2008

State of Utah v. Edgar Jeffries : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
EDGAR JEFFRIES,	:	Case No. 20080009-CA
Defendant/Appellant.	:	Appellant is not incarcerated

REPLY BRIEF OF APPELLANT

Appeal from a judgment of conviction for attempted distribution of a counterfeit substance, a third degree felony under Utah Code Ann. §§ 58-37-8(1)(a)(ii) (2007), and 76-4-101(1) (Supp. 2007), entered in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Judith S. Atherton, presiding.

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The Utah legislature has promulgated two separate acts making it unlawful to distribute a simulated controlled substance. The first act defines the substance as a counterfeit and makes the offense a felony. The second defines the substance as an imitation and makes the offense a misdemeanor. In this case, the State alleged that Appellant Edgar Jeffries sold sheetrock as cocaine, and it charged him under the felony provisions for counterfeit substances. The trial court upheld the charge. That was error.

Jeffries has sought to distinguish between the counterfeit and imitation provisions. He maintains the imitation provisions apply to substances like baking soda, pesticide and sheetrock that are made to resemble illicit controlled substances, and he has cited to cases for that application. (*See, e.g.*, Br. of Appellant, 15-17). On the other hand, the counterfeit provisions apply to substances that bear more than a resemblance to a controlled substance. (*See, e.g.*, *id.*, 8-14). They apply to altered pharmaceutical substances and the like, which are represented to be bona fide controlled substances and meant to be used by consumers as such. (*See, e.g.*, *id.*); *see also* Utah Code Ann. § 58-37-8(1) (2007).

In its brief, the State has focused on counterfeit substances and the dangers they present. (*See* Br. of Appellee, 13-14). Jeffries does not dispute the dangers. Indeed, counterfeits are presented as authentic. Consequently, they may be as hazardous as real drugs since they may contain unknown contaminants or impurities. In that regard, to the extent the State's brief offers any distinction between counterfeit and imitation substances, it is that counterfeits present society with the same risks and dangers as real drugs. (*See, e.g.*, Br. of Appellee, 13-14). And Utah law treats counterfeit and controlled substances the same. *See* Utah Code Ann. § 58-37-8(1).

Notably, an imitation substance – which specifically does not include a "controlled substance" or a "counterfeit controlled substance" – resembles a controlled substance and does not present the same risks or perils as actual drugs. Sheetrock and baking soda qualify as an imitation. They are not controlled or counterfeit controlled substances. They are benign. Nevertheless, distribution even of a benign substance is a step in illegal trafficking, and in Utah, such distribution is a misdemeanor offense. Utah Code Ann. §§ 58-37b-1 to -8 (2007) . Based on those distinctions, the substance at issue here, sheetrock packaged to resemble cocaine, constituted an imitation substance. Jeffries was entitled to have the case proceed under the misdemeanor imitation provisions.

In the alternative, in the event this Court is not compelled by the distinction between counterfeits and imitations, Jeffries nevertheless is entitled to have the case proceed under the misdemeanor provisions. *State v. Shondel*, 453 P.2d 146, 148 (Utah 1969) (stating doubt or uncertainty as to which of two punishments is applicable entitles defendant to the benefit of the lesser). Under Utah law, criminal statutes must contain

significant differences "so that the exact same conduct is not subject to different penalties depending upon which of two statutory sections a prosecutor chooses to charge." *State v. Bryan*, 709 P.2d 257, 263 (Utah 1985) (stating lack of significant distinction gives a prosecutor "impermissible discretion to choose a defendant's penalty based upon which statute the prosecutor chooses to charge"). The State does not dispute the law. (*See* Br. of Appellee, 35-39). On that basis, this Court may apply the *Shondel* doctrine and order that the case proceed under the misdemeanor provisions.

ARGUMENT

THE STATE WAS REQUIRED TO PROCEED WITH THIS CASE UNDER THE PROVISIONS FOR IMITATION SUBSTANCES.

A. THE TOOLS OF STATUTORY CONSTRUCTION SUPPORT THE DETERMINATION THAT SHEETROCK IS AN IMITATION SUBSTANCE.

This case concerns two separate acts in the criminal code: the counterfeit provisions in the Controlled Substances Act, and the Imitation Controlled Substances Act. *See* Utah Code Ann. §§ 58-37-2, 58-37-8 (2007) (the Controlled Substances Act); *id.* at §§ 58-37b-1 to -8 (2007) (the Imitation Controlled Substances Act). Both acts criminalize distribution of a simulated substance. (Brief of Appellee, 35-36 (identifying elements under each act)). The counterfeit provisions make the offense a second degree felony and the imitation provisions make it a misdemeanor. Utah Code Ann. § 58-37-8(1) (identifying felony); *id.* at § 58-37b-4 (identifying misdemeanor).

In this case, Jeffries provided a package of sheetrock in response to an undercover officer's request for "rock." (*See* R. 57-59). The officer testified that the package resembled a $20 dosage of crack cocaine in appearance. (Br. of Appellee, 3); (R. 58-59).

Contrary to the State's claims, Jeffries maintains the felony counterfeit provisions are inapplicable to distribution of that substance. (*See* Br. of Appellee, 9 (incorrectly stating Jeffries's position)). Jeffries has relied on the tools of statutory construction to interpret the counterfeit provisions and the imitation provisions. (Br. of Appellant, Argument A.)

He has relied on the plain language of the relevant statutes, the ordinary meaning of statutory terms, definitional provisions, and the principle that the legislature has used terms in each act advisedly. (*Id.*, 6-13 (citations omitted)). He has relied on the principle that a court will read a statute "'as a whole and interpret its provisions in harmony with other provisions.' A court will give meaning to the terms used in the statute 'so that no part will be inoperative or superfluous, void or insignificant and so that one section will not destroy another.'" (*Id.*, 8 (citations omitted)). Also, he has looked to the doctrine of *ejusdem generis*, legislative history, and case law. (*Id.*, 8-19 (citations omitted)).

Under those tools, Jeffries maintains that the legislature contemplated that a counterfeit would be like a real drug (*see id.*, 11-14) in more than appearance. The counterfeit provisions target those who alter substances and present them for use as legitimate. (*Id.*) That distinguishes counterfeits from imitation substances, which qualify as such based on appearance. *See* Utah Code Ann. § 58-37b-2(3). Sheetrock chunks made to appear as cocaine constitute an imitation. (Br. of Appellant, 18-19).

(1) ***The State's Argument Focuses on Counterfeits and Emphasizes Their Dangers. Jeffries Does Not Deny the Dangers. To the Extent the Dangers Distinguish a Counterfeit from an Imitation, Sheetrock Is an Imitation.***

According to the State, actual drugs and counterfeits present real dangers. (Br. of Appellee, 13-14; *see also id.*, 30-31 (discussing the hierarchy of different offenses)).

Indeed, a counterfeit may be as hazardous as an actual drug since it may contain impurities or a cheap substitute for a bona fide controlled substance, causing users to miscalculate accurate dosage. *See* U.S. Food and Drug Admin., The Possible Dangers of Buying Medicine Online, http://www.fda.gov/consumer/features/drugsonline0707.html (stating counterfeits can be difficult to identify; counterfeiting applies to "brand name and generic products" where substances are mislabeled to suggest authenticity, and dangers include contamination, side effects, or the wrong active ingredient, among other things).

Moreover, under Utah law, counterfeit controlled substances may operate a fraud on legitimate manufacturers or distributors. *See, e.g.*, Utah Code Ann. § 58-37-8(3)(a)(iv) (making it a crime for a counterfeiter to possess a "punch, die, plate, stone, or other thing designed" to mark or imprint a likeness on a drug for purposes of counterfeit). In addition, both *controlled* substances and *counterfeit* substances are subjected to the drug stamp tax act. *See* Utah Code Ann. §§ 59-19-102(1), 59-19-103(1) (2006) (defining "[c]ontrolled substances" under the drug stamp tax act as "real or counterfeit" substances; and imposing a tax on such substances under the act).

The dangers of counterfeits – as pointed out by the State (Br. of Appellee, 13-14) – support that the legislature has treated counterfeits as bona fide illegal drugs because it intended that a counterfeit bear more than a resemblance in appearance to a real drug. Indeed, when considering the statutory provisions as a whole, the legislature contemplated that counterfeits would be used as real drugs, and would present the same harms to society. *See, e.g.*, Utah Code Ann. §§ 58-37-8(1) (criminalizing conduct for controlled or counterfeit substances without distinction), 59-19-102(1), 59-19-103(1)

(taxing controlled and counterfeit substances without distinction). Thus, counterfeits and authentic drugs are governed by the same provisions.

On the other hand, sheetrock chunks do not qualify as a "*controlled* substance" or "counterfeit *controlled* substance." *See* Utah Code Ann. § 58-37b-2(3) (defining imitation substance) (emphasis added). Sheetrock is benign. However, it may resemble drugs when packaged or presented as such. *Id.* (stating an imitation substance resembles a specific controlled substance by overall dosage unit and appearance); *see State v. Hill*, 688 P.2d 450, 452 (Utah 1984) (stating that exchanging baking soda for money is distribution of an imitation substance).[1] In addition, distributing sheetrock chunks as cocaine is a step in drug trafficking. *See, e.g.*, *State v. Nelson*, 2007 UT App 34, ¶ 12, 157 P.3d 329 (reflecting that defendant's conduct fell within imitation provisions where

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[1] The State claims that when *Hill* was decided in 1984, a counterfeit substance was "limited to those substances bearing" a false and unauthorized "trademark, trade name," marking, imprint or the like. (Br. of Appellee, 26). That is incorrect. In 1984, the definition for a counterfeit was contained in a single provision but involved two parts. The first part of the definition for counterfeit dealt with substances bearing false and unauthorized markings, and the second part of the definition dealt with substances "represented" to be controlled. *See* Utah Code Ann. § 58-37-2(23) (Supp. 1983).

In addition, in 1984 a substance constituted an imitation if it was represented as such, or if it *"resemble[d] a specific controlled substance in appearance."* *Hill*, 688 P.2d at 451 (emphasis added). In its discussion about *Hill*, the State ignores the *emphasized language* of the definition for imitation substances. (*See* Br. of Appellee, 26 (stating in *Hill*, the definition for imitation relied on "representations made")). However, the court in *Hill* considered it pertinent. It looked to both parts of the definition for an imitation to rule that baking soda is an imitation. *Hill*, 688 P.2d at 452 (stating "*baking soda sufficiently resembled cocaine* so that combined with defendant's representations that it was 'good' cocaine, it was an imitation controlled substance") (emphasis added).

Today, the Imitation Controlled Substances Act continues to define an imitation as a substance resembling a controlled substance. *See* Utah Code Ann. §§ 58-37b-2(3), 58-37b-3(1) (2007) (stating an imitation resembles a controlled substance in appearance, or based on statements). Thus, *Hill* continues to be pertinent and controlling authority.

defendant told police he removed pesticide from a shed in his backyard and packaged it in a plastic bag because he intended to trick his next thief into stealing pesticide, and police testified that pesticide resembled methamphetamine where small plastic bag was the typical method for packaging methamphetamine).[2] In that regard, the legislature has penalized trafficking as a misdemeanor offense. *See* Utah Code Ann. §§ 58-37b-4; 58-37b-6; 58-37b-7 (2007) (criminalizing all aspects of trafficking in imitation substances, including manufacturing, distributing, possessing, using, advertising and soliciting). Notably, the legislature has not subjected *imitation* substances – or sheetrock chunks – to a stamp tax. *See* Utah Code Ann. §§ 59-19-102(1), 59-19-103(1).

In short, distribution of a controlled substance or a counterfeit controlled substance is punishable as a felony offense: the crimes are indistinguishable. Utah Code Ann. § 58-37-2(1). Based on the plain reading of those provisions, the legislature intended that a counterfeit would mislead those using drugs – including consumers – into believing the substance is bona fide. That is a danger that warrants treating counterfeit drugs as controlled substances. *See, e.g.*, Utah Code Ann. §§ 58-37-8(1), 59-19-102(1), 59-19-

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[2] Jeffries relied on *Nelson* in the opening brief to show application of the imitation provisions. (Br. of Appellant, 15). The State has mistakenly claimed that Jeffries cited to it for more than that. (*See* Br. of Appellee, 29 (claiming Jeffries cited *Nelson* for more)).

In addition, in discussing *Nelson*, the State seems to suggest that the defendant there could have been charged with a felony under the counterfeit provisions, but escaped that fate because he did not indicate "the specific narcotic he was attempting to mimic" with his pesticide. (Br. of Appellee, 32). According to the State's argument, if the defendant had indicated that the pesticide was intended to resemble a "specific narcotic," the prosecutor may have proceeded with the case as a felony counterfeit. (*Id.*) The State's argument ignores the plain language of the Imitation Controlled Substances Act. According to the Act, if a substance "resembles a specific controlled substance" in appearance, the substance is an imitation. Utah Code Ann. § 58-37b-2(3). Thus, resemblance to a "specific" narcotic falls squarely within the definition of imitation.

103(1). Also, the legislature intended that a counterfeit bear more than a resemblance to a controlled substance. *See, e.g.*, Utah Code Ann. § 58-37b-2(3) (recognizing that a substance is an *imitation* if it bears a resemblance to a controlled substance).

On the other hand, an imitation is not a controlled or a counterfeit controlled substance. *Id.* It merely resembles a controlled substance, but otherwise does not present the same dangers as a bona fide or counterfeit drug. Sheetrock is an imitation substance. It is benign. However, distribution of sheetrock as cocaine is not benign: it encourages distribution. Thus, distribution of an imitation is a misdemeanor offense. Utah Code Ann. § 58-37b-4. These distinctions are supported by the plain language of the statutes, the doctrine of *ejusdem generis*, legislative history, and case law. (*See* Br. of Appellant, 6-17). They ensure that terms in the statutory provisions are used advisedly, and are not confusing, inoperable, contradictory, or superfluous; and they consider the statutory provisions as a whole and in harmony with other provisions to avoid absurd results. (*See id.*)

(2) ***Contrary to the State's Claims, this Court May Rely on the Doctrine of Ejusdem Generis and Legislative History to Construe the Statutory Terms Here.***

While the State has cited to the principles of statutory construction in its brief, it has rejected the doctrine of *ejusdem generis* and legislative history in its analysis. (*See* Br. of Appellee, 8, 19). According to the State, those doctrines apply only if the statutory language at issue is ambiguous or confusing. (*See id.*, 19).

In addition, the State claims "if the legislature had intended the second definition of 'counterfeit substance' to reach only substances" in a class similar to those enumerated in the first part of the definition, it could have imported the "necessary language from the

first definition." (Br. of Appellee, 23). The State's argument on that point is irrelevant. The canons of statutory construction already support that the legislature intended "the second definition of 'counterfeit substance' to reach" (*id.*) only substances in a class similar to those identified in the first definition. Indeed, the Utah Supreme Court recently relied on *ejusdem generis* as a primary tool of construction to rule that a general term is "understood as restricted to include things of the same kind, class, character, or nature as those specifically enumerated, unless there is something to show a contrary intent." *See In re Questar Gas Co.*, 2007 UT 79, ¶ 15, 175 P.3d 545. Likewise, this Court relied on legislative history to support its plain reading of a statute. *See Liberty Mut. Ins. Co. v. Shores*, 2006 UT App 393, 147 P.3d 456. Those cases govern here.

(a) *The Utah Supreme Court has relied on ejusdem generis as a primary tool in statutory construction.*

In *Questar Gas Co.*, petitioners sought to intervene in proceedings relating to Questar's application to recover costs for operating a carbon dioxide processing plant. *See* 2007 UT 79, ¶¶ 1, 18. When their applications were rejected, they sought review in the Utah Supreme Court. *See, e.g.*, *id.* at ¶¶ 21-23. The court ascertained whether the petitioners had standing to appeal. *Id.* at ¶¶ 44-45. It looked to a statute that allowed standing if an individual was an aggrieved or prejudiced "party, stockholder, bondholder, or other person pecuniarily interested in the public utility." *Id.* at ¶ 49. Some of the petitioners in *Questar* were ratepayers. *See id.* at ¶¶ 50-53. Thus, according to the court, the ratepayers' standing relied on interpreting the general phrase: other person "pecuniarily interested in the public utility." *Id.* at ¶ 51.

The court looked primarily to the doctrine of *ejusdem generis* to rule that a general term is "understood as restricted to include things of the same kind, class, character, or nature as those specifically enumerated, unless there is something to show a contrary intent." *Id.* at ¶ 54. Based on that doctrine, it held that the catchall provision did not allow the ratepayers/petitioners to intervene in Questar's proceedings. *Id.*

Under *Questar Gas Co.*, the doctrine of *ejusdem generis* is consistent with the primary goals of statutory construction. The doctrine takes the plain language of a statute into consideration, it gives credence to the terms the legislature has used, it strives to bring general catchall language in harmony with related provisions, and it tailors statutory language to ensure that no other provisions are nullified, destroyed, or rendered superfluous or insignificant. *See id.* at ¶ 54 (looking to the statute as a whole and ruling that it would be "nonsensical" to interpret the provision as requested by petitioners); *see also Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 62-63 (2004) (recognizing that the Administrative Procedure Act places restrictions on judicial review of "agency action" as set forth in a list of discretely circumscribed situations, and stating that where the last item in the list contained broad language, "the interpretive canon of *ejusdem generis*" would attribute to that item the "same characteristic of discreteness shared by all the preceding items"); *Black's Law Dictionary*, 556 (8th ed. 2004) (stating *ejusdem generis* is a canon of construction that interprets a general phrase or word so that it includes "only items of the same type as those listed").

In this case, *ejusdem generis* gives meaning to the second part of the definition for "[c]ounterfeit substance." *See* Utah Code Ann. § 58-37-2(1)(i) (defining counterfeit in

two parts). Where the first part of the definition defines counterfeit as a substance that bears a false and unauthorized label, trade name, or the like from a manufacturer, distributor or dispenser and contemplates use by consumers (Utah Code Ann. § 58-37-2(1)(i)(i)), the second provision should be construed similarly. It may be interpreted to include any substance "of the same kind, class, character, or nature" as those enumerated beforehand. *Questar Gas Co.*, 2007 UT 79, ¶ 54. It should be interpreted to apply to any substance falsely represented to come from a manufacturer, distributor or dispenser, even if the substance does not bear an identifying mark or the like. *See* Utah Code Ann. § 58-37-2(1)(i); (Br. of Appellant, 8-13). The provisions contemplate that consumers will use counterfeits, and the substance will bear more than a resemblance to real drugs.

(b) *This Court has looked to legislative history and debates for plain language.*

Next, legislative history is relevant in considering the plain language of a statute. In *Liberty Mut. Ins. Co. v. Shores*, 2006 UT App 393, this Court looked to such history to confirm its plain reading analysis. In that case, Mr. and Mrs. Shores purchased a policy from Liberty Mutual for accident coverage. *Id.* at ¶ 5. The policy provided "liability coverage" of $100,000 per person for bodily injury, and it contained an exclusion referred to as a "step-down" provision. *Id.* According to the step-down provision, the policy would not provide "liability coverage" for injury suffered by one household member due to the negligence of another household member. *Id.* at ¶¶ 1, 5. Instead, the injured party would be allowed to recover only the minimum amount under the law. *See id.* at ¶ 5 & n.4 (reflecting minimum amount at $25,000).

In September 2003, the Shoreses were involved in an accident, and Mrs. Shores

made a personal injury claim for $100,000 against the policy for Mr. Shores's negligence. *Id.* at ¶¶ 6-7. The insurance company refused to pay the amount and filed a declaratory action to limit Mrs. Shores's damages to $25,000 under the step-down provision. *Id.* at ¶¶ 7-8. Mrs. Shores responded by claiming, among other things, that the step-down provision was ambiguous, and it violated Utah law and public policy. *Id.* at ¶¶ 9, 15. The trial court rejected the Shoreses' arguments and granted summary judgment for the insurance company, and the Shoreses appealed. *Id.* at ¶¶ 11-14.

In considering the matter, this Court declined to address whether the provision was ambiguous, and instead addressed the step-down clause under the law. *Id.* at ¶ 15. It looked to a later enacted statute, which "expressly prohibited" step-down provisions. *Id.* at ¶ 17. Also, it relied on legislative history and debates to support its "plain language reading." *Id.* at ¶ 19. Specifically, the legislature indicated in 1999 that insurance companies may not reduce coverage amounts for persons injured due to the negligence of someone living in the home. *Id.* at ¶¶ 19-20. Then in 2005, the legislature amended the law dealing with reduced coverage and it enacted a new provision prohibiting step-down coverage. *Id.* at ¶ 21. According to the legislative debates, the legislative alterations clarified existing law since the legislature intended that the earlier law would prevent step-down provisions. *Id.* at ¶ 21. The debates and amendments made the plain reading "absolutely clear." *Id.* at ¶ 21 & n.6.

In the context of this case, the legislative history of the Controlled Substances Act and the Imitation Controlled Substances Act supports that the legislature did not amend the provisions to expand the definition for counterfeit substances beyond the original

1986 definition. Specifically, as stated in the opening brief (*see* Br. of Appellant, 13), in 1986, the definition for a "[c]ounterfeit substance" was as follows:

> [A]ny controlled substance or container or labeling of any controlled substance that, without authorization bears the trademark, trade name, or other identifying mark, imprint, number, or device or any likeness thereof, of a manufacturer, distributor, or dispenser other than the person or persons who in fact manufactured, distributed, or dispensed the substance which thereby falsely purports *or is represented to be the product of, or to have been distributed by, such other manufacturer, distributor, or dispenser*.

Utah Code Ann. § 58-37-2(23) (Supp. 1983) (emphasis added). According to the legislation, a counterfeit was a substance that was falsely purported to be a controlled substance bearing an unauthorized trademark, trade name, identifying mark or the like from a manufacturer, distributor or dispenser; and it was a substance that was falsely "represented to be" the product of a manufacturer, distributor, or dispenser. *Id.*

In 1987, while the legislature amended the statute and reorganized the definition for counterfeit into parts (i) and (ii), it did not intend to alter the original meaning. (*See* R. 94; 103; 112); *see also* Utah Code Ann. § 58-37-2(1)(i). It intended to clarify the definition in order to avoid duplication between the counterfeit provisions and the imitation provisions. (R. 103; 112).

Pursuant to *Liberty Mut. Ins. Co.*, this Court may look to the legislative history to confirm a plain-reading analysis that a counterfeit is a substance falsely purporting to be a controlled substance and bearing a mark, name or imprint without authorization from a manufacturer, distributor or dispenser; and a substance falsely "represented to be" from a manufacturer, distributor, or dispenser. Utah Code Ann. § 58-37-2 (1986 & 2007). In

addition, the legislature enacted later amendments to avoid duplication with the imitation provisions, not to change the definition of a counterfeit. (R. 103; 112).

(c) *To the extent this Court may apply ejusdem generis and legislative history only when a statute is ambiguous, the State has provided ambiguity in its argument.*

Finally, in the event this Court determines that it may consider legislative history and the doctrine of *ejusdem generis* only if a provision is ambiguous, in this case, the State's analysis provides that ambiguity. Specifically, the State has argued that the counterfeit provisions are so broad as to ensnare "any substance that is described, presented, or put forth – either by words or conduct – as a controlled substance." (Br. of Appellee, 11). The State's expansive definition necessarily includes every substance that is falsely purported to be a controlled substance and contains unauthorized labels, markings, imprints, or the like from a manufacturer, distributor or dispenser. *But see* Utah Code Ann. § 58-37-2(1)(i) (providing a definition for counterfeit that covers unauthorized labeling, marking, imprinting and the like). Indeed, it goes without saying that false and unauthorized labeling qualifies as "present[ing], or put[ting] forth" a substance through "conduct." (Br. of Appellee, 11 (construing second part of definition for counterfeit)). Thus, the State's interpretation serves to nullify the first part of the definition for counterfeit substances.[3]

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[3] The State attempts to distinguish the first definition for counterfeit from the second definition by claiming the definitions represent different burdens of proof for the State. (*See* Br. of Appellee, 17). That is nonsensical. The State's burden in a criminal case is always proof beyond a reasonable doubt. *See State v. Reyes*, 2005 UT 33, ¶ 11, 116 P.3d 305. In addition, the State later asserts that for a conviction under the counterfeit provisions, it is required to establish "(1) that defendant (2) knowingly and intentionally (3) distributed (4) a counterfeit controlled substance." (Br. of Appellee, 35-

In addition, the State's broad interpretation necessarily includes every substance that is "presented, or put forth" through "conduct," such as packaging to resemble a specific controlled substance in terms of overall dosage unit and appearance. (Br. of Appellee, 11); *but see* Utah Code Ann. § 58-37b-2(3) (defining an imitation substance as resembling a specific controlled substance by overall dosage unit and appearance). The State's interpretation for counterfeit under the second part of the definition renders the Imitation Controlled Substances Act meaningless. Indeed, the State's expansive interpretation offers no real distinction between a counterfeit and imitation, thereby creating ambiguity and confusion as to when the different provisions apply. *See, e.g.*, *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (recognizing that legislature must provide minimal guidelines to law enforcement) (citation omitted); *Bryan*, 709 P.2d at 263 (stating "criminal laws must be written so that there are significant differences between offenses and so that the exact same conduct is not subject to different penalties" depending on the prosecutor's predilections); *Shondel*, 453 P.2d at 148 (recognizing that statutes must be clear, specific, and understandable as to which provision applies in given circumstances). Thus, where the State's argument supports ambiguity, this Court may rely on the doctrine of *ejusdem generis* and legislative history to construe the statutory terms. (Br. of Appellant, 8-14 (relying on *ejusdem generis* and legislative history)).

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36). The first part of the definition for counterfeit requires proof that defendant falsely purported the substance to be authentic, and he presented it with a trademark, trade name, imprint or the like without authorization from a manufacturer, distributor or dispenser. Utah Code Ann. § 58-37-2(1)(i). The second part of the definition requires proof that defendant "represented" it "to be a controlled substance." *Id.* Contrary to the State's claims, the burden is not "easier" for a felony conviction under one part or the other. (*See* Br. of Appellee, 17).

B. THE *SHONDEL* DOCTRINE SUPPORTS PROCEEDING WITH THIS CASE UNDER THE MISDEMEANOR PROVISIONS.

In the alternative, in the event the counterfeit provisions may be construed to apply broadly to any substance that is presented to resemble a specific controlled substance by dosage unit and appearance (*see, e.g.*, Br. of Appellee, 11 (defining counterfeit)), those provisions are indistinguishable from the provisions dealing with imitation substances. (*See* Br. of Appellant, Argument B.); Utah Code Ann. § 58-37b-2(3) (defining imitation).

The State acknowledges that for an offense under both the counterfeit provisions and the imitation provisions, the pertinent elements are as follows: (1) that defendant (2) intentionally and knowingly[4] (3) distributed (4) a "substance" as a "controlled substance." (Br. of Appellee, 35-36). For a counterfeit, the State claims that element (4) requires "proof that the substance was represented to be a controlled substance." (*Id.*, 36 (citing Utah Code Ann. § 58-37-2(1)(i))). Also, the State asserts that phrase is interpreted according to its "ordinary meaning" and includes "any substance that is described,

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[4] The State asserts that distribution of an imitation substance may be done "recklessly," and cites to general language at Utah Code Ann. § 76-2-102 (West 2004). (Br. of Appellee, 36 & n. 2). Yet reliance on that general provision is misplaced: Utah courts have ruled that specific statutory provisions govern over general provisions. *See, e.g.*, *Pugh v. Draper City*, 2005 UT 12, ¶ 10, 114 P.3d 546 (stating "the provision more specific in application governs over the more general provision") (citation omitted); *State v. Hinson*, 966 P.2d 273, 277 (Utah Ct. App. 1998). The specific language of the Imitation Controlled Substances Act defines "[d]istribute" to mean actual, constructive, or attempted delivery. Utah Code Ann. § 58-37b-2(2). It does not include "recklessly" as a proper mental state for that offense. *Id.* In addition, under Utah law, actual, constructive, or attempted conduct is always intentional and knowing conduct. *See State v. Casey*, 2003 UT 55, ¶ 12, 82 P.3d 1106 (stating *attempt* requires proof of *intent*); *State v. Layman*, 953 P.2d 782, 787 (Utah Ct. App. 1998) (stating *constructive* conduct requires proof of ability and *intent*), *aff'd*, 1999 UT 79, 985 P.2d 911; *State v. Echevarrieta*, 621 P.2d 709, 712 (Utah 1981) (stating *actual* knowledge is *constructive* knowledge).

presented, or put forth – either by words or conduct – as a controlled substance." (Br. of Appellee, 11). For an imitation, the law requires proof of a substance, "which by overall dosage unit substantially resembles a specific controlled substance in appearance, including its color, shape, or size." Utah Code Ann. § 58-37b-2(3).

The State claims there are discernible differences between the counterfeit provisions and the imitation provisions at element (4). (Br. of Appellee, 36-37). However, it fails to explain those differences. (*Id.*) Instead, it claims that the counterfeit provisions, as it has construed them, contain "expansive language." (*Id.*, 27). Based on the State's interpretation, a substance that is "presented or put forth" by conduct – including in the way of appearance resembling a specific controlled substance – is a counterfeit. (*See id.*, 11 (defining a counterfeit)). Yet such a substance is also an imitation. *See* Utah Code Ann. § 58-37b-2(3) (defining an imitation). In that regard, to the extent the State has offered any distinction between the elements, it is a distinction without a difference.

Moreover, the State relies on the fact that the statute defining an imitation states that an imitation is not a "counterfeit controlled substance." (Br. of Appellee, 36-37 (citing Utah Code Ann. § 58-37b-2(3))). The State does not attempt to explain what that means. (*Id.*) It asserts simply that an imitation cannot be a counterfeit. (*Id.*) Yet in practice, the statute merely leaves it to the prosecutor to decide how to classify a simulated substance. Specifically, if a prosecutor chooses to classify it as a "counterfeit" – because it was "put forth" through "conduct" (Br. of Appellee, 11), *i.e.* packaging in dosage unit to resemble a controlled substance – the case will proceed under the felony provisions. If the prosecutor chooses to classify it as an imitation – because it was put

forth through conduct, *i.e.* packaging in "dosage unit" to "resemble[] a specific controlled substance" (Utah Code Ann. § 58-37b-2(3)) – the case will proceed under the imitation provisions. Without proper guidelines, prosecutors are allowed "to pursue their personal predilections," *Kolender*, 461 U.S. at 358 (citation omitted), in classifying the substances for purposes of felony or misdemeanor proceedings.

In that regard, the counterfeit and imitation provisions fail to contain "significant differences between offenses and so that the exact same conduct is not subject to different penalties depending upon which of two statutory sections a prosecutor chooses to charge." *Bryan*, 709 P.2d at 263. They raise "doubt or uncertainty as to which of two punishments is applicable to an offense." *Shondel*, 453 P.2d at 148. The statutes allow "a form of arbitrariness that is foreign to our system of law. The Legislature may make automobile homicide which is committed recklessly either a misdemeanor or a felony, but it cannot make the crime both a felony and a misdemeanor, leaving the choice to the prosecutor as to whether he charges a felony or misdemeanor." *Bryan*, 709 P.2d at 263.

Next, the State takes Jeffries to task because he has argued that under the law, a substance may be classified as an imitation based on statements concerning the nature of the substance, its use or effect. (*See* Br. of Appellee, 39 (citing Utah Code Ann. § 58-37b-3(1))). The State suggests that Jeffries has relied on factors that a jury may consider in the analysis, rather than a definition for "imitation," which is an element of the offense. (*Id.*) According to the State, factors are inappropriate because "[t]he *Shondel* doctrine limits its inquiry to the elements of the criminal statutes which the defendant claims overlap and applies only when 'two statutes are wholly duplicative as to the elements of

the crime.'" (*Id.* (citing *State v. Williams*, 2007 UT 98, ¶ 14, 175 P.3d 1029)).

The State's argument is misplaced. Under the provisions governing imitation controlled substances, the legislature has defined an imitation as a substance that resembles a controlled substance by overall dosage unit and appearance. Utah Code Ann. § 58-37b-2(3). In addition, the legislature has provided an alternative definition for that element. It has specified that if appearance is insufficient to establish that a substance is an imitation, the fact-finder may consider statements concerning the nature of the substance, its use or effect. *Id.* at § 58-37b-3(1). The legislature has offered alternative definitions *for the element of imitation*. Thus, the offense may be established with proof (1) that defendant (2) intentionally and knowingly (3) distributed (4) a substance resembling a controlled substance based on statements concerning its nature, use, effect or similarity to a controlled substance. Utah Code Ann. §§ 58-37b-3(1); 58-37b-4. That offense is indistinguishable from the State's statutory elements for distribution of a counterfeit substance: (1) that defendant (2) intentionally and knowingly (3) distributed (4) a substance that is represented to be a controlled substance. (Br. of Appellee, 35-36).

Finally, the State does not dispute that the counterfeit provisions and imitation provisions are indistinguishable where the State may prove element (4) with reference to false labeling and packaging represented to be a controlled substance. *See* Utah Code Ann. §§ 58-37-2(1)(i) (defining counterfeit substance based on representations), 58-37b-3(3) (defining imitation substance with reference to packaging or labeling "in a manner similar to that generally used for controlled substances"); (*see also* Br. of Appellee, Argument D (no dispute regarding identical nature of those elements)). In that instance,

the elements for the felony offense or the misdemeanor offense are as follows: (1) that defendant (2) intentionally and knowingly (3) distributed (4) a substance represented to be a controlled substance based on packaging or labeling. Utah Code Ann. §§ 58-37-2(1)(i)(ii), 58-37-8(1) (elements for counterfeit); Utah Code Ann. §§ 58-37b-3(3), 58-37b-4 (elements for imitation). In this case, the offense relied on the packaging: it resembled a specific controlled substance in appearance. (*See* Br. of Appellee, 3); (R. 58-59). According to the State's evidence, Jeffries made no representation concerning the substance. (R. 57-59). Rather he provided a package that resembled "crack cocaine the way it was packaged," it had the "likeness" of cocaine. (*Id.*) Under the *Shondel* doctrine, Jeffries was entitled to have this case proceed under the misdemeanor provisions. *Shondel*, 453 P.2d at 148 (stating "where there is doubt," defendant is entitled to proceed under the lesser); *State v. Loveless*, 581 P.2d 575, 576-77 (Utah 1978) (recognizing that when two statutes proscribe the same conduct but impose different penalties, defendant is entitled to proceed under the lesser).

CONCLUSION

For the reasons set forth herein and in the Brief of Appellant, Jeffries respectfully requests that this Court reverse the trial court's ruling on the felony charge and remand this case for further proceedings under the misdemeanor provisions.

SUBMITTED this 24 day of November, 2008.

_____/x/_____
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CERTIFICATE OF DELIVERY

I, Linda M. Jones, hereby certify that I have caused to be hand-delivered an original and 7 copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and 4 copies to the Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, Salt Lake City, Utah 84114, this _____ day of _____, 2008.

_/x/_____
LINDA M. JONES

DELIVERED to the Utah Attorney General's Office and the Utah Court of Appeals as indicated above this — day of _____, 2008.