

Prosecuting Drug Offenses

Presented by

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I. THE VICTIMLESS CRIME

Bottom-line, drug cases are “victim” crimes! Society (both national and local), families, the user, you, me, are all victims of drug crimes.

Section Note(s): _____

II. POSSESSION CASES

A. OFFENSE ELEMENTS — §58-37-8(2)

(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 . . . : (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, [or] using, 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. DRUG SCHEDULES – §58-37-4 & 4.2 (<http://www.justice.gov/dea/pubs/scheduling.pdf>)

1. §58-37-4.

Drugs are assigned to the differing drug schedules based upon three factors: (1) the drug’s propensity for physical dependence; (2) the drug’s propensity for psychological dependence; and (3) the drug’s potential for abuse. The drug schedules reflect these factors with Schedule I containing the most serious drugs, to Schedule V which identifies drugs still needing to be controlled but pose the least propensity for addiction and abuse. Below are the most common drugs prosecuted, by schedule.

Schedule I: LSD, Marijuana, Mescaline, MDA, Ecstasy, GHB and Psilocybin.

- Schedule II: Opiates, Codeine, Cocaine, *Hydrocodone, Morphine, *Oxycodone (OxyContin), Percocet, Roxicodone, Oxymorphone, Fentanyl, Methadone, Amphetamine, and Methamphetamine.
- Schedule III: Anabolic Steroids, Benzphetamine (Didrex), Codeine (diluted), *Lortab & Vicodin (both Hydrocodone diluted), and Ketamine.
- Schedule IV: Alprazolam (Xanax), Carisoprodol (Soma), Clonazepam (Klonopin), Darvon, Diazepam (Valium), Lorazepam (Ativan), Meprobamate (Equinil), Nordiazepam, Phenobarbital (Donnatal), Zolpidem (Ambien), and Phentermine (Zantryl).
- Schedule V: Any compound, mixture, or preparation containing any of the following limited quantities of narcotic drugs: Codeine, Dihydrocodeine, Ethylmorphine, Diphenoxylate, Opium, Difenoxin, and Pyrovalerone.

2. §58-37-4.2. **Spice and Bath Salts** (Effective 5/8/2012)

Analogues, homologs and synthetic equivalents of these substances are also controlled substances.

Spice/Synthetic Cannabinoids

AM-694; 1-[(5-fluoropentyl)-1H-indol-3-yl]-(2-iodophenyl)methanone;
 AM-2201; 1-(5-fluoropentyl)-3-(1-naphthoyl)indole;
 CP 47,497 and its C6, C8, and C9 homologs; 2-[(1R,3S)-3-hydroxycyclohexyl] -5-(2-methyloctan-2-yl)phenol;
 HU-210; (6aR,10aR)-9-(hydroxymethyl)-6,6-dimethyl-3-(2-methyloctan-2-yl) -6a,7,10,10a-tetrahydrobenzo[c]chromen-1-ol;
 HU-211; Dexanabinol, (6aS,10aS)-9-(hydroxymethyl)-6,6-dimethyl-3-(2-methyloctan-2-yl)-6a,7,10,10a-tetrahydrobenzo[c]chromen-1-ol;
 JWH-015; (2-methyl-1-propyl-1H-indol-3-yl)-1-naphthalenyl-methanone;
 JWH-018; Naphthalen-1-yl-(pentylindol-3-yl)methanone {also known as 1-Pentyl-3-(1-naphthoyl)indole};
 JWH-019; 1-hexyl-3-(1-naphthoyl)indole;
 JWH-073; Naphthalen-1-yl(1-butylindol-3-yl)methanone {also known as 1-Butyl-3-(1-naphthoyl)indole};
 JWH-081; 4-methoxynaphthalen-1-yl-(1-pentylindol-3-yl)methanone;
 JWH-122; CAS#619294-47-2; (1-Pentyl-3-(4-methyl-1-naphthoyl)indole);
 JWH-200; 1-(2-(4-(morpholinyl)ethyl))-3-(1-naphthoyl)indole;
 JWH-203; 1-pentyl-3-(2-chlorophenylacetyl)indole;
 JWH-210; 4-ethyl-1-naphthalenyl(1-pentyl-1H-indol-3-yl)-methanone;
 JWH-250; 1-pentyl-3-(2-methoxyphenylacetyl)indole;
 JWH-251; 2-(2-methylphenyl)-1-(1-pentyl-1H-indol-3-yl)ethanone;
 JWH-398; 1-pentyl-3-(4-chloro-1-naphthoyl)indole;

RCS-4; 1-pentyl-3-(4-methoxybenzoyl)indole; and,
RCS-8; 1-(2-cyclohexylethyl)-3-(2-methoxyphenylacetyl)indole.

Bath Salts/Designer Drugs

Fluoromethcathinone;

4-methylmethcathinone {also known as mephedrone};

3,4-methylenedioxypyrovalerone {also known as MDPV};

3,4-Methylenedioxymethcathinone {also known as methylone}; and

4-methoxymethcathinone.

3. Newly Identified, Not Listed, Spice and Bath Salt Substances.

Spice: JWH-019, JWH-078, JWH-081 - methoxynaphthyl isomer, JWH-164, JWH-201, JWH-302, AM-2233, AM-1220, MAM-2201, UR-144, XLR11, AM-679, JWH-018 adamantyl analog. (Also URB754 has been identified, however, at this time it can't be testified to as being a controlled substance or an analog.)

Bath Salts: 5-methoxy-DALT, 4-methylethcathinone (4-MEC), 4-Ethyl-2,5-dimethoxyphenethylamine (2C-E), Butylone, 2C-I, Pentylone, Bk-MDEA, 3,4-Methylenedioxy-alpha-pyrrolidinobutiophenone, N,N-Dimethylcathinone, and alpha-Pyrrolidinopentiophenone

C. CONTROLLED SUBSTANCE ANALOGS

1. Definition High-Points —§58-37-2(1)(g).

A controlled substance analog is a substance the chemical structure of which is substantially similar to the chemical structure of, or which has a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to, or 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, controlled substances listed in Schedules I and II of §58-37-4, or §58-37-4.2, or federal Schedules I and II.

A controlled substance analog is NOT a currently scheduled substance, a substance for which there is an approved new drug application, a substance federally exempted for investigational use if used only within the parameters of the exemption, any substance not intended for human consumption before an exemption takes effect, 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 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.

2. Specifically Listed Controlled Substance Analogs — §58-37-5.5.

Gamma Butyrolactone (GBL), Butyrolactone, 1,2 Butanolide, 2-Oxanolone, Tetrahydro-2-Furanone, Dihydro-2 (3H)-Furanone, Tetramethylene Glycol, 1,4 Butanediol; and Gamma Valerolactone.

D. RESIDUE — *State v. Vigh*, 871 P.2d 1030 (Utah App 1994)

“In Utah, ‘[t]he determinative test is possession of a narcotic drug, and not useability of a narcotic drug.’ *State v. Winters*, 16 Utah 2d 139, 396 P.2d 872, 875 (1964). Furthermore, “the key in prosecuting for unlawful possession of narcotics is proving that ‘the accused exercised dominion and control over the drug with knowledge of its presence and narcotic character.’ ” *State v. Warner*, 788 P.2d 1041, 1043 (Utah App.1990) (quoting *Winters* . . .). In Warner, we held that a white powdery residue of methamphetamine was sufficient to support a defendant's conviction for possession although the quantity was insufficient to produce a physical effect. *Id.* at 1043-44. We affirmed the possession conviction in Warner because the defendant exercised control over the drug ‘with knowledge of its presence and narcotic character.’ ”

E. CONSTRUCTIVE POSSESSION

1. *State v. Carlson, Utah*, 635 P.2d 72 (1981).

Actual physical possession of the controlled substance is not necessary. “[Constructive possession] exists ‘where the contraband is subject to [defendant's] dominion and control.’ ”

2. *State v. Fox*, 709 P.2d 316 (Utah 1985).

“Ownership and/or occupancy of the premises upon which the drugs are found, although important factors, are not alone sufficient to establish constructive possession, especially when occupancy is not exclusive.” . . . Some other factors which might combine to show a sufficient nexus between the accused and the drug are: (i) incriminating statements made by the accused; (ii) incriminating behavior of the accused; (iii) presence of drugs in a specific area over which the accused had control, such as a closet or drawer containing the accused's clothing or other personal effects; (iv) presence of drug paraphernalia among the accused's personal effects or in a place over which the accused has special control. . . . In every case, the determination that someone has constructive possession of drugs is a factual determination which turns on the particular circumstances of the case. Among these circumstances must be facts which permit the inference that the accused intended to use the drugs as his or her own.

3. *State v. Layman*, 1999 UT 79.

“Here, the question is whether Michael had sufficient control over another person to

prove constructive possession of something that person had in her physical possession. Rather than looking to the factors listed in *Fox* . . . , we refer to the general test that those factors were used to implement in . . . specific *Fox* . . . situations, to wit, whether there was evidence of a sufficient nexus between the defendant and the drugs or paraphernalia to permit a factual inference that the defendant had the power and the intent to exercise control over those drugs or paraphernalia. Stated differently, to show constructive possession, the State must prove beyond a reasonable doubt that the drugs were subject to the defendant's dominion and control and the defendant had the intent to exercise that control. . . . The only fact tending to prove Michael's control over Gina is that she looked at him when the deputy requested to see the pouch and that Michael shook his head in a negative fashion. This simply is not enough.

4. *Spanish Fork v. Bryan*, 1999 UT App 61.

Simple ownership of the home in which drugs or drug paraphernalia are found is not sufficient for conviction.

5. *State v. Workman*, 2005 UT 66.

“There are a number of nonexhaustive factors to consider in determining whether a defendant had constructive possession over a drug; among those factors are (1) ‘ownership and/or occupancy of the residence or vehicle where the drugs were found,’ (2) ‘presence of defendant at the time drugs were found,’ (3) the ‘defendant's proximity to the drugs,’ (4) ‘previous drug use,’ (5) ‘incriminating statements or behavior,’ and (6) ‘presence of drugs in a specific area where the defendant had control.’”

F. POSSESSION BY USE — *State v. Ireland*, 2005 UT App 22 (Aff 2006 UT 17)

“To prosecute a person in Utah, the State must establish jurisdiction by showing that the offense was “committed either wholly or partly within the state,” Utah Code Ann. § 76-1-201(1)(a) (2003), by a preponderance of the evidence. *See id.* § 76-1-501(3) (2003). At trial, the court relied on the broad definition of “consumption” that allowed the mere metabolization of a controlled substance while in the state to satisfy the jurisdictional requirements. We have rejected that view. Because the trial court used the broad definition, it improperly asserted jurisdiction over the possession or use of a controlled substance charge.”

Note: Causing serious bodily injury while knowingly and intentionally driving a motor vehicle with a Schedule I or II controlled substance in the body (except marijuana or tetahydrocannabinoids or their equivalents), is a 2nd degree felony. Committing the act with marijuana or tetahydrocannabinoids or their equivalents in the body is a 3rd degree felony. Committing the offense with any Schedules III, IV, or V controlled substance in the body is a class A misdemeanor (§58-37-8(b)(2)(g)-(h)).

G. INNOCENT POSSESSION — *State v. Miller*, 2008 UT 61

“We hold that the term ‘possess’ . . . excludes temporary possession of a controlled substance for the purpose of returning it to its lawful owner. Thus, the statute implicitly includes the defense of innocent possession. . . . [T]he defendant's possession of the controlled substances found in his pocket did not violate [the statute] if (1) the controlled substance was obtained innocently and held with no illicit or illegal purpose, and (2) the possession of the controlled substance was transitory; that is, the defendant took adequate measures to rid himself of possession of the controlled substance as promptly as reasonably possible. It will be for the jury to decide whether, given this instruction along with the facts Miller presents, his possession was innocent.”

Note: Miller seems to apply only to Rx controlled substance circumstances.

H. BASIC PENALTIES — §58-37-8(2)(b)-(d)

1. 100 pounds or more of marijuana is a 2nd degree felony.
2. 3rd degree felony if the substance or a counterfeit of a substance is in Schedule I or II, or greater than 16 ounces of marijuana.
3. 1–16 ounces of marijuana is a class A misdemeanor.
4. Class B misdemeanor if the substance or a counterfeit of a substance is in Schedule III, IV, V, or is less than one ounce of marijuana.

Section Note(s): _____

III. ARRANGING/DISTRIBUTION/ PRODUCTION CASES

A. THE STATUTE — §58-37-8(1)(a)

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 those 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.

1. Noteworthy cases.

- a. *State v. Simpson*, 541 P2d 1114 (Utah 1975).

State not required to show that defendant had the intent to distribute a controlled substance “in Utah.” (Defendant stopped to refuel his plane in UT on his way to distribute in ID.)

- b. *State v. Echevarrieta*, 621 P2d 709 (Utah 1980).

Possession of marijuana is not a lesser-included of production of marijuana.

- c. *State v. Devlin*, 699 P2d 717 (Utah 1985).

Incomplete sale of the drug is “attempted distribution.”

- d. *State v. Clark*, 783 P2d 68 (Ut App 1989).

Guilty for “arranging,” even though the sale was never consummated.

- e. *State v. Pelton*, 801 P2d 184 (Ut App 1990).

Directing officers to the place where a sale was to be arranged and to occur was sufficient to convict for “arranging.”

- f. *State v. Gurr*, 904 P2d 238 (Ut App 1995).

Quantity of the controlled substance possessed is not the only factor looked at to determine possession with intent to distribute.

g. *State v. Briggs*, 2008 UT 75.

Proof that “accomplice” was going to possess the controlled substance with intent to distribute herself was not required, only that she intended that the principal have it and intentionally aided him in his possession with intent to distribute.

B. BASIC PENALTIES — §58-37-8(1)

1. 1st degree felony if §58-37-8(1)(a)(iv) is violated, with sentence to 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. 2nd degree felony if the 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.
3. 3rd degree felony if the substance or a counterfeit of a substance classified in Schedule III or IV, or marijuana, or a substance listed in §58-37-4.2.
4. Class A misdemeanor if the substance or a counterfeit of a substance classified in Schedule V.

C. SMUGGLING A CONTROLLED SUBSTANCE INTO A JAIL — §76-8-311.3

No such offense

1. High-Points of Statute — §76-8-311.3(1)(b) & (e), and (5)—(6).
 - a. §76-8-311.3(1)(b): "Controlled substance" means any substance defined as a controlled substance under Title 58, Chapter 37, Utah Controlled Substances Act.
 - b. §76-8-311.3(e): "Medicine" means any prescription drug as defined in Title 58, Chapter 17b, Pharmacy Practice Act, but does not include any controlled substances as defined in Title 58, Chapter 37, Utah Controlled Substances Act.
 - c. §76-8-311.3(5): (b) A person is guilty of a third degree felony who knowingly violates correctional or mental health facility policy or rule by providing or selling to any offender at a correctional facility or detainee within a secure area of a mental health facility any: (ii) medicine, whether or not lawfully prescribed for the offender. (c) An inmate is guilty of a third degree felony who, in violation of correctional or mental health facility policy or rule, possesses at a correctional facility or in a secure area of a mental health facility any: (ii) medicine, other than medicine provided by the facility's health care providers in

compliance with facility policy. . . (e) A person is guilty of a class A misdemeanor who, without the permission of the authority operating the correctional or mental health facility, fails to declare or knowingly possesses at a correctional facility or in a secure area of a mental health facility any: (ii) medicine. (f) A person is guilty of a class B misdemeanor who, without the permission of the authority operating the correctional facility, knowingly engages in any activity that would facilitate the possession of any contraband by an offender in a correctional facility. (g) Exemptions may be granted for worship for Native American inmates pursuant to Section 64-13-40.

- d. §76-8-311.3(6): The possession, distribution, or use of a controlled substance at a correctional facility or in a secure area of a mental health facility shall be prosecuted in accordance with Title 58, Chapter 37, Utah Controlled Substances Act.

D. IMITATION CONTROLLED SUBSTANCES — §58-37b-1

1. The Statute.

- a. §58-37b-2(3): "Imitation controlled substance" means a substance designed or packaged to substantially resemble any legally or illegally manufactured controlled substance, but that is not: (a) a controlled substance; or (b) represented to be any legally or illegally manufactured controlled substance. . . .
- b. §58-37b-2(3) [Produce/Possess with Intent to Distribute/Distribute]: It is unlawful for any person to manufacture, distribute, or possess with intent to distribute, an imitation controlled substance. Any person who violates this section is guilty of a class A misdemeanor.
- c. §58-37b-6 [Possession]: It is unlawful for any person to use, or to possess with intent to use, an imitation controlled substance. Any person who violates this section is guilty of a class C misdemeanor.

2. Noteworthy cases.

- a. *State v Hill*, 688 P2d 450 (Utah 1984).

Baking soda represented and sold as cocaine was imitation substance.
- b. *State v Nelson*, 2007 Ut App 34.

Granular pesticide packaged in Meth-type baggie was imitation substance.

E. FORFEITURE AND SEIZURES

1. Seizure as evidence — *Warden, Md. Penitentiary v. Hayden*, 387 US 294 (1967) & §77-24-2, *et seq.*
 - a. “The rationale most frequently suggested for the rule preventing the seizure of evidence is that "limitations upon the fruit to be gathered tend to limit the quest itself. "*United States v. Poller*, 43 F. 2d 911, 914 (C. A. 2d Cir. 1930). But privacy "would be just as well served by a restriction on search to the even-numbered days of the month. . . . And it would have the extra advantage of avoiding hair-splitting questions" *Kaplan*, op. cit. supra, at 479. The "mere evidence" limitation has spawned exceptions so numerous and confusion so great, in fact, that it is questionable whether it affords meaningful protection. But if its rejection does enlarge the area of permissible searches, the intrusions are nevertheless made after fulfilling the probable cause and particularity requirements of the Fourth Amendment and after the intervention of "a neutral and detached magistrate 310*310. . . ." *Johnson v. United States*, 333 U. S. 10, 14. The Fourth Amendment allows intrusions upon privacy under these circumstances, and there is no viable reason to distinguish intrusions to secure "mere evidence" from intrusions to secure fruits, instrumentalities, or contraband.”
 - b. Once a case is filed, evidence retention is no longer under police control, it’s under the control of the prosecutor. The police agency must obtain authorization from the prosecutor to dispose of evidence (§77-24-2(2)(b)). And the prosecutor may decline release “in anticipation of possible collateral attacks upon the judgment or for use in a potential prosecution. . . .” (§77-24-2(3)(b)).
 - c. Noteworthy case.

State v Davis, 769 P2d 840 (UT App 1989):

(i) Statute is a civil procedure and therefore, the claimant is not entitled to public attorney nor public funds; (ii) Statute is not a forfeiture statute and therefor cannot be used to effectuate a forfeiture; (iii) Defendant whose forgery case was dismissed was entitled to return of the money seized from at the time of his arrest.
2. Seizure for Forfeiture — 58-37-8(13) & §24-1-1, *et seq.*
 - a. High-Points of Statute – 58-37-8(13).
 - i. Any item, or property, related to a violation of §§59-37, 37a, 37b, 37c, or 37d, can be forfeited!

- ii. Forfeiture process can begin by: (1) legal process from court; (2) seizure during arrest or search warrant; (3) seizure of police if there's PC to believe the property is directly or indirectly dangerous to public health; and (iii) if officer has PC to believe the property has been, or intended to be used in violation of the statute and if not seized it will be damaged, destroyed, diminished in value, concealed, or removed from the state.
 - iii. All forfeitures are subject to provisions of §24-1-1, *et seq.*
- 3. Forfeiture Proceedings — §24-1-1, *et seq.*
 - a. Civil proceedings — §24-1-4.
 - i. Within 30 days of the seizure, the seizing agency must (1) prepare detailed inventory, and take steps to protect the pro-property until the forfeiture is complete [cash must be deposited into a separate interest bearing account]; (2) notify the prose-cutor of the seizure, and (3) give notice to all owners and known interest holders.
 - ii. Failure to give notice defeats the forfeiture of that owner or interest holder's interest in the property — unless the agency can give cause for the error, or the owner otherwise had actual notice of the forfeiture.
 - iii. Within 60 days of the seizure, the prosecutor must (1) file a complaint for forfeiture; (2) and serve notice to all owners and known interest holders via summons.
 - iv. Summons can be served by (1) actual service; (2) certified mail to last know address; or (3) publication.
 - v. Failure of the prosecutor to file the complaint defeats the forfeiture.
 - vi. Prosecution burden of proof is "clear and convincing" evi-dence that (1) the claimant/owner/interest holder was involved in violations of §§59-37, 37a, 37b, 37c, or 37d (unless there was a conviction in a criminal case); (2) the pro-property was acquired during the period of conduct or within a reasonable time thereafter; (3) there wasn't a likely source for the acquisition of the property except the violation's conduct.
 - vii. State cannot forfeit "innocent owner or innocent interest holder's" interest in the property!
 - viii. Seized property can ordered released upon a finding of "Hardship," including the cost of hiring an attorney! The court can deny the hardship request if the benefit of release is outweighed by the potential that the

property will be destroyed, concealed, or removed from the state.

- ix. Seizing agency must have special written record keeping policy to deal with property held for forfeiture.

b. In Criminal Proceedings — §24-1-8.

- i. Brought as part of the criminal information.
- ii. Prosecution burden of proof is “beyond a reasonable doubt.”
- iii. Court can enter injunctions or restraining orders. Court is not bound to the rules of evidence in any hearing regarding injunctions and restraining orders.
- iv. Forfeiture to be found by “special verdict” of the jury after the defendant is found guilty of the criminal offense giving rise to the forfeiture.
- v. Non-party claimants cannot intervene in the criminal case, or any appeal, nor bring a separate suit at law or equity against the state or county maintaining the criminal action.
- vi. Once the forfeiture order is entered, the prosecuting office must “publish notice of the order’s intent to dispose of the property as the court directs.”
- vii. Non-party claimant has a right to a jury trial. At trial, the claimant has the burden, and the burden is a “preponderance” of the evidence that: (1) the interest in the property is valid and superior to others, including the defendant; (2) that the property was obtained in a bona fide transaction for value; and (3) that he/she did not know that the property was subject to forfeiture.
- viii. Within 30 days of the published notice, or actual notice, a non-party claimant may petition the court to adjudicate his/her alleged interest in the property. The petition must be in affidavit form, and subject to penalty of perjury. Civil discovery rules apply, and at the hearing the claimant can present witnesses and evidence. The prosecution can rebut with witnesses and evidence. After the hearing, the court can quash or modify the forfeiture order.

c. Provisions which Apply to both Civil & Criminal Forfeitures.

- i. Damages/cost of prosecution by a claimant, including attorney fees & costs, can be leveled against the State if it loses a forfeiture action – even

if only in part or the action is dismissed! Any “win” by a claimant, even if only on part of the action, exacts application of damage and cost awards. (*See, State v. One Lot of Personal Property*, 2004 UT 36.)

- ii. The forfeiture must be “proportional” to level of the statute’s violation. Proportionality is determined by the court.
- iii. Successful claimant has a right of action to sue the seizing agency if the property is damaged or lost while in its custody and care.
- iv. An indigent claimant has the right to a public attorney.

Section Note(s): _____

IV. ENHANCEMENTS AND DRUG FREE ZONES

A. ENHANCEMENTS

- 1. High-Points of the Statutes.
 - a. Possession — §58-37-8(2)(a)–(f).
 - i. All possession charges are enhanced one degree if the defendant has a prior conviction for arranging, selling, or distributing.
 - ii. Possession of marijuana (less than 16 ounces), and all Schedule III & IV controlled substances are enhanced on subsequent convictions: 2nd conviction is a class A misdemeanor, 3rd conviction is a 3rd degree felony.

iii. Violations of §58-37-8(2)(a)(ii) or(iii) are enhanced on subsequent convictions: 2nd conviction is a class A misdemeanor, 3rd conviction is a 3rd degree felony.

iv. Possession in a Jail, or Prison — §58-37-8(2)(e).

Possession of a controlled substance in a jail, prison, or other place of confinement, is enhanced one degree and carries mandatory consecutive sentencing provisions.

b. Production, Arranging, Distributing or Possession with Intent to distribute — §58-37-8(1)(b) & (c).

i. §58-37-8(1)(b).

(1) 1st degree felony if the defendant has a prior conviction for violation of §58-37-8(1)(a) in regard to a substance or a counterfeit of a substance in Schedule I or II, an analog thereof, or gammahydroxybutyric acid as listed in Schedule III.

(2) 2nd degree felony if the defendant has a prior conviction for violation of §58-37-8(1)(a) in regard to a substance or a counterfeit of a substance in Schedule III or IV, or marijuana, or a substance listed in §58-37-4.2.

(3) Class A misdemeanor if the defendant has a prior conviction for violation of §58-37-8(1)(a) in regard to a substance or a counterfeit of a substance classified in Schedule V.

ii. §58-37-8(1)(c).

(1) If the trier of fact finds a firearm was used, carried, or possessed on the defendant's person or in his immediate possession during the commission or in furtherance of a violation of §58-37-8(1)(a)(ii) or (iii) the court may be sentenced to imprisonment for an indeterminate term as provided by law, but, 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.

2. Enhancement within the Information — *State v. Hunt*, 906 P.2d 311 (Utah 1995).

“[W]e hold that under §58-37-8(1)(b) a conviction on count I may serve as the basis for enhancing Hunt's penalty on counts II and III irrespective of the timing of the offenses or the employment of a separate or a multi-count information.”

B. DRUG FREE ZONES (DFZ)

1. Statute — §58-37-8(4).

- (i) in, or on the grounds, of any public or private elementary or secondary school;
- (ii) in, or on the grounds of a public or private vocational school or postsecondary institution;
- (iii) in those portions of any building, park, stadium, or other structure or grounds which are, at the time of the act, being used for an activity sponsored by a school or institution;
- (iv) in, or on the grounds, of a preschool or child-care facility;
- (v) in a public park, amusement park, arcade, or recreation center;
- (vi) in or on the grounds of a house of worship;
- (vii) in a shopping mall, sports facility, stadium, arena, theater, movie house, playhouse, or parking lot or structure adjacent thereto;
- (viii) in or on the grounds of a library;
- (ix) within 1,000 feet of any structure, facility, or grounds included in §§(4)(a)(i), (ii), (iv), (vi), and (vii);
- (x) in the presence of a juvenile, regardless of where the act occurs; or
- (xi) for the purpose of facilitating, arranging, or causing the transport, delivery, or distribution of a substance . . . to an inmate or on the grounds of any jail or prison.

2. Enhanced Penalties.

- a. If predicate offense is a 1st degree felony, it becomes a “Super First” and mandatory sentencing of not less than five years. The imposition or execution of the sentence may not be suspended, and the court cannot grant probation.
- b. One degree enhancement on all other offense levels.
- c. If the violation is of §58-37-8(4)(a)(xi) [arranging/distributing to an inmate or on grounds of prison or jail]: 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 the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently. These provisions also apply to any person who aids & abets a violation of §58-37-8(4)(a)(xi).

3. Statutory Preclusion of Defenses.

It is not a defense that the actor mistakenly believed the juvenile to be an adult at the time of the offense or was unaware of the juvenile’s true age; nor that the actor mistakenly believed that the location where the act occurred was not a DFZ or was unaware that the location where the act occurred was DFZ.

C. NOTEWORTHY CASES.

1. *State v. Vigh*, 871 P.2d 1030 (Utah App. 1994).

“[The] 1000 feet should be measured in a straight line radius extending outward from the school's or other specified structure's property. . . . In short, Utah's sentence enhancement is measured "as the crow flies."

2. *State v. South*, 932 P.2d 622 (Utah App. 1997).

“[DFZ] is additional element for the underlying offenses, to be determined by the trier of fact at trial. Therefore, the State had the burden to prove [it] beyond a reasonable doubt.”

3. *State v. Davis*, 2007 UT App 13.

Court erred in instructing the jury that a city bike path was a DFZ. Jury should have decided the issue.

Section Note(s): _____

V. PRESCRIPTION FRAUD

A. THE STATUTE — §58-37-8(3)

(a) It is unlawful for any person knowingly and intentionally: (i) use a bogus, revoked or suspended license number in the course of manufacturing or distributing a controlled substance, or, to assume the title of, or represent oneself to be, a manufacturer, wholesaler,

apothecary, physician, dentist, veterinarian, or other authorized person, to obtain a controlled substance; (ii) to 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) Any person convicted of violating Subsection (3)(a) is guilty of a third degree felony.

B. NOTEWORTHY CASES

1. *State v Lopez*, 520 P2d 213 (Utah 1974).

Possession of the drug not necessary for Rx fraud charge.

2. *Helmuth v. Morris*, 598 P2d 333 (Utah 1979).

Cannot charge forgery under §76-5-501 and Rx fraud under §58-37-8(3) based upon same facts.

3. *State v Johnson*, 2008 UT App 458 (Unpublished).

No Doctor-patient privilege under URE §506, in not telling prescribing Dr that drugs are coming from other medical provider.

Section Note(s): _____

VI. POSSESSION OF DRUG PARAPHERNALIA – §58-37c-1, *et seq.*

A. HIGH-POINTS OF THE STATUTE.

1. Anything you can think of being used in association with a control substance's production, possession, use, or distribution, is drug paraphernalia (§58-37c-3).
2. Prior convictions (whether state or federal), if any, of an owner, or of anyone in control of the object is admissible to assist the trier of fact in determining whether the item is drug paraphernalia (§58-37c-4(2)).
3. Use of or possession with intent to use, manufacture or distribution, or possession with intent to manufacture or distribute, drug paraphernalia are all specific intent crimes.
4. It's a class A misdemeanor for any person to deliver drug paraphernalia to another, however, it's a 3rd degree felony for an adult to deliver drug paraphernalia to a juvenile who is more than 3-years younger than he/she is.
5. A hookah or smoke shop cannot advertise the sale of drug paraphernalia.
6. Statutory defenses: (a) syringes are sealed sterile package at time of sale or distribution and for legitimate medical purpose, ie inject legitimate Rx or (b) the prevention of disease transmission; and (c) if the syringe is unused and in a sealed sterile package.

B. NOTEWORTHY CASES.

1. *State v. Layman*, 1999 UT 79, and *Spanish Fork v. Bryan* 1999 UT App 61.

“Constructive Possession” applies to possession of drug paraphernalia.
2. *State v. Williams*, 2007 UT 98.

Drug paraphernalia not a lesser-included offense of possession a controlled substance.
3. *State v. Nelson*, 2007 UT App 34.

Defendant's admission that he had used drug paraphernalia was sufficient for conviction, even though the item did not test positive for any controlled substance.
4. *State v. Briggs*, 2008 UT 75.

Proof that “accomplice” was going to use the drug paraphernalia herself was not required, only that she intended that the principal have it and intentionally aided him in the possession and future use of it.

Section Note(s): _____

Appendix 1

Drug Category	CNS Depressants	CNS Stimulants	Hallucinogens	Dissociative Anesthetics	Narcotic Analgesics	Inhalants	Cannabis
HGN	Present	None	None	Present	None	Present	None
VGN	Present	None	None	Present	None	Present	None
Pupil Size	Normal (1)	Dilated	Dilated	Normal	Constricted	Normal (2)	Dilated(3)
LOC	Present	None	None	Present	None	Present	Present
General Indicators	Uncoordinated Disorientated Sluggish Thick, slurred speech Drunk-like behavior Gait ataxia Drowsiness Droopy Eyes Fumbling	Restlessness Body tremors Excited Euphoric Talkative Exaggerated reflexes Anxiety Grinding teeth Nasal redness Runny nose Loss of appetite Insomnia Increased Alertness Dry mouth Irritability	Dazed appearance Body tremors Synesthesia Hallucinations Paranoia Uncoordinated Nausea Disorientated Difficulty in speech Perspiring Poor perception of time/distance Memory loss Flashbacks	Perspiring Warm to the touch Blank stare Difficulty in speech Incomplete verbal responses Repetitive speech Increased pain threshold Cyclic behavior Confused Agitated Hallucinations Possible violent/combative Chemical odor "Moon walking"	Droopy eyelids "On the nod" Drowsiness Depressed reflexes Low, raspy, slow speech Dry mouth Itching Euphoria Track marks Nausea Fresh puncture marks	Residue of substance around mouth/nose Odor of substance possible nausea Slurred speech Disorientation Confusion Bloodshot, watery eyes Lack of muscle control Flushed face Non-communicative Intense headaches	Marked reddening of conjunctiva Odor of marijuana Marijuana debris in mouth Body tremors Eyelid tremors Relaxed inhibitions Increased appetite Impaired perception of time/distance Disorientation. Possible paranoia
Ingestion Methods	Oral Injected (occasionally)	Insufflation (snorting) Smoked Injected Oral	Insufflation Smoked Injected Oral Transdermal	Insufflation Smoked Injected Oral Eye Drops	Insufflation Smoked Injected Oral	Insufflation (Historically have been taken orally)	Smoked Oral
Overdose Signs	Shallow breathing Cold, clammy skin Dilated pupils Rapid, weak pulse	Increased body temperature Hallucinations Convulsions	Long Intense Trip	Long Intense Trip	Slow, shallow breathing Clammy skin Coma Convulsions	Coma	Fatigue Paranoia

Appendix 2

JEFFREY R. BUHMAN #7041
Utah County Attorney
Guy Probert #7284
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Phone: (801) 851-8026
Fax: (801) 8518051

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. SHIANN HAMILTON 6054 Oslo Bay Holladay, UT DOB: 12/25/1991, TRAVIS LEFRANC 6054 Oslo Bay Holladay, UT DOB: 08/31/1990, Defendants.	INFORMATION Case No. Judge OTN Case No. Judge OTN
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The State of Utah, by and through Guy Probert, Deputy Utah County Attorney, charges the defendant(s) with the commission of the following offense(s):

COUNT 1: POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE (DFZ), a First Degree Felony, in violation of Utah Code Ann § 58-37-8(1)(a)(iii), in that on or about 09/30/2011, in Utah County, **the defendants** did knowingly and intentionally

possess, with intent to distribute, Heroin, a Schedule I controlled substance, and furthermore the offense was committed in a drug free zone as defined in Utah Code 58-37-8(4).

COUNT 2: POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE, a First Degree Felony, in violation of Utah Code Ann § 58-37-8(1)(a)(iii), in that on or about 09/30/2011, in Utah County, the defendants did knowingly and intentionally possess, with intent to distribute, Cocaine, a Schedule II controlled substance, that was, and furthermore the offense was committed in a drug free zone as defined in Utah Code 58-37-8(4).

COUNT 3: POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE, a Third Degree Felony, in violation of Utah Code Ann § 58-37-8(1)(a)(iii), in that on or about 09/30/2011, in Salt Lake County, the defendants did knowingly and intentionally possess, with intent to distribute, Xanax (Alprazolam) a Schedule IV controlled substance.

COUNT 4: POSSESSION OR USE OF A CONTROLLED SUBSTANCE, a Class B Misdemeanor, in violation of Utah Code Ann § 58-37-8(2)(a)(i), in that on or about 09/30/2011, in Salt Lake County, the defendants did knowingly and intentionally possess or use Marijuana, a Schedule I controlled substance.

COUNT 5: POSS OF DRUG PARAPHERNALIA IN A DRUG FREE ZONE, a Class A Misdemeanor, in violation of Utah Code Ann § 58-37a-5a, in that on or about 09/30/2011, in Utah County, the defendant did while in a drug-free zone, did knowingly, intentionally or recklessly use, or possess with intent to use, drug paraphernalia 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.

NOTICE: CRIMINAL FORFEITURE OF \$7,699.00 (seven thousand six hundred and ninety-nine dollars): The Plaintiff, State of Utah, elects pursuant to Utah Code Ann. §24-1-8(2) to criminally forfeit from the above named defendants **SHIANN HAMILTON and TRAVIS LEFRANC** as owner(s) all that his/her/their right title and interest in the sum of \$7,699.00 which was seized in part from him/her/them when he/she/they was/were arrested on the charge set out in Count 1 and 2 of this information and during the continuing investigation of the case. The subject property is subject to criminal forfeiture to the State of Utah pursuant to Utah Code Ann. 24-1-1 et seq and Utah Code Ann. §58-37-13 because it was intended to be used to

facilitate the distribution or possession with intent to distribute controlled substances, and/or it was furnished in exchange for a controlled substance, and/or it is illegal contraband used in connection with violations of the *Utah Controlled Substances Act*, kept or located in proximity to controlled substances, and/or it represents proceeds of any violation of the *Utah Controlled Substances Act*.

PROBABLE CAUSE STATEMENT: Scott Spieth, Orem Police Department, having probable cause to believe a crime was committed, submitted evidence in support of the filing of this Information: On 9/30/11 in Orem, acting on information from an informant of an imminent drug sale to a female named Tiffany, police set up observation in the Winco parking lot; a short time later a vehicle of the description given for the transaction entered the parking lot driven by a male later identified as Travis Lefranc and shortly after that police observed a female passenger in the vehicle, later identified as Shiann Hamilton, with some wrapped up plastic in her hand and an open digital scale on the console next to her; as police attempted to make contact with her she attempted to hide the item in her hand at which point police opened the door identified themselves and told her to show her hands; at this point the female apologized and surrendered the item in her hand which was plastic twist which contained heroin; as the investigation proceeded police found a second twist containing heroin and a plastic baggie which contained about 23 balloons which contained cocaine; police also found a spiral bound book in Hamilton's purse in the vehicle which was a record of drug transactions and cash particularly denominated in slang (black and white) terminology for heroin and cocaine and involving substantial sums of money; they also found cash which defendants admitted was proceeds of drug sales; police found tin foil squares with burned residue on one side and burn marks on the other and two pen tubes with brown residue all consistent with cocaine use; both defendants admitted they were there to sell heroin to a person named Tiffany; both admitted that there was further heroin and cocaine in their basement apartment in Holladay and cash which was the proceeds of drug sales; they both admitted that they were unemployed, and that they had invented a story to explain their supply of cash to Hamilton's mother, in whose basement they live; with the consent of both defendants police went to the apartment in Holladay, in Salt Lake County where they found about an ounce more heroin, cocaine and a substantial amount of cash; they also found marijuana and a marijuana pipe with burned residue and a bottle of about 20 Xanax pills of various weights for which they had no prescription; police seized all the drugs and all the cash which defendants identified as being the proceeds of drug sales and provided notice of intention to forfeit the seized funds which totaled \$7,699, which included \$230 removed from the vehicle; the initial stop and arrest in Orem took place within 1000 of a university placing the incidents in Cts 1, 2 and 5 within a drug free zone..

Based upon evidence received from Scott Spieth, Orem Police Department, I have reason to believe the defendant(s) committed the offense(s) as charged herein.

Authorized for presentment and filing this _____ day of _____, 2011.

UTAH COUNTY ATTORNEY'S OFFICE

Sworn to by: _____
Guy Probert
Deputy Utah County Attorney
Attorney for Plaintiff
100 East Center, Suite 2100
Provo, Utah 84606

Appendix 3

NOTICE OF PROPERTY SEIZURE

(Controlled Substances)

In accordance with U.C.A. § 24-1-4(c), you _____, are hereby notified that on _____, the following property, which you may or may not have an interest in, was seized as evidence and for possible forfeiture purposes pursuant to U.C.A. §58-37-13 and § 24-1-1 *et seq.*, under agency case number _____ and will be held by this agency pending approval of its release by the prosecuting attorney where it is held merely as evidence, or a court order of release, or a final determination of forfeiture:

1 _____

2 _____

3 _____

(Use additional sheet(s) if necessary.)

You are further notified that a prosecuting attorney will be, or has been, notified that the above listed property is being seized. You will have one or more of the rights and obligations listed below should the prosecuting attorney elect to proceed with a forfeiture proceeding, with respect to the above listed property or any of it.

a. The statutory basis for forfeiture of the listed property is that it was intended to be used to facilitate the distribution or possession with intent to distribute controlled substances, or it was furnished in exchange for a controlled substance, or it is illegal contraband, or it is a firearm or ammunition used in connection with violations of the *Utah Controlled Substances Act*, kept or located in proximity to controlled substances, or it represents proceeds of any violation of the *Utah Controlled Substances Act*.

b. If you are an indigent person, you may qualify for court-appointed counsel.

c. Some, or all, of the above property may be petitioned for expedited release through a court order, for hardship reasons, in appropriate circumstances (good cause being shown).

d. You may be able to obtain release of some, or all, of the above property, by posting with the district court a surety bond equal to the fair market value of the property.

e. The Prosecuting Attorney may elect to proceed with forfeiture criminally or civilly. If he elects to file a civil, *in rem*, Complaint for Forfeiture against your property it shall be filed within 60 days of the date the property was seized and, in that event, he will mail, personally serve, or publish, a Summons and Notice of Intent, with a copy of the Complaint, to or upon you.

f. After Notice is served, you will have 30 days to file a Claim and Answer to the Complaint for Forfeiture with the court and the prosecuting attorney.

g. You will then receive a request for information, and will have the obligation of providing detailed answers (Discovery) to the prosecuting attorney within 30 days of request, and throughout the course of the forfeiture proceeding.

h. The right to trial by jury will apply in both criminal and civil forfeiture proceedings.

i. If you contest the forfeiture proceeding and lose, you (or your property) may be held liable for all costs associated with the legal proceeding, including costs of maintaining and storing the property, pending the final outcome.

j. If the Prosecuting attorney elects to proceed with forfeiture criminally, notice of that proceeding will be contained in the criminal information filed against you for the conduct giving rise to the forfeiture.

k. If judgment is entered forfeiting all or part of the listed property, the court will order that the property be turned over to the State, with the net proceeds being distributed according to State law in furtherance of the Crime Reduction Assistance Program.

Signature of Notifying Police Officer: _____ Phone Number: _____

Date Served: _____ Method of Service: _____

Address for service of notices: _____

_____ which shall continue to

be my address for service until I give notice of a change of address for service to the seizing agency.

Signature of Interested Owner/Claimant _____ (if served in person)

Seizing agency:

NOPS 2010/2