

**UTAH JUDICIAL COUNCIL  
STANDING COMMITTEE ON MODEL UTAH CRIMINAL JURY INSTRUCTIONS  
MEETING AGENDA**

Hybrid Meeting: Matherson Courthouse Judicial Council Room & Via Webex  
March 5<sup>th</sup>, 2025 – 12:00 p.m. to 1:30 p.m.

12:00	Welcome and Approval of Minutes		Tab 1	Judge Welch
	Review of Public Comments: CR1002: Actual Physical Control		Tab 2	Judge Welch
	Proposed CR1016: Drinking an Alcoholic Beverage While Operating a Motor Vehicle		Tab 3	Nic Mills
	Proposed CR1017: Open Container in a Motor Vehicle		Tab 4	Nic Mills
	Proposed CR1017A: Definition of a Passenger Compartment		Tab 5	Nic Mills
	Proposed CR1013: Alcohol Restricted Driver		Tab 6	Breanne Miller
	Proposed CR1012: Ignition Interlock Driver Violation		Tab 7	Judge Bates
1:30	Adjourn			

**COMMITTEE WEB PAGE:** <https://www.utcourts.gov/utc/muji-criminal/>

**UPCOMING MEETING SCHEDULE:**

Meetings are held via Webex on the first Wednesday of each month from 12:00 noon to 1:30 p.m. (unless otherwise specifically noted):

April 2<sup>nd</sup>, 2025  
May 7<sup>th</sup>, 2025  
June 4<sup>th</sup>, 2025  
August 6<sup>th</sup>, 2025

September 3<sup>rd</sup>, 2025  
October 1<sup>st</sup>, 2025  
November 5<sup>th</sup>, 2025  
December 3<sup>rd</sup>, 2025

Category 1 = Instruction exists and no amendments necessary

Category 2 = Instruction exists and amendments necessary

Category 3 = Instruction does exist, but instruction awaiting publication

Category 4 = Instruction does not exist

### **Proposed Order of DUI Instructions CR1000 Series:**

CR1000 – DUI Instructions (Category 1)

CR1001 – Preamble to Driving Under the Influence Instructions (Category 1)

CR1002 – Actual Physical Control (J. Jones) (Category 3)

CR1003 – Simple Driving Under the Influence Instruction (Category 2) (Nic Mills)

CR1004 – Enhanced Driving Under the Influence Instruction (Category 2) (Nic Mills)

CR1005 – Driving Under the Influence of Alcohol, Drugs, or Combination/Extreme DUI (Category 2) (Nic Mills)

CR1006 – Automobile Homicide (McKay Lewis) (Category 1)

CR1007 – Reserved

CR1008 – Driving with a Measurable Controlled Substance (Category 1)

CR1009 – Negligently Operating a Vehicle Resulting in Injury (McKay Lewis) (Category 1)

CR1010 – Refusing a Chemical Test or Blood Draw (McKay Lewis) (Category 4)

CR1011 – Refusal as Evidence of Consciousness of Guilt (McKay Lewis) (Category 4)

CR1012 – Ignition Interlock (J. Bates) (Category 4)

CR1013 – Alcohol Restricted Driver (Breanne Miller) (Category 4)

CR1014 – Driving With Alcohol in Your System as an Alcohol Restricted Driver (Janet Lawrence) (Category 4)

CR1015 – Driving a Motor Vehicle Under the Influence of Alcohol or Drugs When the Driving Privilege Has Been Suspended, Disqualified, or Revoked (Janet Lawrence) (Category 4)

CR1016 – Drinking an Alcohol Beverage While Operating a Motor Vehicle (Nic Mills) (Category 4)

CR1017 – Open Container in a Motor Vehicle (Nic Mills) (Category 4)

CR1017A – Definition of Passenger Compartment (Nic Mills) (Category 4)

### **Proposed DUI Special Verdict Forms**

SVF1001 – Driving Under the Influence [Will Revise] (Nic Mills)

Placeholders:

**CR??? 41-6a-504. Defense not available for driving under the influence violation.**

The fact that a person charged with violating Section [41-6a-502](#) is or has been legally entitled to use alcohol or a drug is not a defense against any charge of violating Section [41-6a-502](#). (Nic Mills)

**CR??? 41-6a-526. Drinking alcoholic beverage and open containers in motor vehicle prohibited -- Definitions -- Exceptions.** (Nic Mills)

**CR??? 41-6a-518.1. Tampering with an ignition interlock system.** (J. Bates)

Other Assignments:

CR??? Burglary (McKay Lewis) (Category 4)

CR??? Aggravated Burglary (McKay Lewis) (Category 4)

CR1320: Aggravated Assault (Breanne Miller) (Category 2)

# **TAB 1**

**Meeting Minutes – February 5<sup>th</sup>, 2025**

**UTAH JUDICIAL COUNCIL  
STANDING COMMITTEE ON MODEL UTAH CRIMINAL JURY INSTRUCTIONS  
MEETING MINUTES**

Via Webex  
February 5, 2025 – 12:00 p.m. to 1:30 p.m.

**DRAFT**

COMMITTEE MEMBER:	ROLE:	PRESENT	EXCUSED	GUESTS:
Hon. Teresa Welch	District Court Judge [Chair]	•		<b>STAFF:</b>  Bryson King
[VACANT]	Justice Court Judge	N/A	N/A	
Dr. Jay Jordan	Linguist/Communications Professor	•		
Hon. Linda Jones	Emeritus District Court Judge	•		
Hon. Matthew Bates	District Court Judge		•	
[VACANT]	Defense Attorney	N/A	N/A	
Janet Lawrence	Defense Attorney	•		
Jeffrey Mann	Prosecutor	•		
Breanne Miller	Prosecutor	•		
[VACANT]	Defense Attorney	N/A	N/A	
Freyja Johnson	Defense Attorney	•		
McKay Lewis	Prosecutor	•		
Nic Mills	Prosecutor	•		

**(1) WELCOME AND APPROVAL OF JANUARY 2025 MINUTES**

Judge Welch welcomed the Committee and asked new Committee member, Dr. Jay Jordan, to introduce himself. Judge Welch then asked Bryson King to give an update regarding the vacant Justice Court Judge and Defense attorney positions on the Committee. Bryson informed the Committee that our new Justice Court Judge should be joining us for the March meeting, and the Judicial Council will be reviewing the applications for defense attorneys in March. Upon approval, the new defense attorneys will join in April. Judge Welch then asked the Committee to review the minutes from last month and called for a motion. Freyja Johnson moved to approve the minutes with McKay Lewis seconding that motion. Without opposition, the motion passes and the minutes are approved.

**(2) AGENDA ITEM 2: CR1006 & CR1009**

Judge Welch then turned the Committee’s attention to CR1006 & CR1009, which were re-posted for public comment after receiving feedback from Ms. Skibine. Bryson King informed the Committee that no additional comments were submitted.

### **(3) AGENDA ITEM 3: CR1002: DEFINITION OF ACTUAL PHYSICAL CONTROL**

Judge Welch then asked Judge Jones to introduce her draft of CR1002: Definition of Actual Physical Control. Judge Jones reviewed the relevant statutory definitions for the terms “negligence,” “criminal negligence,” and “actual physical control.” Judge Jones mentioned that the terms “negligence” and “criminal negligence” are defined by statute and are reflected in published criminal instructions. Thus, the only other term that needs to be defined in our instructions is “actual physical control.” Judge Jones then introduced her draft for an instruction defining that term. Judge Welch asked for any thoughts or comments regarding the draft definition for CR1002. Without comments, Judge Welch requested a motion to approve the draft instruction. Nic Mills moved to approve the instruction. McKay Lewis then asked about the title of the instruction and whether it should be “Definition of Actual Physical Control” or “Actual Physical Control.” Judge Welch then asked McKay to explain the argument for what the title should be. McKay explained that in our published instructions, there are several terms defined in instructions that include the title “Definition of.” However, Janet Lawrence indicated that there are other instructions where the title of instructions defining terms simply have the term in the title, instead of including the phrase “Definition of.” Breanne Miller noted that instructions CR1202B, CR1207, and CR1301 include titles with the phrase “Definition of.” The Committee then continued its discussion about whether CR1002 should be consistent with the titles that include the phrase “Definition of” or consistent with the titles that don’t include the phrase “Definition of.” After extensive discussion, the Committee determined to keep the title, “Actual Physical Control.” Judge Welch then requested a motion to approve the instruction. McKay Lewis moved to approve the instruction, and Nic Mills seconded the motion. Without opposition the motion is approved and the instruction will be published for public comment.

### **(4) DUI SERIES ROADMAP UPDATE**

Following this vote, the Committee then re-reviewed the DUI series roadmap to update the projects in the series. The Committee also discussed removing CR1007 from the series roadmap and leaving it as a placeholder for another instruction based on the Supreme Court’s decision in *Cisse!* to deny cert on the case involving unanimity.

### **(5) AGENDA ITEM 4: OPEN CONTAINER**

Nic Mills then introduced his proposed draft instruction for Open Container. Judge Welch asked Nic where he believed the instruction should be placed in the DUI series and how it should be numbered. Nic offered that it should be numbered CR1016. Janet Lawrence, however, noted that there should be a separate instruction for drinking an alcoholic beverage while driving. Judge Welch then proposed that CR1016 would be Drinking an Alcoholic Beverage While Operating a Motor Vehicle and CR1017 would be Open Container in a Motor Vehicle. After renumbering, Judge Welch proposed that Nic draft separate instructions for CR1016 and CR1017 and return with these drafts at the next meeting.

### **(6) ADJOURN**

The Committee adjourned around 1:00p.m. The Committee’s next meeting will be March 5<sup>th</sup>, 2025, from 12:00p.m. to 1:30p.m.

# **TAB 2**

**Public Comments – CR1002: Actual Physical Control**



# MODEL UTAH JURY INSTRUCTIONS – PUBLISHED FOR COMMENT

The Utah Judicial Council invites comments about these proposed jury instructions. To view the proposed instructions, click on the link below the instruction batch. To view or submit comments, click on the "comment" button. Comments cannot be acknowledged, but all will be considered. A name and email address must be included with your comment. Comments are saved to a buffer for review before publication.

HOME

LINKS

Posted: February 6, 2025

Utah Courts

### Criminal Jury Instructions – Comment Period Closes March 20th, 2025

The following instruction has been amended or created. The Committee requests feedback on the proposed instruction:

**CR1002 – Actual Physical Control**

Please reference the instruction(s) in your comments. Although these instructions are subject to a comment period, they are now ready for use. The Model Criminal Jury Instructions Committee will consider all comments made during the comment period and may revise the instructions as appropriate.

This entry was posted in [Uncategorized](#).

Criminal Instructions – Comment Period Closes January 31st, 2025 »

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- Criminal Jury Instructions – Comment Period Closes March 20th, 2025

Criminal Instructions – Comment Period Closes January 31st, 2025

Civil Jury Instructions – Avoiding Bias, Easements, Present Cash Value – Comment period expires January 24, 2025

Criminal Instructions – Comment Period Closes December 15th, 2024

Civil Jury Instructions – Standard of Care Defined; Survival claim – Comment Period Expires Oct. 25, 2024

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3 thoughts on “Criminal Jury Instructions – Comment Period Closes March 20th, 2025”

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**Brett Keeler**  
February 7, 2025 at 9:34 am

I understand that this basically follows the wording of the statute but instructions framed in the negative are ALWAYS super confusing, even to attorneys. There has to be a better way to phrase this.

[Reply](#)

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**Rich Jorgensen**  
February 7, 2025 at 10:43 am

I agree that as written it could be confusing to jurors by reciting the statute verbatim. Instructions to a jury should be clear and explain what the statute states. I would suggest:

“Actual physical control” is determined by a consideration of the totality of the circumstances. However, a person is not in actual physical control if all of the following conditions are met:

- (a) the person is asleep inside the vehicle;
- (b) the person is not in the driver’s seat of the vehicle;
- (c) the engine of the vehicle is not running;
- (d) the vehicle is lawfully parked; and
- (e) under the facts presented, it is evident that the person did not drive the vehicle to the location while under the influence of alcohol, a drug, or the combined influence of alcohol and any drug.

[Reply](#)

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**David Ferguson**  
February 11, 2025 at 3:09 pm

## RECENT COMMENTS

David Ferguson on [Criminal Jury Instructions – Comment Period Closes March 20th, 2025](#)

Rich Jorgensen on [Criminal Jury Instructions – Comment Period Closes March 20th, 2025](#)

Brett Keeler on [Criminal Jury Instructions – Comment Period Closes March 20th, 2025](#)

Shawn McGarry on [Civil Jury Instructions – Avoiding Bias, Easements, Present Cash Value – Comment period expires January 24, 2025](#)

Bryson King on [Criminal Instructions – Comment Period Closes December 15th, 2024](#)

I suggest that the committee consider tabling this instruction or substantially reworking it.

“Actual physical control” (APC) is not defined in statute despite the existence of an example provided by the legislature.

Because APC is not defined, jurors should look to the plain meaning of the words: actual (not merely possible), physical (not merely considered), control (not just capable of control). They are instructed, according to the statute, to consider the totality of circumstances as their source of insight. That, however, is not entirely helpful since, after all, the entire fact-finding mission of a jury is to consider the totality of the facts presented and then weigh them. In other words, a jury is not instructed to do anything with APC that they aren’t already supposed to do.

To be clear, there is a line of cases, culminating in *State v. Barnhart* that suggest how APC could be understood. 850 P.2d 473 (Utah App 1993). *Barnhart* affirms a set of non-exclusive factors from a prior case.

Instructing the jury on a multi-factored test that was created by the courts is not without precedent. This committee’s constructive possession instruction (CR1202B) does just that.

I join with other commentors in noting that this committee should not be in the business of merely reproducing a statute in an instruction; it should be making the law as simple as it can be without incorrectly stating the law.

APC should be left undefined by this committee because it is undefined by statute.

If the committee feels emboldened to provide an instruction, the instruction should provide guidance on the totality of the circumstances in a way that mirrors CR1202B.

If the committee provides the multifactored analysis for the jury to consider, it should not include the legislature’s example of when APC doesn’t exist. The legislature’s example provides no real insight to a jury. It indicates that there is no APC when a person is merely present in a car, asleep, unable to drive the car. To be slightly crass: “well duh!” The statute effectively says, “no APC exists when there are no facts suggesting APC exists.” It’s entirely unhelpful.

Even worse, the legislature’s example could be misunderstood by the jury to require a conviction when the evidence is against it. Again, according to the statute, it’s not APC if the defendant is *\*asleep\** in the back seat of a turned off car that’s parked normally. Well, what if a prosecutor gets up on closing and says, “Members of the jury, the defendant is guilty because he was *\*awake\** while in the back seat of a turned off car that’s parked normally. Because he was awake and listening to a podcast instead of asleep when the police saw him, he is guilty” The instruction could be misused to suggest that the prosecutor has carried his burden because he has shown one fact that’s slightly different than the legislature’s example. A jury might misunderstand the instruction to believe that the prosecutor

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## ARCHIVES

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- [June 2016](#)
- [March 2016](#)
- [September 2015](#)

has met his burden. To the extent that the proposed instruction could lead to that result simply because the jury is confused about the minimum threshold for APC, the proposed instruction does harm.

I respectfully request that the committee either foregoes this instruction, or reworks it to mirror CR1202B.

[Reply](#)

Leave a Reply

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POST COMMENT



Bryson King &lt;brysonk@utcourts.gov&gt;

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**CR1002 – Actual Physical Control**

2 messages

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**Jake Smith** <jssjd83@gmail.com>  
To: brysonk@utcourts.gov

Thu, Feb 6, 2025 at 3:52 PM

Mr. King,

This comment is in response to the request for comments to the proposed Model Criminal Jury Instruction for **CR1002 – Actual Physical Control**.

Attached you will find my Motion to Include a Proposed Jury Instruction based on the ambiguity of the statute Utah Code Ann. § 41-6a-501(1)(a). The State filed their proposed jury instructions, which I included as well. Finally, Judge Brereton ruled against me (which I would have appealed if not for securing an acquittal during trial) and made a hybrid with her Final Jury Instructions attached.

I still believe, based on my argument provided in the motion, that my jury instruction was correct, but if the committee disagrees, I would suggest using the language in Judge Brereton's final jury instruction instead. The current proposed jury instruction is simply a restatement of the statute and will only serve to confuse the jurors.

Thank you for your consideration,  
Jake Smith #18544

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**3 attachments****State's Proposed Jury Instruction.pdf**  
141K**Final Jury Instructions.pdf**  
968K**Motion to Include Proposed Jury Instruction.pdf**  
574K

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**Bryson King** <brysonk@utcourts.gov>  
To: Jake Smith <jssjd83@gmail.com>

Fri, Feb 7, 2025 at 9:40 AM

Thank you, Jake. I will share this comment and the attached documents with the Committee at our March meeting!



Bryson King | Associate General Counsel  
Administrative Office of the Courts  
Office: 801-578-3800 | Cell: 385-379-7307

[Quoted text hidden]

Jacob S. Smith (#18522)  
Salt Lake Legal Defender Association  
275 East 200 South  
Salt Lake City, Utah 84111  
Telephone: (801) 532-5444  
*Attorney for Defendant*

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**IN THE THIRD DISTRICT COURT, STATE OF UTAH  
IN AND FOR SALT LAKE COUNTY, SALT LAKE DEPARTMENT**

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STATE OF UTAH,  
Plaintiff,

vs.  
JOSHUA DESI LOPEZ  
Defendant.

**MOTION TO INCLUDE PROPOSED  
JURY INSTRUCTION**

Case No. 241903523  
JUDGE HEATHER BRERETON

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**INTRODUCTION**

The Defendant, Joshua Desi Lopez, by and through counsel, Jacob Smith, respectfully moves this Court to include the following instruction in its closing instructions to the jury.

**PROPOSED JURY INSTRUCTION**

**Actual Physical Control**

You must determine whether the defendant operated a vehicle or was in actual physical control of a vehicle. Actual physical control is determined by a consideration of the totality of the circumstances, but does not include a circumstance in which:

1. The person is asleep inside the vehicle;
2. The person is not in the driver's seat of the vehicle;
3. The engine of the vehicle is not running;
4. The vehicle is lawfully parked; and
5. Under the facts presented, it is evident that the person did not drive the vehicle to the location while under the influence of alcohol.

Therefore, in determining whether the defendant was in actual physical control of a vehicle, you

must look to the totality of the circumstances. Not all five factors must be present to find that the defendant was not in actual physical control; rather they are for your consideration in making the determination. If you determine that the defendant was neither driving nor in actual physical control of a vehicle on the date in question, you must find him "not guilty."

### **ARGUMENT<sup>1</sup>**

“Actual physical control” under Utah Code § 41-6a-501(1)(a) does not require all five factors to determine that an individual is not in actual physical control of a vehicle. Instead, Utah courts have held that a totality of the circumstances approach is how actual physical control should be determined.

In *Richfield City v. Walker*, the court held that courts “must look to a totality of the circumstances” and lists “relevant factors for making [that] determination.” *Richfield City v. Walker*, 790 P.2d 87, 91-92 (Utah App. 1990). These “relevant factors. . . include, but are not limited to” a list ending with “and (9) whether the defendant drove it there.” *Id.* at 93. The “and” did not make the list exclusive to a finding of actual physical control. This is further supported by *State v. Barnhart*, where the court held that they must look at a totality of the circumstances with “no single factor being dispositive as a matter of law.” *State v. Barnhart*, 850 P.2d 473, 478 (Utah App. 1993). More recently, in *State v. Prawitt*, the Court of Appeals held that “[t]here are several nonexclusive factors for assessing whether a person is in actual physical control of a vehicle, which are to be evaluated under the totality of the circumstances.” *State v. Prawitt*, 2011 UT App 261, ¶17, 262 P.3d 1203. These decisions did not make a distinction that all factors are necessary. Further, Utah Code § 68-3-12 Rules of Construction, states that “include” means that factors listed “are not an exclusive list” unless the word “only or similar language” is used. Utah

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<sup>1</sup> See Appendix A for Research

Code § 68-3-12(1)(f). There is no mention of “only” in § 41-6a-501(1)(a), therefore the five factors are nonexclusive and not all required.

In addition, the congressional hearings for § 41-6a-501 emphasized “totality of the circumstances” over the factors. *Senate Hearing 1HB139*: 2020 Gen. Sess. (Utah 2020) (*starting at 1:35:02*). When asked about a single factor being a defense, Senator Bramble points out “there will be other facts in evidence” and the totality of them will be used. *Id.* (1:43:10). If “it’s just you’re behind the wheel, you’re off the road, in a spot, but you’re behind the wheel, and you’re drunk, that might apply.” *Id.* (1:43:29 – 1:43:51). This further proves that there could be any number of circumstances where a finding of actual physical control may not be established.

### **CONCLUSION**

Upon a plain reading of the statute, it can be understood why the “and” clause would be interpreted as requiring all five factors. However, the Congressional hearings emphasized the totality of the circumstances analysis rather than having each of the factors present to decide that actual physical control was not present, and previous cases about similar statutes tended to focus on totality of the circumstances as well. Consequently, Defendant moves the Court to allow the proposed jury instruction to be given in closing instructions to the jury.

DATED this 20<sup>th</sup> day of September 2024.

/s/ Jacob S. Smith  
Attorney for Defendant



### **CERTIFICATE OF SERVICE**

I hereby certify that on the 20<sup>th</sup> day of September 2024, I caused a true and correct copy of the foregoing MOTION TO INCLUDE JURY INSTRUCTION to be filed via the Court's e-file system with notice going to the Salt Lake County District Attorney's Office.

/s/ sbedard

# **APPENDIX A**

## **RESEARCH**

### **A. Applicable Statutes, Constitutional Provisions**

#### **41-6a-501 Definitions.**

- (a) “Actual physical control” is determined by a consideration of the totality of the circumstances, but does not include a circumstance in which:
- i) the person is asleep inside the vehicle;
  - ii) the person is not in the driver’s seat of the vehicle;
  - iii) the engine of the vehicle is not running;
  - iv) the vehicle is lawfully parked; and
  - v) under the facts presented, it is evident that the person did not drive the vehicle to the location while under the influence of alcohol, a drug, or the combined influence of alcohol and any drug.

#### **68-3-12 Rules of Construction**

- (f) “Include,” “includes,” or “including” means that the items listed are not an exclusive list, unless the word “only” or similar language is used to expressly indicate that the list is an exclusive list.

### **B. Utah Caselaw**

#### ***State v. Prawitt, 2011 UT App 261, 262 P.3d 1203.***

- “There are several nonexclusive factors for assessing whether a person is in actual physical control of a vehicle, which are to be evaluated under the totality of the circumstances.” *Id.* ¶17.
- “Here, the State presented substantial evidence that would support a determination of probable cause to believe that Prawitt was in actual physical control of the vehicle, even without consideration of exactly when Toscano observed that the keys were present in the vehicle.” *Id.* ¶17.

#### ***Richfield City v. Walker, 790 P.2d 87 (Utah App. 1990).***

- Facts: Walker was found asleep in truck with the engine off, headlights on, and keys in the ignition. Convicted in Sixth Circuit Court of being in actual physical control of the vehicle while having a blood alcohol level of .21%. The Court of appeals held that the driver was in actual physical control of the truck while sleeping.
  - o Older statute
- “[W]e must look to the totality of the circumstances to determine whether defendant was in actual physical control of his vehicle.” *Id.* at 91.
- “Relevant factors for making this determination include, but are not limited to the following: (1) whether defendant was asleep or awake when discovered; (2) the position of the automobile; (3) whether the automobile’s motor was running; (4) whether defendant was positioned in the driver’s seat of the vehicle; (5) whether defendant was the vehicle’s sole occupant; (6) whether defendant had possession of

the ignition key; (7) defendant's apparent ability to start and move the vehicle; (8) how the car got to where it was found; and (9) whether defendant drove it there." *Id.* at 93.

***State v. Barnhart*, 850 P.2d 473 (Utah App. 1993).**

- Reaffirms *Walker*.
- "The trial court must look to the totality of the circumstances, no single factor being dispositive as a matter of law." *Id.* at 478.
  - o Discusses §41-6-44 which became §41-6a-502 in 2005.

**C. Other Sources**

**H.B. 139, 2020 Gen. Sess. (Utah 2020).**

- When the "actual physical control" amendment was passed.

**House Hearing HB139S1**

- 2020 Gen. Sess. Day 24 (Utah 2020).
- <https://le.utah.gov/av/floorArchive.jsp?markerID=109798> Starts at -1:02:59

**Senate Hearing 1HB39S1**

- 2020 Gen. Sess. Day 37 (Utah 2020).
- <https://le.utah.gov/av/floorArchive.jsp?markerID=110842> Starts at -13:07
- Senator Bramble emphasizes totality of the circumstances rather than the factors themselves. A senator asks if under this amendment saying "I was asleep" would be an affirmative defense because of how it is written. Senator Bramble rejected this argument, saying there were other factors to look at and it was a totality of the circumstances with the facts themselves.

**INSTRUCTION NO. \_\_\_\_\_**

**Driving Under the Influence of Alcohol**

JOSHUA DESI LOPEZ is charged in Count 1 with Driving Under the Influence on or about December 6, 2023. You cannot convict him of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

**1. JOSHUA DESI LOPEZ**

- a. operated a vehicle; OR
- b. was in actual physical control of a vehicle; AND

**2. JOSHUA DESI LOPEZ**

- a. had sufficient alcohol in his body that a subsequent chemical test showed that he had a blood or breath alcohol concentration of .05 grams or greater at the time of the test; OR
- b. had a blood or breath alcohol concentration of .05 grams or greater at the time of operation or actual physical control.

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.

**INSTRUCTION NO. \_\_\_\_\_**

**Operate Definition**

"Operate" means: "the activities performed in order to perform the entire dynamic driving task for a given motor vehicle."

**INSTRUCTION NO. \_\_\_\_\_**

**Actual Physical Control**

You must initially determine whether the defendant was either driving a vehicle or was in actual physical control of a vehicle. Actual physical control is defined to mean that the operator was in a circumstance in which he was either exercising or was in a position to exercise control over a vehicle. Relevant factors in determining whether a person is in actual physical control of a vehicle include, but are not limited to, the following:

1. Whether or not the defendant was in the driver's seat of the vehicle;
2. Whether or not the keys were in the ignition;
3. Whether or not the engine was running;
4. Whether or not the defendant was the sole occupant of the vehicle;
5. How the vehicle got to where it was found, or, in other words, who drove the vehicle to its location;
6. The defendant's apparent ability to start and move the vehicle;
7. Whether the defendant was asleep or awake when discovered; and
8. The position of the vehicle.

In determining whether the defendant was in actual physical control of a vehicle on the date in question, you must look to the totality of circumstances, taking into account the foregoing factors and all other relevant evidence. However, actual physical control does not include a circumstance in which:

1. The person is asleep in the vehicle;
2. The person is not in the driver's seat
3. The engine of the vehicle is not running
4. The vehicle is lawfully parked; AND

5. Under the facts presented, it is evident that the person did not drive the vehicle to the location while under the influence of alcohol, a drug, or the combined influence of alcohol and any drug.



**INSTRUCTION NO. \_\_\_\_\_**

**Driving Under the Influence is a Strict-Liability Crime**

For you to find a person guilty of the crime of Driving Under the Influence, a person only needs to do the prohibited act. The prosecution does not need to prove any intent or other mental state.

IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs.

JOSHUA DESI LOPEZ,

Defendant.

VERDICT FORM

Case No. 241903523  
DA No. 23.024114  
HON. Judge Heather Brereton

We, the jurors in the above case find the verdict against the defendant

JOSHUA DESI LOPEZ, as follows:

Count I: Driving Under the Influence

\_\_\_\_\_ Guilty

\_\_\_\_\_ Not Guilty

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2024.

\_\_\_\_\_  
FOREPERSON

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IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

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STATE OF UTAH,

Plaintiff,

vs.

JOSHUA DESI LOPEZ,

Defendant.

**FINAL INSTRUCTIONS TO THE JURY**

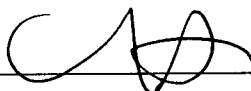
Case No. 241903523

Judge: Heather Brereton

Ladies and gentlemen, attached are the instructions given to you at the close of this trial.

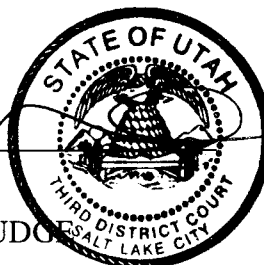
Dated this 25 day of September, 2024.

BY THE COURT:



Heather Brereton

DISTRICT COURT JUDGE



**INSTRUCTION NO. 18**

**Actual Physical Control**

You must initially determine whether the defendant was either driving a vehicle or was in actual physical control of a vehicle. Let me suggest some factors to consider in determining whether a person is in actual physical control of a vehicle include:

1. Whether the defendant was asleep or awake when discovered;
2. The position of the vehicle;
3. Whether the engine was running;
4. Whether the defendant was in the driver's seat of the vehicle;
5. Whether the defendant was the sole occupant of the vehicle;
6. Whether the defendant was in possession of the ignition key;
7. Whether the defendant had the apparent ability to start and move the vehicle;
8. How the vehicle got to where it was found;
9. Whether the defendant drove the vehicle to its location.

In determining whether the defendant was in actual physical control of a vehicle on the date in question, you must look to the totality of circumstances, you may consider the foregoing factors and anything else you think is important.

However, actual physical control does not include a circumstance in which you find each of the following factors exist:

1. The defendant is asleep in the vehicle;
2. The defendant is not in the driver's seat
3. The engine of the vehicle is not running
4. The vehicle is lawfully parked; AND

5. Under the facts presented, it is evident that the defendant did not drive the vehicle to the location while under the influence of alcohol, a drug, or the combined influence of alcohol and any drug.

If you find that each of the foregoing five circumstances exist, you must conclude that the defendant was not in actual physical control of a vehicle.

# **TAB 3**

**Proposed CR1016: Drinking an Alcoholic  
Beverage While Operating a Motor Vehicle**

## **CR1016: Drinking an Alcoholic Beverage While Operating a Motor Vehicle**

(DEFENDANT'S NAME) is charged [in Count \_\_\_\_] with committing Drinking an Alcoholic Beverage in a Motor Vehicle [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. Drank an alcoholic beverage while:
  - a. Operating a [golf cart], [a motor vehicle], [a motor assisted scooter], [or a class 2 electric assisted bicycle]; or
  - b. They were a passenger in a motor vehicle on any [highway] [or waters of the state].

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 sect. 41-6a-526

### **Committee Notes**

This instruction contains bracketed language which suggests optional language. Please review and edit before finalizing this instruction.

Please note that this offense has several exceptions as outlined in 41-6a-526(4) and (5). The offense does not apply to passengers in the living quarters of a motor home or camper; who have carried an alcoholic beverage onto a limousine or chartered bus (in compliance with Subsections 32B-4-415(4)(b) and (c)); or in a motorboat on the waters of the state. Further, the prohibition on keeping, carrying, possessing, transporting, or allowing another to do those acts does not apply to passengers traveling in any licensed taxicab or bus.

Practitioners may also find value in using additional instructions to define "Alcoholic Beverage," "Chartered Bus," "Limousine," "Passenger Compartment," or "Waters of the State" as appropriate.

# **TAB 4**

**Proposed CR1017: Open Container in a  
Motor Vehicle**



## **CR1017: Open Container in a Motor Vehicle**

(DEFENDANT'S NAME) is charged [in Count \_\_\_\_] with having an Open Containers in a Motor Vehicle [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. Kept, carried, possessed, or transported, [or allowed another to keep, carry, possess or transport];
3. In the passenger compartment of a [motor vehicle,] [on a golf cart,] [on a motor assisted scooter,] [or on a class 2 electric assisted bicycle];
4. On any [highway] [or waters of the state];
5. Any container whatsoever which contained any alcoholic beverage; and
6. any container that contained an alcoholic beverage if the container had been opened, its seal broken, or the contents of the container partially consumed.

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 sect. 41-6a-526

## **Committee Notes**

This instruction contains bracketed language which suggests optional language. Please review and edit before finalizing this instruction.

Please note that this offense has several exceptions as outlined in 41-6a-526(4) and (5). The offense does not apply to passengers in the living quarters of a motor home or camper; who have carried an alcoholic beverage onto a limousine or chartered bus (in compliance with Subsections 32B-4-415(4)(b) and (c)); or in a motorboat on the waters of the state. Further, the prohibition on keeping, carrying, possessing, transporting, or allow another to do those acts does not apply to passengers traveling in any licensed taxicab or bus.

Practitioners may also find value in using additional instructions to define "Alcoholic Beverage," "Chartered Bus," "Limousine," "Passenger Compartment," or "Waters of the State" as appropriate.

# **TAB 5**

## **Proposed CR1017A: Definition of Passenger Compartment**

## **CR1017A: Definition of Passenger Compartment**

You are instructed that "Passenger Compartment" means:

- (i) the area of the vehicle normally occupied by the operator and passengers.
- (ii) This includes areas accessible to the operator and passengers while traveling, including a utility or glove compartment.
- (iii) But the term does not include a separate front or rear trunk compartment or other area of the vehicle not accessible to the operator or passengers while inside the vehicle.

## **References**

- Utah Code sect. 41-6a-526 (1)(d)

# **TAB 6**

**Proposed CR1013: Alcohol Restricted Driver**

## **CR1013 - Alcohol Restricted Driver**

(DEFENDANT'S NAME) is charged [in Count \_\_\_\_] with committing Alcohol Restricted Driver [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. Operated a vehicle; or
  - b. Was in actual physical control of a vehicle; and
2. (DEFENDANT'S NAME)
  - a. Had any measurable or detectable amount of alcohol in [his][her] 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.

### **References:**

- Utah Code Ann § 41-6a-530

### **Committee Notes:**

For the definition of "actual physical control" see CR 1002. Practitioners may also include instructions defining "vehicle" pursuant to Utah Code Ann § 41-6a-102(90) and "measurable or detectable amount" pursuant to Utah Code Ann § 41-6a-530(2).

### **Vehicle as defined in 41-6a-102(90)**

"Vehicle" means a device in, on, or by which a person or property is or may be transported or drawn on a highway, except a mobile carrier, as defined in Section [41-6a-1120](#), or a device used exclusively on stationary rails or tracks.

### **Measurable or detectable amount as defined in 41-6a-530(2)**

A "measurable or detectable amount" of alcohol in the person's body may be established by:

- a) A chemical test;
- b) Evidence other than a chemical test; or
- c) A combination of both.

# **TAB 7**

## **Proposed CR1012: Ignition Interlock Driver Violation**

## **CR1012 Interlock Restricted Driver Violation**

(DEFENDANT'S NAME) is charged [in Count \_\_\_\_] with violating an ignition interlock restriction on (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. On (Date)
  - b. Was an interlock restricted driver; and
2. (DEFENDANT'S NAME):
  - a. Operated or was in actual physical control of a vehicle without an ignition interlock system; [and]
  - b. [The affirmative defense of operating a vehicle in the scope of employment, as defined in Instruction \_\_\_\_, 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 § 41-6a-518.2