

AGENDA

COMMITTEE ON THE MODEL UTAH CRIMINAL JURY INSTRUCTIONS

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

12:00	Welcome	Judge James Blanch
12:05	Approval of Minutes (Tab 1)	Judge James Blanch
12:10	Drug Offense Instructions (Tab 2)	Karen Klucznik
1:25	Other Business	
1:30	Adjourn	

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

November 4, 2015
December 2, 2015
January 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, September 2, 2015
12:00 p.m. to 1:30 p.m.
Judicial Council Room

PRESENT

Judge James Blanch, Chair
Alison Adams-Perlac, Staff
Mark Field
Sandi Johnson
Linda Jones
Karen Klucznik
Judge Brendon McCullagh
Steve Nelson
Jesse Nix
Nathan Phelps

EXCUSED

Jennifer Andrus
Professor Carissa Byrne Hessick
David Perry
Judge Michael Westfall
Scott Young

1. Welcome, Approval of Minutes

Judge Blanch

Judge Blanch welcomed everyone to the meeting. All present members of the committee introduced themselves. Judge Blanch asked that committee members who were not present at the meeting introduce themselves at the next meeting.

Judge Blanch expressed condolences for an invaluable member of the committee, Jennifer Andrus, who was seriously injured recently.

Ms. Klucznik moved to approve the minutes from the June 3 meeting. Mr. Phelps seconded the motion and it passed unanimously.

2. Update on CJA 3-418, Website, and Public Comment

Committee

Ms. Adams-Perlac told the committee that the new criminal jury instruction website is now ready for publication.

She also explained Rule CJA 3-418. This rule makes the committee a committee under the Judicial Council. The committee is no longer a standing committee of the Supreme Court.

3. Sex Offense Definitions

Committee

Judge Blanch asked for the discussion on the following definitions.

(a) Indecent Liberties

Mr. Phelps stated that the committee already created a definition for Indecent Liberties. He stated that the court, in *State v. Lewis*, 337 P.3d 1053, stated that “the model Utah jury instructions include appropriate legal definition of indecent liberties.”

Ms. Jones asked if the committee could adopt the definition that the court cited. Judge Blanch stated that this instruction, although vague, was approved by the Court of Appeals. Mr. Phelps read *State v. Lewis*, 337 P.3d 1053, where the court stated:

We quote the model instruction here to demonstrate that an instruction on the definition of “indecent liberties” was readily available to trial counsel and because, in this case, the model instruction's definition accurately reflects current law. We note, however, that the model instructions, taken alone, are “merely advisory and do not necessarily represent correct statements of Utah law.”

Ms. Jones asked if prosecutors used indecent liberties as an alternative. Ms. Johnson agreed that it is one of several alternatives that prosecutors can use.

Ms. Klucznik stated that the brackets in the instruction should be removed. Ms. Jones asked if the brackets should stay because a case could involve criminal activity not over the clothes. Ms. Klucznik answered that it should be in the general instruction.

Ms. Jones stated that the instruction should include bracketed language. She stated that the committee should research statutes dealing with indecent liberties to determine if they require touching over or under clothing. Ms. Klucznik stated there is a case where the touching can be over clothing even for statutes that otherwise require under clothing. Ms. Jones stated that she was concerned that excluding the brackets would create a problem in a case where touching over clothing is not enough. She stated that the instruction, without brackets, would say that over clothing is enough. She stated that if “indecent liberties” is isolated to cases where over clothing is enough, then the brackets are not necessary. Ms. Klucznik stated that in cases where the skin of the breast must be touched to be liable for touching the breast, “incident liberties” covers this scenario even if skin is not touched. She stated that the bracketed phrase applies in every case.

Mr. Phelps read Utah Code 76-5-407: “In any prosecution for the following offenses, any touching, even if accomplished through clothing, is sufficient to constitute the relevant element of the offense [of sodomy on a child and sexual abuse of a child.]”

Ms. Johnson stated that “indecent liberties” is not defined in statute. It is a catch-all definition.

Mr. Phelps stated that only one statute includes “over clothing.” He stated that the other statutes involving “indecent liberties” do not specify that the touching must be over clothing. Ms. Klucznik recommended that the brackets remain until she could research the issue. Judge Blanch stated that keeping the brackets would not preclude practitioners from creating a correct instruction, even if Ms. Klucznik was correct about “over clothing,” because the brackets could easily be removed. Ms. Klucznik stated that the brackets suggest that it only applies in certain cases and she believes it applies to all cases.

Judge Blanch stated that if Ms. Klucznik is correct that over clothing can constitute indecent liberties, then the brackets should be removed. Judge McCullagh stated that this is a question that should be answered.

Ms. Jones moved to approve the instruction with the brackets and if Ms. Klucznik finds a case showing that Indecent Liberties can occur over clothing, then the brackets will be removed. Judge McCullagh seconded the motion and it passed unanimously.

Subsequent to the meeting, Ms. Klucznik emailed the committee with the case of *State v. Peters*, 796 P.2d 708, 711 & n.5 (Utah App. 1990). *Based on this case and on the motion made in the meeting, Ms. Adams-Perlac removed the brackets and added the case to the committee notes.*

(b) Position of Special Trust

Ms. Jones asked if the definition was post-*Watkins*. She stated that a pre-*Watkins* instruction was needed because the earlier definition applies to old cases. Ms. Klucznik agreed that prosecutors would be using the old definitions. Ms. Adams-Perlac stated that the alternative instruction could be placed in the archive. Ms. Jones stated that the alternative instruction should be in a committee note rather than hidden in an archive. Judge Blanch explained that the committee already decided to create an archive for older statutes.

Ms. Klucznik stated that the instruction should include, “this jury instruction relies on the statute in effect in [YEAR].” She stated that some cases would be older because of the statute of limitations of certain crimes, especially sexual crimes involving children where disclosure is made years after the crime. Judge Blanch stated that the archive would be the appropriate place for it. Ms. Klucznik stated that if the goal of the committee is to avoid error, placing the instruction in the archive could invite error. Ms. Johnson stated that practitioners must be responsible for their jury instructions. Ms. Jones stated that this situation would not happen often because the statutory language changed in response to a Supreme Court decision. The older cases require something different and more specific than this definition. Judge Blanch stated that this is not unique because statutes change all the time. Ms. Klucznik stated that the committee note should include the *Watkins* citation because it is a substantial change from prior law.

Judge Blanch stated that a committee note would not undermine the principle of moving forward instead of backwards because the committee is simply notifying practitioners and not creating an old instruction.

Ms. Adams-Perlac stated that she would create proposed language. Judge McCullagh stated that if the conduct proscribed shrinks with a new statute, the old proscribed conduct will not be criminal and the defendant will get the benefit of the shrinkage.

Ms. Johnson stated that the definition matched the statute because she created the instruction.

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

(c) Religious Counselor

Judge Blanch asked for comment and there was none.

Ms. Jones moved to approve the definition. Judge McCullagh seconded the motion and it passed unanimously.

(d) Retaliation

Ms. Jones suggested adding “threatening use of physical force.” Ms. Johnson stated that the statute separates threats of physical force, kidnapping, or extortion. Judge Blanch stated that this definition does not make sense because it could be threats of physical force, threats of kidnapping, or threats of extortion, or the acts of physical force, kidnapping, or extortion. Judge McCullagh stated that retaliation is not defined, but exemplified by these three acts. Ms. Johnson stated that this definition does not make sense because it includes threatening to threaten. Ms. Klucznik stated that the plain meaning of retaliate should be enough. Judge Blanch stated that many things could constitute retaliation under the statute that are not captured in the definition because the statute uses the word, “includes.”

Ms. Jones moved to not create a definition. Mr. Nelson seconded the motion and it passed unanimously.

(e) Serious Bodily Injury

Ms. Johnson stated that the definition is the statute word for word. Ms. Jones stated that “creates or causes” should be added. Ms. Klucznik stated “creates” must be in all places or it should be removed from the last part. Judge Blanch suggested moving “substantial risk of death” to the beginning of the instruction. Ms. Klucznik asked if there is a difference between “creates” or “causes.” Judge McCullagh stated that the instruction should match the statutory language.

Ms. Jones moved to approve the definition. Mr. Phelps seconded the motion and it passed unanimously.

(f) Committee Note

Ms. Klucznik suggested adding, “if the jury requests a definition for a word not defined by statute or case law...”

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

4. Mens Rea Instruction

Committee

Ms. Adams-Perlac stated that 303B should be amended to include “reasonably certain.” Ms. Johnson agreed.

Ms. Klucznik stated that 304A includes “but he/she consciously disregards the risk” for part two. She stated that this language should be included on both prongs. Ms. Jones agreed. Ms. Klucznik suggested using “and” instead of “but” because it makes more sense. Judge Blanch stated that “but” can be interpreted as having a value judgment or condemnation whereas “and” is nonjudgmental statement of the law. Ms. Jones also suggested using “and” instead of “but” in 304B.

Mr. Nelson stated that “but” may be important because it is included in the statutory language and it avoids using two uses of “and.” Judge Blanch stated that if there is doubt of what is better, the statutory language should be used.

Ms. Jones moved to approve the definition for 304A, 304B, and 304C. Mr. Nelson seconded the motion and it passed unanimously.

Mr. Field moved to approve the definition for 303B. Ms. Jones seconded the motion and it passed unanimously.

5. Adjourn

Committee

The meeting was adjourned at 1:25 p.m. The next meeting is Wednesday, October 7, 2015.

Tab 2

DISTRIBUTION OF A CONTROLLED SUBSTANCE

(Utah Code Ann. § 58-37-8(1)(a)(ii))

(effective October 1, 2015)

(approved by subcommittee)

(DEFENDANT'S NAME) is charged [in Count ____] with committing Distribution of a [Controlled Substance] [Counterfeit Substance] [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. [[a.] distributed a schedule [I] [II] [III] [controlled substance] [counterfeit substance]] [or] [and]
[[b.] [agreed, consented, offered, or arranged to distribute a controlled or counterfeit 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.

POSSESSION WITH INTENT TO DISTRIBUTE

(Utah Code Ann. § 58-37-8(1)(a)(iii))

(effective October 1, 2015)

(approved by subcommittee)

(DEFENDANT'S NAME) is charged [in Count ____] with committing Possession of a [Controlled Substance] [Counterfeit Substance] with Intent to Distribute [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. possessed a controlled substance
4. with the intent to distribute that controlled substance[; 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.

POSSESSION OF A CONTROLLED SUBSTANCE

(other than marijuana)
(Utah Code Ann. §58-37-8(2)(a)(i))
(effective October 1, 2015)
(approved by subcommittee)

(DEFENDANT'S NAME) is charged [in Count ____] with committing Possession of a Controlled Substance [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. possessed or used a [controlled substance][controlled substance analog] [; 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.

POSSESSION OF AN ALTERED OR FORGED PRESCRIPTION

(Utah Code Ann. §58-37-8(2)(a)(iii))

(effective October 1, 2015)

(approved by subcommittee)

(DEFENDANT'S NAME) is charged [in Count ____] with committing Possession of an Altered or Forged Prescription [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
3. an altered or forged prescription; and
4. the altered or forged prescription is for a controlled substance.

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 MARIJUANA – Second Degree Felony
(Utah Code Ann. § 58-37-8(2)(a)(ii), (2)(b)(i))
(effective October 1, 2015)
(approved by subcommittee)

(DEFENDANT’S NAME) is charged [in Count ____] with committing Possession or Use of Marijuana [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)
 - a. intentionally and knowingly
 - b. possessed or used marijuana; [and]
2. the amount of marijuana was 100 pounds or more [; and]
- [3. 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.

POSSESSION OF MARIJUANA - Class B Misdemeanor
(Utah Code Ann. § 58-37-8(2)(a)(ii), (2)(d))
(effective October 1, 2015)
(approved by subcommittee)

(DEFENDANT'S NAME) is charged [in Count ____] with committing Possession or Use of Marijuana [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. possessed or used marijuana [; 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.

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

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:

- a. During the commission or in furtherance of [distributing a [controlled substance][counterfeit substance]] [possessing a [controlled substance][counterfeit substance] with the intent distribute]
- b. (DEFENDANT'S NAME)
- c. used, carried, or possessed on his person or in his immediate possession
- d. a firearm.

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.