;

(v) in or on the grounds of a house of worship as defined in Section 76-10-501;

(vi) in or on the grounds of a library when the library is open to the public;

(vii) within any area that is within 100 feet of any structure, facility, or grounds included in Subsections (4)(a)(i), (ii), (iii), (iv), (v), and (vi);

(viii) in the presence of a person younger than 18 years of age, regardless of where the act occurs; or

(ix) for the purpose of facilitating, arranging, or causing the transport, delivery, or distribution of a substance in violation of this section to an inmate or on the grounds of any correctional facility as defined in Section 76-8-311.3.

(b)(i) A person convicted under this Subsection (4) is guilty of a first degree felony and shall be imprisoned for a term of not less than five years if the penalty that would otherwise have been established but for this Subsection (4) would have been a first degree felony.

(ii) Imposition or execution of the sentence may not be suspended, and the person is not eligible for probation.

(c) If the classification that would otherwise have been established would have been less than a first degree felony but for this Subsection (4), a person convicted under this Subsection (4) is guilty of one degree more than the maximum penalty prescribed for that offense. This Subsection (4)(c) does not apply to a violation of Subsection (2)(g).

(d)(i) If the violation is of Subsection (4)(a)(ix):

(A) the person may be sentenced to imprisonment for an indeterminate term as provided by law, and the court shall additionally sentence the person convicted

for a term of one year to run consecutively and not concurrently; and

(B) the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently; and

(ii) the penalties under this Subsection (4)(d) apply also to any person who, acting with the mental state required for the commission of an offense, directly or indirectly solicits, requests, commands, coerces, encourages, or intentionally aids another person to commit a violation of Subsection (4)(a)(ix).

(e) It is not a defense to a prosecution under this Subsection (4) that the actor mistakenly believed the individual to be 18 years of age or older at the time of the offense or was unaware of the individual's true age; nor that the actor mistakenly believed that the location where the act occurred was not as described in Subsection (4)(a) or was unaware that the location where the act occurred was as described in Subsection (4)(a).

(5) Any violation of this chapter for which no penalty is specified is a class B misdemeanor.

(6)(a) For purposes of penalty enhancement under Subsections (1) and (2), a plea of guilty or no contest to a violation or attempted violation of this section or a plea which is held in abeyance under Title 77, Chapter 2a, Pleas in Abeyance, is the equivalent of a conviction, even if the charge has been subsequently reduced or dismissed in accordance with the plea in abeyance agreement.

(b) A prior conviction used for a penalty enhancement under Subsection (2) shall be a conviction that is:

(i) from a separate criminal episode than the current charge; and

(ii) from a conviction that is separate from any other conviction used to enhance the current charge.

(7) A person may be charged and sentenced for a violation of this section, notwithstanding a charge and sentence for a violation of any other section of this chapter.

(8)(a) Any penalty imposed for violation of this section is in addition to, and not in lieu of, any civil or administrative penalty or sanction authorized by law.

(b) Where violation of this chapter violates a federal law or the law of another state, conviction or acquittal under federal law or the law of another state for the same act is a bar to prosecution in this state.

(9) In any prosecution for a violation of this chapter, evidence or proof which shows a person or persons produced, manufactured, possessed, distributed, or dispensed a controlled substance or substances, is prima facie evidence that the person or persons did so with knowledge of the character of the substance or substances.

(10) This section does not prohibit a veterinarian, in good faith and in the course of the veterinarian's professional practice only and not for humans, from prescribing, dispensing, or administering controlled substances or from causing the substances to be administered by an assistant or orderly under the veterinarian's direction and supervision.

(11) Civil or criminal liability may not be imposed under this section on:

(a) any person registered under this chapter who manufactures, distributes, or possesses an imitation controlled substance for use as a placebo or investigational new drug by a registered practitioner in the ordinary course of professional practice or research; or

(b) any law enforcement officer acting in the course and legitimate scope of the officer's employment.

(12)(a) Civil or criminal liability may not be imposed under this section on any Indian, as defined in Subsection 58-37-2(1)(v), who uses, possesses, or transports peyote for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion as defined in Subsection 58-37-2(1)(w).

(b) In a prosecution alleging violation of this section regarding peyote as defined in Subsection 58-37-4(2)(a)(iii)(V), it is an affirmative defense that the peyote was used, possessed, or transported by an Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion.

(c)(i) The defendant shall provide written notice of intent to claim an affirmative defense under this Subsection (12) as soon as practicable, but not later than 10 days prior to trial.

(ii) The notice shall include the specific claims of the affirmative defense.

(iii) The court may waive the notice requirement in the interest of justice for good cause shown, if the prosecutor is not unfairly prejudiced by the lack of timely notice.

(d) The defendant shall establish the affirmative defense under this Subsection (12) by a preponderance of the evidence. If the defense is established, it is a complete defense to the charges.

(13)(a) It is an affirmative defense that the person produced, possessed, or administered a controlled substance listed in Section 58-37-4.2 if the person:

(i) was engaged in medical research; and

(ii) was a holder of a valid license to possess controlled substances under Section 58-37-6.

(b) It is not a defense under Subsection (13)(a) that the person prescribed or dispensed a controlled substance listed in Section 58-37-4.2.

(14) It is an affirmative defense that the person possessed, in the person's body, a controlled substance listed in Section 58-37-4.2 if:

(a) the person was the subject of medical research conducted by a holder of a valid license to possess controlled substances under Section 58-37-6; and

(b) the substance was administered to the person by the medical researcher.

(15) The application of any increase in penalty under this section to a violation of Subsection (2)(a)(i) may not result in any greater penalty than a second degree felony. This Subsection (15) takes precedence over any conflicting provision of this section.

(16)(a) It is an affirmative defense to an allegation of the commission of an offense listed in Subsection (16)(b) that the person:

(i) reasonably believes that the person or another person is experiencing an overdose event due to the ingestion, injection, inhalation, or other introduction into the human body of a controlled substance or other substance;

(ii) reports in good faith the overdose event to a medical provider, an emergency medical service provider as defined in Section 26-8a-102, a law enforcement officer, a 911 emergency call system, or an emergency dispatch system, or the person is the subject of a report made under this Subsection (16);

(iii) provides in the report under Subsection (16)(a)(ii) a functional description of the actual location of the overdose event that facilitates responding to the person experiencing the overdose event;

(iv) remains at the location of the person experiencing the overdose event until a responding law enforcement officer or emergency medical service provider arrives, or remains at the medical care facility where the person experiencing an overdose event is located until a responding law enforcement officer arrives;

(v) cooperates with the responding medical provider, emergency medical service provider, and law enforcement officer, including providing information regarding the person experiencing the overdose event and any substances the person may have injected, inhaled, or otherwise introduced into the person's body; and

(vi) is alleged to have committed the offense in the same course of events from which the reported overdose arose.

(b) The offenses referred to in Subsection (16)(a) are:

(i) the possession or use of less than 16 ounces of marijuana;

(ii) the possession or use of a scheduled or listed controlled substance other than marijuana; and

(iii) any violation of Chapter 37a, Utah Drug Paraphernalia Act, or Chapter 37b, Imitation Controlled Substances Act.

(c) As used in this Subsection (16) and in Section 76-3-203.11, "good faith" does not include seeking medical assistance under this section during the course of a law enforcement agency's execution of a search warrant, execution of an arrest warrant, or other lawful search.

(17) If any provision of this chapter, or the application of any provision to any person or circumstances, is held invalid, the remainder of this chapter shall be given effect without the invalid provision or application.

(18) A legislative body of a political subdivision may not enact an ordinance that is less restrictive than any provision of this chapter.

(19)(a) If a minor who is under 18 years of age is found by a court to have violated this section and the violation is the minor's first violation of this section, the court may:

- (i) order the minor to complete a screening as defined in Section 41-6a-501;
- (ii) order the minor to complete an assessment as defined in Section 41-6a-501 if the screening indicates an assessment to be appropriate; and
- (iii) order the minor to complete an educational series as defined in Section 41-6a-501 or substance abuse treatment as indicated by an assessment.

(b) If a minor who is under 18 years of age is found by a court to have violated this section and the violation is the minor's second or subsequent violation of this section, the court shall:

- (i) order the minor to complete a screening as defined in Section 41-6a-501;
- (ii) order the minor to complete an assessment as defined in Section 41-6a-501 if the screening indicates an assessment to be appropriate; and
- (iii) order the minor to complete an educational series as defined in Section 41-6a-501 or substance abuse treatment as indicated by an assessment.