

2010

Utah v. Larry Lewis Hutchings : Brief of Appellant

Utah Supreme Court

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IN THE UTAH SUPREME COURT

STATE OF UTAH,

Plaintiff/Appellee,

v.

LARRY LEWIS HUTCHINGS,

Defendant/Appellant

No. 20100024-SC

No. 20080681-CA

Appeal from Third Judicial District
Court, Salt Lake County, Honorable
Dennis M. Fuchs, No. 061902496

OPENING BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

Mr. Hutchings currently is incarcerated in connection with this matter

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FILED
UTAH APPELLATE COURTS

AUG 24 2010

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Jurisdiction

This court has jurisdiction under Utah Code section 78A-3-102(3)(a), (5).

Statement of the Issues and Standards of Review

Issue 1: Whether the court of appeals erred in affirming the district court's jury instruction defining intentional conduct for the crime of aggravated assault.

Standard of Review: On certiorari, this court reviews the decision of the court of appeals for correctness. Ostermiller v. Ostermiller, 2010 UT 43, ¶ 14, 233 P.3d 489.

Issue 2: Whether Mr. Hutchings' trial counsel was constitutionally ineffective.

Standard of Review: "As to an ineffective assistance of counsel claim, 'we review a lower court's purely factual findings for clear error, but review the application of the law to the facts for correctness.'" Benvenuto v. State, 2007 UT 53, ¶ 9, 165 P.3d 1195 (quoting Taylor v. State, 2007 UT 12, ¶ 13, 156 P.3d 739).

Preservation: State v. Hutchings, 2009 UT App 330, 2009 Utah App. LEXIS 342.

Determinative Provisions

All determinative provisions are at Addendum E.

Statement of the Case

I. Nature of the Case and Course of Proceedings

This case concerns a physical altercation between Larry Hutchings and his girlfriend, Deborah Cuddeback. During the altercation Ms. Cuddeback's hand was broken, which provided the basis for the State to file charges against Mr. Hutchings for aggravated assault. (R. 272:15.) The State also charged Mr. Hutchings with aggravated burglary and criminal mischief. (R. 272:15.)

The jury was instructed that it could find Mr. Hutchings guilty of aggravated assault if (i) he intended to assault Ms. Cuddeback and (ii) the assault resulted in serious bodily injury. (R. 253.) The jury was not instructed that it must find Mr. Hutchings intended the serious bodily injury. The jury convicted Mr. Hutchings of aggravated assault and criminal mischief, but not aggravated burglary. (R. 163; 271:219.) Mr. Hutchings was sentenced to a term of 1 to 15 years. (R. 229.)

In a memorandum decision, the court of appeals affirmed the conviction. State v. Hutchings, 2009 UT App 330, 2009 Utah App. LEXIS 342. The court of appeals held that under Utah's aggravated assault statute, "[i]t is enough to satisfy the mens rea requirement if the defendant intends the act that results in serious bodily injury." Id. ¶ 5.

II. Statement of Facts

When Mr. Hutchings came home on April 6, 2006, Ms. Cuddeback would not open the door, leading Mr. Hutchings eventually to kick in the door to retrieve his personal belongings. (R. 271:106, 113-14; 272:102.) A physical altercation followed. (R. 271:114.) During that altercation, Ms. Cuddeback's hand was broken. (R. 271:12.)

At trial, Mr. Hutchings did not dispute the physical altercation with Ms. Cuddeback, but maintained that (i) he was defending himself and (ii) Ms. Cuddeback had broken her hand while assaulting him. (R. 271:113-14.) Thus, the trial court's instruction concerning the elements of aggravated assault were critical. The instruction given by the trial court permitted the jury to convict Mr. Hutchings if it found that it was his "conscious objective or desire to engage in the conduct" that resulted in the injury to Ms. Cuddeback's hand. (R. 253.) Because Mr. Hutchings did not dispute the alleged conduct, the only issue was whether during the altercation Mr. Hutchings intended serious bodily injury, something the jury was instructed that it need not find. (R. 253.)

Both Mr. Hutchings and Ms. Cuddeback's version of events are consistent with Mr. Hutchings' contention that he did not intend serious bodily injury. According to Mr. Hutchings, after Ms. Cuddeback refused to open the door and he kicked the door open, and Ms. Cuddeback attacked him by grabbing him around the neck and choking him until he pushed her off of him. (R. 271:113-14, 116.) Ms. Cuddeback then clawed his face with her fingers outstretched. (R. 271:117-18). After clawing his face, Ms. Cuddeback punched him in the head, something that left the bruise visible in the photos introduced at trial. (R. 271:120; State's Exhibit 12 attached at Addendum C.) According to Mr. Hutchings, Ms. Cuddeback injured her hand when she punched him in the head. (R. 271:121.) It was undisputed that Mr. Hutchings suffered injuries to his face, head, and neck during the altercation. (R. 271:10; Add. C.)

According to Ms. Cuddeback, Mr. Hutchings tackled her to the floor and choked her. (R. 272:53.) Ms. Cuddeback admitted that she then scratched his face and dug her nails into his forehead. (R. 272:52, 54.) At that point, according to Ms. Cuddeback,

Mr. Hutchings threw her hand out of his way “because I was pushing him, trying to get him off me. And the nails must of hurt him. They were cutting him. He grabbed my wrist and threw my hand backwards.” (R. 272:55.)¹ Ms. Cuddeback testified that the altercation ended when she asked, “what are you going to do, kill me?” (R. 272:56.) Mr. Hutchings then stopped, went to the freezer, and took out a pack of cigarettes. (R. 272:57.) He then proceeded to fix the broken doorframe by using Ms. Cuddeback’s hiking boot. (R. 272:86.) At the time, neither of them knew her hand was broken, the only injury that could later support an aggravated assault charge. (R. 272:86.)

After Ms. Cuddeback’s testimony, the defense moved for directed verdict. (R. 271:75.) Trial counsel argued, “what is required in order to establish a prima facie case of [aggravated assault] is not only that the serious bodily injury was caused but that it was intentionally caused. And I would remind the court of the testimony of Ms. Cuddeback, which as I recall, appears to indicate that during the struggle she was scratching Mr. Hutchings’ face. And according to her testimony he grabbed her hand and flung it back consistent with somebody trying to get scratching off of their face. I would indicate to the court that that certainly does not in my view rise to the level of establishing a prima facie case of intentionally injuring the hand.” (R. 271:76-77.) The trial court denied the motion and later instructed the jury that it need not find that Mr. Hutchings intended serious bodily injury. (R. 271:80; 253.)

¹ (See also R. 272:85 (on cross-examination Ms. Cuddeback reiterated: “Q: And he flung your right hand, that’s the injured hand? A: That would be because I was trying to push him off.”); R. 271:38 (the doctor who treated Ms. Cuddeback testified: “She said that she’d been assaulted. . . . And as she attempted to scratch her assailant, he grabbed her arm and flung it backwards, hit a hard object, and she was afraid her hand was broken.”).)

Summary of the Argument

The trial court instructed the jury that aggravated assault does not require a specific intent to cause serious bodily injury, but instead requires only that the defendant intends an act that then results in serious bodily injury. The court of appeals agreed, citing a case involving a jury instruction for second degree murder—a general intent crime—not aggravated assault. State v. Fontana, 680 P.2d 1042, 1044 n.1 (Utah 1984).

Both the court of appeals and trial court erred. The plain language of the aggravated assault statute requires that one “intentionally causes serious bodily injury to another.” Utah Code Ann § 76-5-103(1)(a). This court three times has construed that language to require specific intent to cause serious bodily injury. In re Besendorfer, 568 P.2d 742, 744 (Utah 1977) (“a specific intent to inflict serious bodily injury on the victim”); State v. Howell, 554 P.2d 1326, 1328 (Utah 1976) (“specific intent to inflict serious bodily harm upon the victim”); State v. Peck, 542 P.2d 1084, 1085 (Utah 1975) (rejecting that aggravated assault requires only a simple assault that causes serious bodily injury). Thus, the jury instruction was plainly erroneous under existing law.

And that error was prejudicial, whether viewed under plain error or ineffective assistance of counsel analysis. Mr. Hutchings stated that Ms. Cuddeback injured her hand while she was hitting him. Ms. Cuddeback stated that Mr. Hutchings injured her hand when he pushed her hand away from him to stop her from digging her fingernails into his face. Neither version of events supports the view that Mr. Hutchings intended serious bodily injury rather than, at most, intended an act that resulted in injury. Thus, there is a substantial likelihood that Mr. Hutchings would not have been convicted of aggravated assault had the jury been properly instructed. This court should reverse.

Argument

I. The Court of Appeals Erred in Holding That Aggravated Assault Is a General Intent Crime

The trial court erred when it gave a jury instruction describing aggravated assault as requiring only that Mr. Hutchings intended an act that caused serious bodily injury, instead of as requiring that Mr. Hutchings have “intentionally cause[d] serious bodily injury to another,” which is the language of the statute. Utah Code Ann. § 76-5-103(1)(a) (2005).² The court of appeals then erred in rejecting Mr. Hutchings’ argument “that to be guilty of aggravated assault he must have intended to cause the serious bodily injury suffered by the victim, not simply the conduct that resulted in the serious bodily injury.” State v. Hutchings, 2009 UT App 330, ¶ 5, 2009 Utah App. LEXIS 342. The aggravated assault statute, as well as this court’s cases interpreting that statute, plainly requires a specific intent to cause serious bodily injury, not a general intent to act.

The crime of aggravated assault contains two mens rea requirements. First, the defendant must “commit assault as defined in § 75-6-102.” Utah Code Ann. § 76-5-103(1)(a). Section 75-6-102 defines “assault” as “an act, committed with unlawful force or violence, that causes bodily injury to another or creates a substantial risk of bodily injury to another.” Id. § 76-5-102. Because there is no prescribed mens rea for simple assault, a defendant’s conduct may be intentional, knowing, or reckless. Id. Second, and most important here, to transform simple assault into aggravated assault the defendant

² “A person commits aggravated assault if he commits assault as defined in Section 76-5-102 and he: (a) intentionally causes serious bodily injury to another; or (b) under circumstances not amounting to a violation of Subsection (1)(a), uses a dangerous weapon as defined in Section 76-1-601 or other means or force likely to produce death or serious bodily injury.” Utah Code Ann. § 76-5-103(1) (2005) (emphasis added).

must “intentionally cause serious bodily injury to another.”³ Id. § 76-5-103(1)(a). That language plainly requires the defendant specifically to intend serious bodily injury.

In this case, the jury first was correctly instructed as to the elements of aggravated assault: “Intentionally or knowingly; Committed an assault on [Ms. Cuddeback]; and Intentionally caused serious bodily injury to her.” (R. 186 (Add. B).) But the jury then was incorrectly instructed that “intentionally” does not require that Mr. Hutchings intend the result, i.e., serious bodily injury: “A person engages in conduct intentionally, or with intent or willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.” (R. 198 (Add. B)); Hutchings, 2009 UT App 330, ¶ 5 (emphasis added). The combination of these instructions permitted the jury to convict Mr. Hutchings of aggravated assault whether he merely intended to push Ms. Cuddeback’s hand away from him or intended to cause serious bodily injury to Ms. Cuddeback’s hand.

The court of appeals found no error in the jury instructions based upon the following analysis, which is quoted in its entirety:

It is enough to satisfy the mens rea requirement if the defendant intends the act that results in serious bodily injury.
See State v. Fontana, 680 P.2d 1042, 1044 n.1 (Utah 1984)
(upholding nearly identical instructions for intent).

Hutchings, 2009 UT App 330, ¶ 5.⁴ There are a number of problems with the court of appeals’ abrupt analysis.

³ Because it is undisputed that Mr. Hutchings did not use a dangerous weapon, this brief ignores the alternative definition of aggravated assault involving the use of a dangerous weapon. Utah Code Ann. § 76-5-103(1)(b).

⁴ For some reason, the court of appeals cites to the 2008 version of the Utah Code. Hutchings, 2009 UT App 330, ¶ 4 & n.2. But the 2005 version applies, as the incident occurred in April 2006. (R. 271:106, 113.) The mistake is inconsequential because the relevant statutes did not change between 2005 and the 2010 Legislative Session.

The first problem is that Fontana upheld a jury instruction for second degree murder, not aggravated assault. 680 P.2d 1042, 1044 (Utah 1984). The jury instruction in Fontana stated that second degree murder can be based on three “alternative forms of conduct.” Id. These alternatives included (i) knowingly or intentionally engaging in conduct that causes the death of another, (ii) acting with the intent to cause serious bodily injury and committing an act clearly dangerous to human life that results in the death of another, or (iii) acting under circumstances evidencing a depraved indifference to a human life. Id. Thus, the jury instruction in Fontana described a crime that can be committed with a general intent to act in a manner that results in death.⁵ Conversely, aggravated assault requires a specific intent to cause serious bodily injury.⁶

The second problem with the court of appeals’ analysis is that it ignores entirely three cases in which this court has held that aggravated assault is a specific intent crime requiring that the defendant intend to cause serious bodily injury. In In re Besendorfer, this court held that aggravated assault requires proof that “the accused intentionally caused serious body injury, viz., that he had a specific intent to inflict serious bodily injury on the victim, and such injuries were, in fact, caused by the assault.” 568 P.2d 742, 744 (Utah 1977).⁷ In State v. Howell, this court held that aggravated assault

⁵ Even today, “[c]riminal homicide constitutes murder in the second degree if the actor: (a) intentionally or knowingly causes the death of another, (b) intending to cause serious bodily injury to another, he commits an act clearly dangerous to human life that causes the death of another, and (c) acting under circumstances evidencing a depraved indifference to human life, he engages in conduct which creates a grave risk of death to another and thereby causes the death of another.” Utah Code Ann. § 76-5-203(1).

⁶ “A person commits aggravated assault if he commits assault as defined in Section 76-5-102 and he . . . intentionally causes serious bodily injury to another.” Utah Code Ann. § 76-5-103(1)(a).

⁷ The aggravated assault statute in Besendorfer is identical to the statute at issue here. 568 P.2d at 743-44.

“requires a specific intent to inflict serious bodily harm upon the victim.” 554 P.2d 1326, 1328 (Utah 1976).⁸ And in State v. Peck this court held that the trial court committed reversible error when, among other things, it instructed the jury that “a person commits aggravated assault if he commits assault as defined above and he causes serious bodily injury to another.” 542 P.2d 1084, 1085 (Utah 1975).⁹ After noting that the instruction omits the requirement that a defendant intend serious bodily injury, this court observed that the “instruction would have permitted a verdict of simple assault” rather than aggravated assault. Id. That is precisely what the jury instructions permit here.

Confirming the court of appeals’ error, the Legislature in 2010 amended the aggravated assault statute to transform it from a specific intent crime into a general intent crime. Starting in November 2010, the statute requires only that a defendant act in a manner likely to cause serious bodily injury.¹⁰ If serious bodily injury in fact results, then the crime is a second-degree felony; but if no serious bodily injury results, the crime is only a third-degree felony. The bill explains that the amendment was necessary to “provide that commission of aggravated assault resulting in serious bodily injury is a second degree felony, regardless of whether the actor intended to cause serious bodily injury.” Enrolled Copy of Senate Bill 10, 2010 General Session, at 1:18-20, attached as Addendum F. Were the court of appeals correct that “[i]t is enough to satisfy the mens

⁸ The aggravated assault statute in Howell is identical to the statute at issue here. 554 P.2d at 1328.

⁹ The aggravated assault statute in Peck is identical to the statute at issue here. 542 P.2d at 1084.

¹⁰ “A person commits aggravated assault if the person commits assault as defined in Section 76-5-102 and uses: (a) a dangerous weapon as defined in Section 76-1-601; or (b) other means or force likely to produce death or serious bodily injury.” Utah Code Ann. § 76-5-103(1)(a) (2010).

rea requirement if the defendant intends the act that results in serious bodily injury,” Hutchings, 2009 UT App 330, ¶ 5, then the 2010 amendment to the statute would have been unnecessary.

The court of appeals erred in approving of jury instructions that permitted the jury to convict Mr. Hutchings if it found “his conscious objective or desire to engage in the conduct or cause the result,” where the statute expressly required that Mr. Hutchings intentionally “cause the result,” here serious bodily injury. The court of appeals, and the trial court, erred.

II. The Trial Court Committed Plain Error, and Trial Counsel Was Constitutionally Ineffective, in Failing to Ensure the Jury Was Instructed That It Had to Find Mr. Hutchings Intended Serious Bodily Injury

This court can vacate the aggravated assault conviction on two grounds: (i) plain error and (ii) ineffective assistance of counsel. Under plain error doctrine, this court will reverse where “(i) an error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error there is a reasonable likelihood of a more favorable outcome.” State v. Ross, 2007 UT 89, ¶ 17, 174 P.3d 628 (quotations omitted). For ineffective assistance, counsel’s performance must (i) have fallen below “an objective standard of reasonableness” and (ii) prejudice the client. Adams v. State, 2005 UT 62, ¶ 25, 123 P.3d 400 (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)). Because the error should have been obvious to both the trial court and trial counsel, Mr. Hutchings will analyze the error under both doctrines at the same time.

A. The Error in the Jury Instructions Should Have Been Obvious to the Trial Court and Trial Counsel

As demonstrated above, the plain language of the aggravated assault statute required the jury to find that Mr. Hutchings intended to cause serious bodily injury to Ms. Cuddeback's hand. Utah Code Ann. § 76-5-103(1)(a) ("A person commits aggravated assault if he commits assault as defined in Section 76-5-102 and he... intentionally causes serious bodily injury to another."). Under Utah law, an error is obvious when "the law governing the error was clear at the time the alleged error was made." State v. Dean, 2004 UT 63, ¶ 16, 95 P.3d 276. Here, no fewer than three cases decided by this court interpret section 76-5-103(1) to require a specific intent to cause serious bodily injury. In re Besendorfer, 568 P.2d 742, 744 (Utah 1977) ("a specific intent to inflict serious bodily injury on the victim"); State v. Howell, 554 P.2d 1326, 1328 (Utah 1976) ("specific intent to inflict serious bodily harm upon the victim"); State v. Peck, 542 P.2d 1084, 1085 (Utah 1975) (rejecting that aggravated assault requires only a simple assault that causes serious bodily injury). Therefore, the error was obvious under the law governing at the time the error was made in September 2007.

For the same reason, constitutionally effective counsel would have objected to a jury instruction that expanded the definition of "aggravated assault" to include a mere intent to act instead of an intent to cause serious bodily injury. The erroneous instruction freed the State from proving every element of its case beyond a reasonable doubt, namely that Mr. Hutchings intended to cause serious injury to Ms. Cuddeback. Utah Code Ann. § 76-1-501. Here, trial counsel's error was particularly puzzling in light of the fact that he moved for directed verdict on the ground that there was no evidence that Mr. Hutchings specifically intended serious bodily injury to Ms. Cuddeback. (R. 271:76-

77.) There is no strategic reason later to misstate the law to relieve the State of proving the most crucial, and lacking, element of the crime. As the Texas Court of Criminal Appeals recently explained, it is objectively unreasonable to instruct a jury that it may convict of a specific intent crime “based on his conduct, rather than on intending or knowing the prohibited result.” Chaney v. State, 314 S.W.3d 561 (Tex. App. 2010) (reversing unpreserved jury instruction); Cook v. State, 884 S.W.2d 485, 489 (Tex. Crim. App. 1994) (when a court issues a charge defining a specific intent offense it must tailor jury instructions and exclude all inconsequential language relating to the nature of the defendant’s conduct). Trial counsel was constitutionally ineffective.

B. Absent Misleading Jury Instructions, the Jury Likely Would Not Have Convicted Mr. Hutchings of Aggravated Assault

In this case, accurate jury instructions likely would have resulted in a different outcome, something that warrants reversal under both a plain error and ineffective assistance standard.

Under a plain error analysis, errors are harmful where there is a “reasonable likelihood” that they “affected the outcome of the proceedings.” C.T. v. Johnson, 1999 UT 35, ¶ 18, 977 P.2d 479. Put differently, errors are harmful if a trial without the errors “may well have resulted in a different jury determination.” S.H. v. Bistrski, 923 P.2d 1376, 1382 (Utah 1996). A “reasonable likelihood” of a better outcome exists when the court’s confidence in the verdict is undermined. State v. Knight, 734 P.2d 913, 919-20 (Utah 1987). And “confidence in the verdict” is legitimately undermined at a point “substantially short” of where a court might conclude that a different result was “more probable than not.” Id. at 920.

Similarly, counsel's deficient performance is prejudicial when "there is a reasonable probability that, absent the errors, the fact-finder would have had a reasonable doubt respecting guilt." State v. Hales, 2007 UT 14, ¶ 86, 152 P.3d 321. "A reasonable probability is a probability sufficient to undermine confidence in the jury verdict." Id.

Here, the error was prejudicial. Had the jury not been instructed that it could convict Mr. Hutchings of aggravated assault if it found that he intended an act that resulted in serious bodily injury, it likely would have concluded that the evidence does not support an aggravated assault conviction, especially beyond a reasonable doubt. While the jury clearly believed Ms. Cuddeback's version of events, her version supports only a finding that Mr. Hutchings intended an act that then caused serious bodily injury to her hand. According to Ms. Cuddeback, Mr. Hutchings took her hand and threw it back into a bookshelf in order to stop her from digging her fingernails into his face.

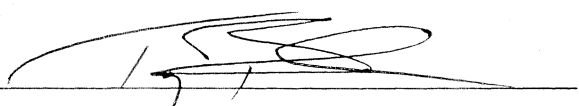
The prosecutor then specifically told the jury in closing argument that an intent to act was sufficient for aggravated assault. Specifically, the prosecutor told the jury that Mr. Hutchings intentionally broke Ms. Cuddeback's hand "because he grabbed her hand and he threw it back behind her head" and therefore "intentionally caused the serious bodily injury." (R. 178). The prosecutor then reiterated that because Mr. Hutchings' actions were not accidental, they were intentional, and, therefore, Mr. Hutchings intentionally broke her hand. (R. 207). Coupled with the erroneous instruction and lack of any evidence that Mr. Hutchings intended serious bodily injury, the prosecutor's statements make it very likely that the jury convicted Mr. Hutchings of aggravated assault for his intent to engage in conduct, not to cause the result of serious bodily injury. The error was therefore prejudicial.

Conclusion

This court should vacate Mr. Hutchings' conviction for aggravated assault. The trial court plainly erred, and trial counsel was constitutionally ineffective, when the jury was instructed that it need only find that Mr. Hutchings intended to engage in conduct, instead of intended the result, to be guilty of aggravated assault. And the error was prejudicial, as there was no evidence that Mr. Hutchings intended serious bodily injury and the prosecutor specifically told the jury that it need not find that Mr. Hutchings intended serious bodily injury. Thus, the court of appeals erred in affirming his conviction. This court should reverse

DATED this 24th day of August, 2010.

SNELL & WILMER L.L.P.



Troy L. Booher
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CERTIFICATE OF SERVICE

This is to certify that on the 24th day of August, 2010, two true and correct copies of the foregoing Opening Brief of Appellant were sent via U.S. Mail, postage prepaid, to:

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A handwritten signature in black ink, appearing to read "R. Tenney", is written over a horizontal line.

Addenda

- Addendum A: Minutes – Sentence, Judgment, Commitment (R. 229-30)
- Addendum B: Jury Instruction Nos. 14, 18, 27 (R. 174, 186, 189, 198)
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Tab A

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, : MINUTES
Plaintiff, :
 : SENTENCE, JUDGMENT, COMMITMENT
 :
 :
vs. : Case No: 061902496 FS
 :
LARRY LEWIS HUTCHINGS, : Judge: DENNIS M FUCHS
Defendant. : Date: October 22, 2007

PRESENT

Clerk: patd

Prosecutor: PARKINSON, PATRICIA

Defendant

Defendant's Attorney(s): LJUNGBERG, ROBIN K

DEFENDANT INFORMATION

Date of birth: February 16, 1965

Video

Tape Number: S42 Tape Count: 21746

CHARGES

2. AGGRAVATED ASSAULT - 2nd Degree Felony
Plea: Not Guilty - Disposition: 09/04/2007 Guilty
3. CRIMINAL MISCHIEF - Class B Misdemeanor
Plea: Not Guilty - Disposition: 09/04/2007 Guilty

SENTENCE PRISON

Based on the defendant's conviction of AGGRAVATED ASSAULT a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

COMMITMENT is to begin immediately.

To the SALT LAKE County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

Case No: 061902496
Date: Oct 22, 2007

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE

RUN CONSECUTIVELY TO TIME NOW SERVING AT UTAH STATE PRISON

SENTENCE JAIL SERVICE NOTE

DEFENDANT GIVEN CREDIT FOR TIME SERVE ON COUNT 2 - CRIMINAL MISCHIEF

SENTENCE FINE

Charge # 2 Fine: \$10,000
 Suspended: \$0.00
 Surcharge: \$8525.00
 Due: \$18525.00

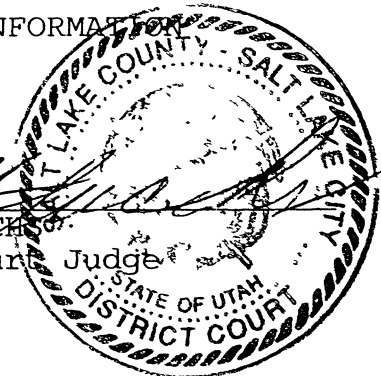
Charge # 3
 Total Fine: \$10000
 Total Suspended: \$0
 Total Surcharge: \$8525.00
 Total Principal Due: \$18525
 Plus Interest
Attorney Fees Amount: \$250.00 Plus Interest
Pay in behalf of: S L ATTORNEYS FEES S L COUNTY ATTORNEY

SENTENCE TRUST NOTE

STATE HAS 60 DAYS TO PROVIDE ANY RESTITUTION INFORMATION

Dated this 22 day of Oct, 2007.


DENNIS M FUCHS
District Court Judge



Tab B


THIRD DISTRICT COURT, STATE OF UTAH
SALT LAKE COUNTY, SALT LAKE DEPARTMENT

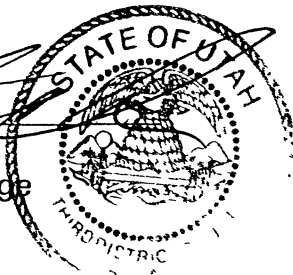
STATE OF UTAH,)	JURY INSTRUCTIONS
Plaintiff,)	
vs.)	Case No. 061902496 FS
LARRY LEWIS HUTCHINGS,)	
Defendant,)	Honorable Dennis M. Fuchs

The Court, in its charge to the jury, gives the following instructions numbered one (1) through

forty (40) inclusive.

Dated this 5 day of Sept., 2007.


Dennis M. Fuchs
Third District Court Judge



INSTRUCTION NO. 19

Before you can convict the defendant, LARRY HUTCHINGS, of the crime of Aggravated Assault, as charged in count II of the information, you must find from all of the evidence and beyond a reasonable doubt, each and every one of the following elements of that offense:


1. That on or about April 6, 2006, in Salt Lake County, Utah, the defendant, LARRY HUTCHINGS;
2. Intentionally or knowingly;
3. Committed an assault on Deborah Cuddeback; and
4. Intentionally caused serious bodily injury to her.

If, after careful consideration of all of the evidence in this case, you are convinced of the truth of each and every one of the foregoing elements beyond a reasonable doubt, then you must find the defendant guilty of Aggravated Assault as charged in count II of the information. If, on the other hand, you are not convinced beyond a reasonable doubt of any one or more of the foregoing elements, then you must find the defendant not guilty of count II.

A handwritten signature in black ink, located in the bottom right corner of the page. The signature is stylized and appears to be a combination of initials and a surname, possibly 'M. J. Hutchings'.

INSTRUCTION NO. 18


"Serious bodily injury" means bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death.

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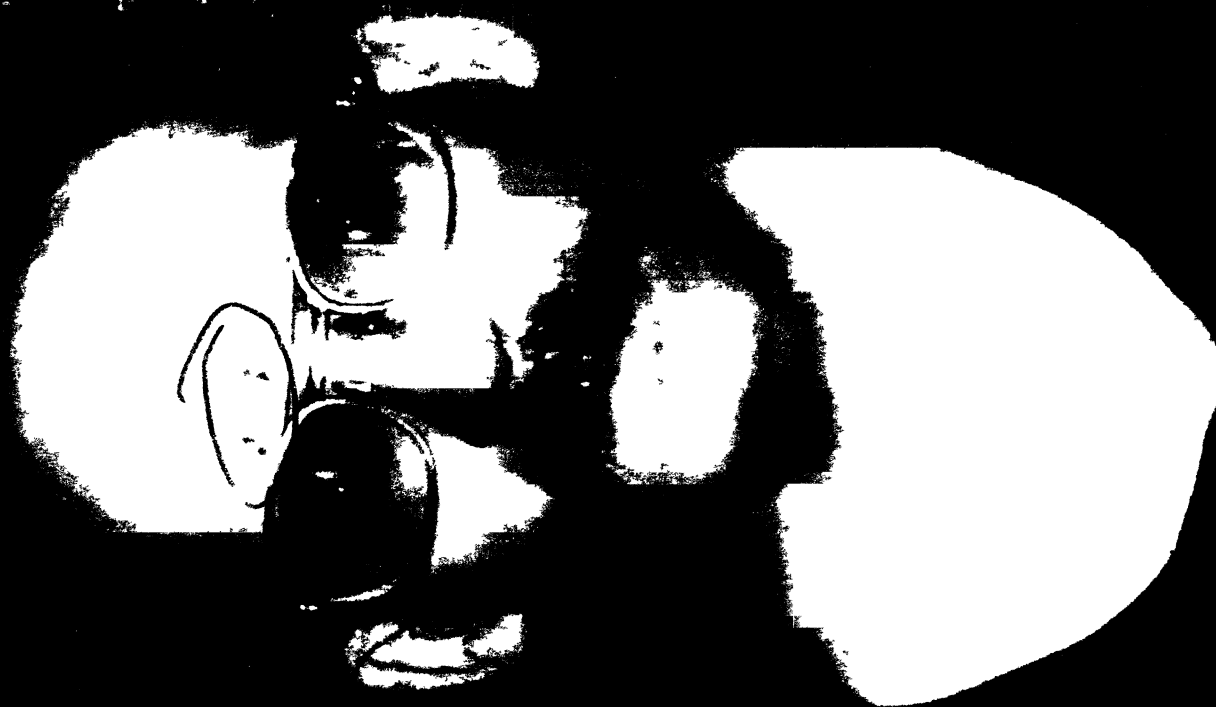
INSTRUCTION NO. 27

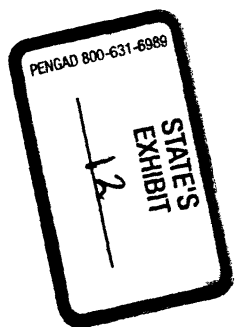
A person engages in conduct intentionally, or with intent or willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.

A person engages in conduct knowingly, or with knowledge, with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or the existing circumstances. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

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Tab C





Tab D

IN THE UTAH COURT OF APPEALS

-----ooOoo-----

State of Utah,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 20080681-CA
v.)	
)	F I L E D
Larry Lewis Hutchings,)	(November 13, 2009)
)	
Defendant and Appellant.)	2009 UT App 330

Third District, Salt Lake Department, 061902496
The Honorable Dennis M. Fuchs

Attorneys: Ronald Fujino, Salt Lake City, for Appellant
Mark L. Shurtleff and Ryan D. Tenney, Salt Lake City,
for Appellee

Before Judges Bench, Thorne, and McHugh.

McHUGH, Judge:

Larry Lewis Hutchings appeals his convictions for aggravated assault and criminal mischief. Hutchings raises multiple issues on appeal, challenging his convictions. With respect to all but one of those issues, Hutchings's lawyer has filed an Anders brief, and Hutchings has filed a memorandum to supplement counsel's brief. See generally Anders v. California, 386 U.S. 738 (1967) (describing the procedures that appointed counsel must follow when he believes his client's claims on appeal are frivolous); State v. Clayton, 639 P.2d 168, 169-70 (Utah 1981) (adopting Anders requirements "as an expression of the requirements of due process of law" under the Utah Constitution). Because our independent review convinces us that the issues identified by Hutchings's counsel in the Anders brief (the Anders issues) are indeed frivolous, see generally State v. Romano, 29 Utah 2d 237, 507 P.2d 1025, 1025 (1973) (defining "frivolous" as "having no basis in fact or law"), we do not consider those issues further. See Clayton, 639 P.2d at 170 (holding that an appellate court may grant a withdrawal and affirm a conviction if it unanimously determines that an appeal is wholly frivolous).

Apart from the Anders issues, appellate counsel argues that the trial court incorrectly instructed the jury on the culpable mental state required for aggravated assault and the definition of "intentional."¹ "Whether a jury instruction correctly states the law presents a question of law which we review for correctness." State v. Miller, 2008 UT 61, ¶ 13, 193 P.3d 92.

The jury instruction on aggravated assault provided,

Before you can convict . . . HUTCHINGS
. . . of Aggravated Assault, . . . you must
find from all of the evidence and beyond a
reasonable doubt, each and every one of the
following elements of that offense:

1. That on or about April 6, 2006, in
Salt Lake County, Utah, . . . HUTCHINGS;
2. Intentionally or knowingly;
3. Committed an assault on [his
girlfriend]; and
4. Intentionally caused serious bodily
injury to her.

We agree with the State that the jury instruction correctly listed the elements of aggravated assault, including the culpable mental states.

Aggravated assault requires that a person commit "assault as defined in [Utah Code s]ection 76-5-102, and . . . intentionally cause[] serious bodily injury to another." Utah Code Ann. § 76-5-103(1)(a) (2008) (emphasis added).² An "[a]ssault is . . . an act, committed with unlawful force or violence, that causes bodily injury to another or creates a substantial risk of bodily injury to another." Id. § 76-5-102. Because the assault statute does not provide the culpable mental state required to support a

¹Although Hutchings failed to object to these instructions in the trial court, he requests that we review them under the plain error doctrine. The State does not contest our review of these issues.

²Because it is irrelevant to this appeal, we need not address the alternative element of aggravated assault, that is, the use of a dangerous weapon or other means likely to produce death in the commission of the assault, see Utah Code Ann. § 76-5-103(1)(b) (2008).

conviction, "intent, knowledge, or recklessness shall suffice to establish criminal responsibility." Id. § 76-2-102. To be liable for aggravated assault, however, the defendant must also have intentionally caused serious bodily injury. See id. § 76-5-103(1)(a). Thus, there are actually two mens rea requirements that must be met to convict a defendant of aggravated assault: the first is the intent, knowledge, or recklessness included in a simple assault charge; the second is the requirement that the defendant intentionally cause serious bodily injury. The challenged jury instruction correctly identified each of these mental state requirements.³ Accordingly, we reject counsel's claim that the jury instruction was erroneous.⁴

Finally, Hutchings challenges the instruction to the jury that defined "intentional" conduct. That instruction stated, "A person engages in conduct intentionally, or with intent or willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result." Hutchings argues that to be guilty of aggravated assault he must have intended to cause the serious bodily injury suffered by the victim, not simply the conduct that resulted in the serious bodily injury. We disagree. It is enough to satisfy the mens rea requirement if the defendant intends the act that results in serious bodily injury. See State v. Fontana, 680 P.2d 1042, 1044 n.1 (Utah 1984) (upholding nearly identical instructions for intent).

Because counsel has complied with the requirements of Anders v. California, 386 U.S. 738 (1967), and because we confirm that the Anders issues are frivolous, we grant counsel's request to withdraw with respect to the Anders issues only and affirm the trial court's rulings with respect to those issues. In addition, the jury instructions properly informed the jury of the elements

³Indeed, by not including recklessness as a basis for a finding of assault, the State was held to a higher standard of proof for that mens rea element than required by the statute.

⁴Because we conclude that the jury instruction was proper, we need not address Hutchings's claim that he received ineffective assistance of counsel when his trial lawyer failed to object to the instruction.

of aggravated assault, including the mental states required.
Accordingly, we affirm the convictions.

Carolyn B. McHugh, Judge

I CONCUR:

Russell W. Bench, Judge

I CONCUR IN THE RESULT:


William A. Thorne Jr., Judge

Tab E

FOCUS™ Terms 76-2-102

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Utah Code Ann. § 76-2-102

UTAH CODE ANNOTATED

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*** ARCHIVE DATA ***

*** STATUTES CURRENT THROUGH THE 2005 SECOND SPECIAL SESSION ***

*** ANNOTATIONS CURRENT THROUGH 2006 UT 7, 2006 UT APP 33 ***

*** FEBRUARY 9, 2006(FEDERAL CASES) ***

TITLE 76. UTAH CRIMINAL CODE
CHAPTER 2. PRINCIPLES OF CRIMINAL RESPONSIBILITY
PART 1. CULPABILITY GENERALLY

Utah Code Ann. § **76-2-102** (2005)

§ **76-2-102**. Culpable mental state required -- Strict liability

Every offense not involving strict liability shall require a culpable mental state, and when the definition of the offense does not specify a culpable mental state and the offense does not involve strict liability, intent, knowledge, or recklessness shall suffice to establish criminal responsibility. An offense shall involve strict liability if the statute defining the offense clearly indicates a legislative purpose to impose criminal responsibility for commission of the conduct prohibited by the statute without requiring proof of any culpable mental state.

HISTORY: C. 1953, **76-2-102**, enacted by L. 1973, ch. 196, § **76-2-102**; 1983, ch. 90, § 2.

NOTES TO DECISIONS

ANALYSIS



Depraved indifference.



Jury instructions.



Relation to other sections.



Cited.

DEPRAVED INDIFFERENCE.

In a prosecution for second degree murder, although the court's jury instruction did not expressly treat the element of knowledge, there was no error since the other jury instructions and the evidence of the defendant's actions left little room for the jury to misunderstand that the defendant must have been aware that his conduct created a grave risk of death to another, within the definitions contained in the instructions. State v. Fontana, 680 P.2d 1042 (Utah 1984).

JURY INSTRUCTIONS.

Requisite state of mind for a violation of the Utah Bail Bond Recovery Act, Utah Code Ann. § 53-11-107, is intent, knowledge, or recklessness; therefore, a trial court properly instructed the jury on the required mental state because it was not classified as a strict liability crime. State v. Norton, 2003 UT App 88, 67 P.3d 1050.

RELATION TO OTHER SECTIONS.

In light of this section and § 32A-12-104, under § 32A-12-203(1), if a person recklessly provides alcohol to a minor, that person is guilty of a class B misdemeanor; however, under § 32A-12-203(2) if a person knowingly provides alcohol to a minor that person is guilty of a class A misdemeanor. State v. Valdez, 933 P.2d 400 (Utah Ct.

FOCUS™ Terms 76-5-102

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*** FEBRUARY 9, 2006(FEDERAL CASES) ***

TITLE 76. UTAH CRIMINAL CODE
CHAPTER 5. OFFENSES AGAINST THE PERSON
PART 1. ASSAULT AND RELATED OFFENSES

Utah Code Ann. § **76-5-102** (2005)

§ **76-5-102**. Assault

(1) Assault is:

(a) an attempt, with unlawful force or violence, to do bodily injury to another;

(b) a threat, accompanied by a show of immediate force or violence, to do bodily injury to another; or

(c) an act, committed with unlawful force or violence, that causes bodily injury to another or creates a substantial risk of bodily injury to another.

(2) Assault is a class B misdemeanor.

(3) Assault is a class A misdemeanor if:

(a) the person causes substantial bodily injury to another; or

(b) the victim is pregnant and the person has knowledge of the pregnancy.

(4) It is not a defense against assault, that the accused caused serious bodily injury to another.

HISTORY: C. 1953, **76-5-102**, enacted by L. 1974, ch. 32, § 38; 1989, ch. 51, § 1; 1991, ch. 75, § 3; 1995, ch. 291, § 4; 1996, ch. 140, § 1; 2000, ch. 170, § 2; 2003, ch. 109, § 1.

NOTES: REPEALS AND REENACTMENTS. --Laws 1974, ch. 32, § 38 repealed former § **76-5-102**, as enacted by L. 1973, ch. 196, § **76-5-102**, relating to assault, and enacted present § **76-5-102**.

AMENDMENT NOTES. --The 2000 amendment, effective May 1, 2000, added the Subsection (3)(a) designation, added Subsection (3)(b), and made two related changes.

The 2003 amendment, effective May 5, 2003, added "bodily injury to another" in Subsection (1)(c).

CROSS-REFERENCES. --Bus hijacking, assault with intent to commit, § 76-10-1504.

Power of city to prohibit assault and battery, § 10-8-47.

NOTES TO DECISIONS


ANALYSIS



FOCUS™ Terms 76-5-102

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Utah Code Ann. § 76-5-103

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*** ANNOTATIONS CURRENT THROUGH 2006 UT 7, 2006 UT APP 33 ***

*** FEBRUARY 9, 2006(FEDERAL CASES) ***

TITLE 76. UTAH CRIMINAL CODE
CHAPTER 5. OFFENSES AGAINST THE PERSON
PART 1. ASSAULT AND RELATED OFFENSES

Utah Code Ann. § 76-5-103 (2005)

§ 76-5-103. Aggravated assault

(1) A person commits aggravated assault if he commits assault as defined in Section **76-5-102** and he:

(a) intentionally causes serious bodily injury to another; or

(b) under circumstances not amounting to a violation of Subsection (1)(a), uses a dangerous weapon as defined in Section 76-1-601 or other means or force likely to produce death or serious bodily injury.

(2) A violation of Subsection (1)(a) is a second degree felony.

(3) A violation of Subsection (1)(b) is a third degree felony.

HISTORY: C. 1953, 76-5-103, enacted by L. 1973, ch. 196, § 76-5-103; 1974, ch. 32, § 10; 1989, ch. 170, § 2; 1995, ch. 291, § 5.

NOTES: CROSS-REFERENCES. --Attempt, § 76-4-101.

Possession of a dangerous weapon with intent to assault, § 76-10-507.

NOTES TO DECISIONS

ANALYSIS



Dangerous weapon.



Defense of habitation.



Evidence.



-- Sufficient.



Included offense.



Indictment or information.



Instructions.



-- Citizen's arrest.

Tab F

CRIMINAL OFFENSE PENALTIES

AMENDMENTS

2010 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Jon J. Greiner

House Sponsor: Curtis Oda

LONG TITLE

General Description:

This bill modifies provisions of the Criminal Code regarding elements of specified criminal offenses and regarding the dollar value of damage used to determine levels of criminal offenses.

Highlighted Provisions:

This bill:

- ▶ applies the enhanced penalty that currently applies to persons committing a crime in concert with two or more persons to persons who commit any of the listed offenses in association with a criminal street gang;
- ▶ provides that commission of aggravated assault resulting in serious bodily injury is a second degree felony, regardless of whether the actor intended to cause serious bodily injury;
- ▶ modifies the penalty for a second offense of theft, or of robbery or burglary with the intent to commit theft, to require that the second offense be committed or the conviction obtained within 10 years prior to the current theft offense;
- ▶ modifies the factors considered by the juvenile court in hearings to certify a juvenile to stand trial as an adult to include if the juvenile engaged in criminal activity in association with a criminal street gang;
- ▶ modifies the definition of a criminal nuisance to include criminal activity conducted in association with a criminal street gang; and
- ▶ modifies the dollar value of damage that determines the levels of offense for

offenses, including arson, criminal mischief, theft, various fraud offenses, unlawful dealing by a fiduciary, destruction of livestock, reckless burning, computer crimes, bad checks, mortgage fraud, and theft of utility services.

Monies Appropriated in this Bill:

None

Other Special Clauses:

This bill provides an effective date of November 1, 2010.

Utah Code Sections Affected:**AMENDS:**

9-4-612, as last amended by Laws of Utah 2007, Chapter 322

63M-7-510, as last amended by Laws of Utah 2008, Chapter 339 and renumbered and amended by Laws of Utah 2008, Chapter 382

76-3-203.1, as last amended by Laws of Utah 2009, Chapter 157

76-5-103, as last amended by Laws of Utah 1995, Chapter 291

76-6-101, as last amended by Laws of Utah 2009, Chapter 320

76-6-102, as last amended by Laws of Utah 2004, Chapter 134

76-6-104, as last amended by Laws of Utah 1998, Chapter 71

76-6-106, as last amended by Laws of Utah 2002, Chapter 166

76-6-111, as enacted by Laws of Utah 2009, Chapter 282

76-6-409.3, as last amended by Laws of Utah 1995, Chapter 291

76-6-412, as last amended by Laws of Utah 1997, Chapters 119 and 289

76-6-505, as last amended by Laws of Utah 2007, Chapter 306

76-6-506.5, as last amended by Laws of Utah 2009, Chapter 166

76-6-513, as last amended by Laws of Utah 2008, Chapter 382

76-6-518, as last amended by Laws of Utah 1995, Chapter 291

76-6-608, as last amended by Laws of Utah 2003, Chapter 173

76-6-703, as last amended by Laws of Utah 2005, Chapter 72

76-6-1204, as last amended by Laws of Utah 2009, Chapter 211

58 **76-8-1206**, as last amended by Laws of Utah 1995, Chapter 291
59 **76-8-1301**, as last amended by Laws of Utah 2008, Chapter 305
60 **76-10-1801**, as last amended by Laws of Utah 2009, Chapter 211
61 **78A-6-703**, as renumbered and amended by Laws of Utah 2008, Chapter 3
62 **78B-6-1101**, as last amended by Laws of Utah 2009, Chapter 21
63 **78B-6-1107**, as renumbered and amended by Laws of Utah 2008, Chapter 3

64
65 *Be it enacted by the Legislature of the state of Utah:*

66 Section 1. Section **9-4-612** is amended to read:

67 **9-4-612. Penalties for fraudulently obtaining or continuing to receive housing**
68 **assistance benefits.**

69 (1) No person may knowingly, by misrepresentation, impersonation, or any other
70 fraudulent means, make any false statement to housing authority personnel or, after being
71 accepted as a recipient of housing authority benefits, fail to disclose to housing authority
72 personnel any:

73 (a) change in household composition;
74 (b) employment change;
75 (c) change in marital status;
76 (d) receipt of any other monetary assistance;
77 (e) receipt of in-kind gifts; or
78 (f) any other material fact or change in circumstances which would affect the
79 determination of that person's eligibility to receive housing assistance benefits, or would affect
80 the amount of benefits for which he is eligible.

81 (2) No person may fail to disclose any of the information described in Subsection (1)
82 for the purpose of obtaining or continuing to receive funds or other housing assistance benefits
83 to which he is not entitled, or in an amount larger than that to which he is entitled.

84 (3) No person who has duties relating to the administration of any housing authority
85 program may fraudulently misappropriate any funds or other assistance with which he has

been entrusted, or of which he has gained possession by virtue of his position.

(4) No person may knowingly:

(a) file or falsify any claim, report, or document required by state or federal law, or provider agreement, to obtain or attempt to obtain unauthorized housing assistance benefits under this chapter; or

(b) attempt to commit, or aid or abet the commission of, any act prohibited by this section.

(5) The punishment for violation of any provision of this section by a housing assistance recipient is determined by the cumulative value of the funds or other benefits he received from all the frauds he committed, and not by each separate instance of fraud.

(6) The punishment for the offenses of this section are:

(a) a ~~[felony of the]~~ second degree felony if the value of the funds or other benefits received, misappropriated, claimed, or applied for, is equal to or exceeds \$5,000;

(b) a ~~[felony of the]~~ third degree felony if the value of the funds or other benefits received, misappropriated, claimed, or applied for, is equal to or greater than ~~[\$1,000]~~ \$1,500 but less than \$5,000;

(c) a class A misdemeanor if the value of the funds or other benefits received, misappropriated, claimed, or applied for, is equal to or greater than ~~[\$300]~~ \$500 but less than ~~[\$1,000]~~ \$1,500; or

(d) a class B misdemeanor if the value of the funds or other benefits received, misappropriated, claimed, or applied for, is less than ~~[\$300]~~ \$500.

Section 2. Section **63M-7-510** is amended to read:

63M-7-510. Ineligible persons -- Fraudulent claims -- Penalties.

(1) The following individuals are not eligible to receive an award of reparations:

(a) persons who do not meet all of the provisions set forth in Section 63M-7-509;

(b) the offender;

(c) an accomplice of the offender;

(d) any person whose receipt of an award would unjustly benefit the offender,

accomplice, or other person reasonably suspected of participating in the offense;

(e) the victim of a motor vehicle injury who was the owner or operator of the motor vehicle and was not at the time of the injury in compliance with the state motor vehicle insurance laws;

(f) any convicted offender serving a sentence of imprisonment in any prison or jail or residing in any other correctional facility;

(g) all persons who are on probation or parole if the circumstances surrounding the offense of which they are victims constitute a violation of their parole or probation; and

(h) any person whose injuries are the result of criminally injurious conduct which occurred in a prison, jail, or any other correctional facility while the person was serving a sentence of imprisonment.

(2) A person who knowingly submits a fraudulent claim for reparations or who knowingly misrepresents material facts in making a claim, and who receives an award based on that claim, is guilty of an offense, based on the following award amounts:

(a) for value under ~~[\$300]~~ \$500, a class B misdemeanor;

(b) for value equal to or greater than ~~[\$300]~~ \$500, but less than ~~[\$1,000]~~ \$1,500, a class A misdemeanor;

(c) for value equal to or greater than ~~[\$1,000]~~ \$1,500, but less than \$5,000, a third degree felony; and

(d) for value equal to or greater than \$5,000, a second degree felony.

(3) A person who submits a claim described in Subsection (2) but receives no award based on that claim is guilty of a class B misdemeanor.

(4) The state attorney general may prosecute violations under this section or may make arrangements with county attorneys for the prosecution of violations under this section when the attorney general cannot conveniently prosecute.

(5) The state may also bring a civil action against a claimant who receives reparation payments that are later found to be unjustified and who does not return to the Crime Victim Reparations Fund the unjustified amount.

Section 3. Section 76-3-203.1 is amended to read:

76-3-203.1. Offenses committed in concert with two or more persons or in relation to a criminal street gang -- Notice -- Enhanced penalties.

(1) As used in this section:

(a) "Criminal street gang" has the same definition as in Section 76-9-802.

(b) "In concert with two or more persons" means:

(i) the defendant was aided or encouraged by at least two other persons in committing the offense and was aware of this aid or encouragement; and

(ii) each of the other persons:

(A) was physically present; or

(B) participated as a party to any offense listed in Subsection (5).

(c) "In concert with two or more persons" means, regarding intent:

(i) other persons participating as parties need not have the intent to engage in the same offense or degree of offense as the defendant; and

(ii) a minor is a party if the minor's actions would cause the minor to be a party if the minor were an adult.

~~[(1)(a)]~~ (2) A person who commits any offense listed in Subsection ~~[(4)]~~ (5) is subject to an enhanced penalty for the offense as provided in Subsection ~~[(3)]~~ (4) if the trier of fact finds beyond a reasonable doubt that the person acted:

~~(a) in concert with two or more persons[.];~~

~~[(b) "In concert with two or more persons" as used in this section means the defendant was aided or encouraged by at least two other persons in committing the offense and was aware that he was so aided or encouraged, and each of the other persons:]~~

~~[(i) was physically present; or]~~

~~[(ii) participated as a party to any offense listed in Subsection (4).]~~

~~[(c) For purposes of Subsection (1)(b)(ii):]~~

~~[(i) other persons participating as parties need not have the intent to engage in the same offense or degree of offense as the defendant; and]~~

[70 ~~[(ii) a minor is a party if the minor's actions would cause him to be a party if he were~~

[71 ~~an adult.]~~

[72 (b) for the benefit of, at the direction of, or in association with any criminal street gang

[73 as defined in Section 76-9-802; or

[74 (c) to gain recognition, acceptance, membership, or increased status with a criminal

[75 street gang as defined in Section 76-9-802.

[76 ~~[(2)]~~ (3) The prosecuting attorney, or grand jury if an indictment is returned, shall

[77 cause to be subscribed upon the information or indictment notice that the defendant is subject

[78 to the enhanced penalties provided under this section.

[79 ~~[(3)]~~ (4) The enhanced penalty for a:

[80 (a) class B misdemeanor is a class A misdemeanor;

[81 (b) class A misdemeanor is a third degree felony;

[82 (c) third degree felony is a second degree felony;

[83 (d) second degree felony is a first degree felony; and

[84 (e) first degree felony is an indeterminate prison term of not less than five years in

[85 addition to the statutory minimum prison term for the offense, and which may be for life.

[86 ~~[(4)]~~ (5) Offenses referred to in Subsection ~~[(1)]~~ (2) are:

[87 (a) any criminal violation of ~~[Title 58, Chapter 37, 37a, 37b, or 37c, regarding~~

[88 ~~drug-related offenses;]~~ the following chapters of Title 58:

[89 (i) Chapter 37, Utah Controlled Substances Act;

[90 (ii) Chapter 37a, Utah Drug Paraphernalia Act;

[91 (iii) Chapter 37b, Imitation Controlled Substances Act; or

[92 (iv) Chapter 37c, Utah Controlled Substance Precursor Act;

[93 (b) assault and related offenses under Title 76, Chapter 5, Part 1, Assault and Related

[94 Offenses;

[95 (c) any criminal homicide offense under Title 76, Chapter 5, Part 2, Criminal

[96 Homicide;

[97 (d) kidnapping and related offenses under Title 76, Chapter 5, Part 3, Kidnapping,

198 Trafficking, and Smuggling;
199 (e) any felony sexual offense under Title 76, Chapter 5, Part 4, Sexual Offenses;
200 (f) sexual exploitation of a minor as defined in Section 76-5a-3;
201 (g) any property destruction offense under Title 76, Chapter 6, Part 1, Property
202 Destruction;
203 (h) burglary, criminal trespass, and related offenses under Title 76, Chapter 6, Part 2,
204 Burglary and Criminal Trespass;
205 (i) robbery and aggravated robbery under Title 76, Chapter 6, Part 3, Robbery;
206 (j) theft and related offenses under Title 76, Chapter 6, Part 4, Theft, or Part 6, Retail
207 Theft;
208 (k) any fraud offense under Title 76, Chapter 6, Part 5, except Sections 76-6-504,
209 76-6-505, 76-6-507, 76-6-508, 76-6-509, 76-6-510, 76-6-511, 76-6-512, 76-6-513, 76-6-514,
210 76-6-516, 76-6-517, 76-6-518, and 76-6-520;
211 (l) any offense of obstructing government operations under Title 76, Chapter 8, Part 3,
212 except Sections 76-8-302, 76-8-303, 76-8-304, 76-8-307, 76-8-308, and 76-8-312;
213 (m) tampering with a witness or other violation of Section 76-8-508;
214 (n) extortion or bribery to dismiss criminal proceeding as defined in Section 76-8-509;
215 (o) any explosives offense under Title 76, Chapter 10, Part 3, Explosives;
216 (p) any weapons offense under Title 76, Chapter 10, Part 5, Weapons;
217 (q) pornographic and harmful materials and performances offenses under Title 76,
218 Chapter 10, Part 12, Pornographic and Harmful Materials and Performances;
219 (r) prostitution and related offenses under Title 76, Chapter 10, Part 13, Prostitution;
220 (s) any violation of Title 76, Chapter 10, Part 15, Bus Passenger Safety Act;
221 (t) any violation of Title 76, Chapter 10, Part 16, Pattern of Unlawful Activity Act;
222 (u) communications fraud as defined in Section 76-10-1801;
223 (v) any violation of Title 76, Chapter 10, Part 19, Money Laundering and Currency
224 Transaction Reporting Act; and
225 (w) burglary of a research facility as defined in Section 76-10-2002.

126 ~~[(5)]~~ (6) It is not a bar to imposing the enhanced penalties under this section that the
127 persons with whom the actor is alleged to have acted in concert are not identified,
128 apprehended, charged, or convicted, or that any of those persons are charged with or convicted
129 of a different or lesser offense.

130 Section 4. Section **76-5-103** is amended to read:

131 **76-5-103. Aggravated assault.**

132 (1) A person commits aggravated assault if ~~[he]~~ the person commits assault as defined
133 in Section 76-5-102 and ~~[he]~~ uses:

134 ~~[(a) intentionally causes serious bodily injury to another; or]~~

135 ~~[(b) under circumstances not amounting to a violation of Subsection (1)(a), uses]~~

136 (a) a dangerous weapon as defined in Section 76-1-601; or

137 (b) other means or force likely to produce death or serious bodily injury.

138 (2) (a) A violation of Subsection ~~[(1)(a)]~~ (1) is a ~~[second]~~ third degree felony, except
139 under Subsection (2)(b).

140 ~~[(3)]~~ (b) A violation of Subsection (1)~~[(b)]~~ that results in serious bodily injury is a
141 ~~[third]~~ second degree felony.

142 Section 5. Section **76-6-101** is amended to read:

143 **76-6-101. Definitions.**

144 For purposes of this chapter:

145 (1) "Property" means any form of real property or tangible personal property which is
146 capable of being damaged or destroyed and includes a habitable structure.

147 (2) "Habitable structure" means any building, vehicle, trailer, railway car, aircraft, or
148 watercraft used for lodging or assembling persons or conducting business whether a person is
149 actually present or not.

150 (3) "Property" is that of another, if anyone other than the actor has a possessory or
151 proprietary interest in any portion thereof.

152 (4) "Value" means:

153 (a) The market value of the property, if totally destroyed, at the time and place of the

offense, or where cost of replacement exceeds the market value; or

(b) Where the market value cannot be ascertained, the cost of repairing or replacing the property within a reasonable time following the offense.

(5) If the property damaged has a value that cannot be ascertained by the criteria set forth in Subsections (4)(a) and (b), the property shall be considered to have a value less than ~~[\$300]~~ \$500.

(6) "Fire" means a flame, heat source capable of combustion, or material capable of combustion that is caused, set, or maintained by a person for any purpose.

Section 6. Section **76-6-102** is amended to read:

76-6-102. Arson.

(1) A person is guilty of arson if, under circumstances not amounting to aggravated arson, ~~[by means of fire or explosives,]~~ the person by means of fire or explosives unlawfully and intentionally damages:

(a) any property with intention of defrauding an insurer; or

(b) the property of another.

(2) A violation of Subsection (1)(a) is a second degree felony.

(3) A violation of Subsection (1)(b) is:

(a) a second degree felony if:

(i) the damage caused is or exceeds \$5,000 in value; or

(ii) as a proximate result of the fire or explosion, any person not a participant in the offense suffers serious bodily injury as defined in Section 76-1-601;

(b) a third degree felony if:

(i) the damage caused is or exceeds ~~[\$1,000]~~ \$1,500 but is less than \$5,000 in value;

(ii) as a proximate result of the fire or explosion, any person not a participant in the offense suffers substantial bodily injury as defined in Section 76-1-601; or

(iii) the fire or explosion endangers human life;

(c) a class A misdemeanor if the damage caused is or exceeds ~~[\$300]~~ \$500 but is less than ~~[\$1,000]~~ \$1,500 in value; and

(d) a class B misdemeanor if the damage caused is less than [~~\$300~~] \$500.

Section 7. Section **76-6-104** is amended to read:

76-6-104. Reckless burning.

(1) A person is guilty of reckless burning if the person:

(a) recklessly starts a fire or causes an explosion which endangers human life;

(b) having started a fire, whether recklessly or not, and knowing that it is spreading and will endanger the life or property of another, either fails to take reasonable measures to put out or control the fire or fails to give a prompt fire alarm;

(c) builds or maintains a fire without taking reasonable steps to remove all flammable materials surrounding the site of the fire as necessary to prevent the fire's spread or escape; or

(d) damages the property of another by reckless use of fire or causing an explosion.

(2) (a) A violation of Subsection (1)(a) or (b) is a class A misdemeanor.

(b) A violation of Subsection (1)(c) is a class B misdemeanor.

(c) A violation of Subsection (1)(d) is:

(i) a class A misdemeanor if damage to property is or exceeds [~~\$1,000~~] \$1,500 in value;

(ii) a class B misdemeanor if the damage to property is or exceeds [~~\$300~~] \$500 but is less than [~~\$1,000~~] \$1,500 in value; and

(iii) a class C misdemeanor if the damage to property is or exceeds \$150 but is less than [~~\$300~~] \$500 in value.

(d) Any other violation under Subsection (1)(d) is an infraction.

Section 8. Section **76-6-106** is amended to read:

76-6-106. Criminal mischief.

(1) As used in this section, "critical infrastructure" includes:

(a) information and communication systems;

(b) financial and banking systems;

(c) transportation systems;

(d) any public utility service, including the power, energy, and water supply systems;

- 310 (e) sewage and water treatment systems;
- 311 (f) health care facilities as listed in Section 26-21-2, and emergency fire, medical, and
- 312 law enforcement response systems;
- 313 (g) public health facilities and systems;
- 314 (h) food distribution systems; and
- 315 (i) other government operations and services.
- 316 (2) A person commits criminal mischief if the person:
- 317 (a) under circumstances not amounting to arson, damages or destroys property with
- 318 the intention of defrauding an insurer;
- 319 (b) intentionally and unlawfully tampers with the property of another and as a result:
- 320 (i) recklessly endangers:
- 321 (A) human life; or
- 322 (B) human health or safety; or
- 323 (ii) recklessly causes or threatens a substantial interruption or impairment of any
- 324 critical infrastructure;
- 325 (c) intentionally damages, defaces, or destroys the property of another; or
- 326 (d) recklessly or willfully shoots or propels a missile or other object at or against a
- 327 motor vehicle, bus, airplane, boat, locomotive, train, railway car, or caboose, whether moving
- 328 or standing.
- 329 (3) (a) (i) A violation of Subsection (2)(a) is a third degree felony.
- 330 (ii) A violation of Subsection (2)(b)(i)(A) is a class A misdemeanor.
- 331 (iii) A violation of Subsection (2)(b)(i)(B) is a class B misdemeanor.
- 332 (iv) A violation of Subsection (2)(b)(ii) is a second degree felony.
- 333 (b) Any other violation of this section is a:
- 334 (i) second degree felony if the actor's conduct causes or is intended to cause pecuniary
- 335 loss equal to or in excess of \$5,000 in value;
- 336 (ii) third degree felony if the actor's conduct causes or is intended to cause pecuniary
- 337 loss equal to or in excess of [~~\$1,000~~] \$1,500 but is less than \$5,000 in value;

(iii) class A misdemeanor if the actor's conduct causes or is intended to cause pecuniary loss equal to or in excess of [~~\$300~~] \$500 but is less than [~~\$1,000~~] \$1,500 in value; and

(iv) class B misdemeanor if the actor's conduct causes or is intended to cause pecuniary loss less than [~~\$300~~] \$500 in value.

(4) In determining the value of damages under this section, or for computer crimes under Section 76-6-703, the value of any item, computer, computer network, computer property, computer services, software, or data includes the measurable value of the loss of use of the items and the measurable cost to replace or restore the items.

(5) In addition to any other penalty authorized by law, a court shall order any person convicted of any violation of this section to reimburse any federal, state, or local unit of government, or any private business, organization, individual, or entity for all expenses incurred in responding to a violation of Subsection (2)(b)(ii), unless the court states on the record the reasons why the reimbursement would be inappropriate.

Section 9. Section **76-6-111** is amended to read:

76-6-111. Wanton destruction of livestock -- Penalties -- Seizure and disposition of property.

(1) As used in this section:

(a) "Law enforcement officer" is as defined in Section 53-13-103.

(b) "Livestock" means a domestic animal or fur bearer raised or kept for profit, including:

(i) cattle;

(ii) sheep;

(iii) goats;

(iv) swine;

(v) horses;

(vi) mules;

(vii) poultry; and

(viii) domesticated elk as defined in Section 4-39-102.

(2) Unless authorized by Section 4-25-4, 4-25-5, 4-25-14, 4-39-401, or 18-1-3, a person is guilty of wanton destruction of livestock if that person:

(a) injures, physically alters, releases, or causes the death of livestock; and

(b) does so:

(i) intentionally or knowingly; and

(ii) without the permission of the owner of the livestock.

(3) Wanton destruction of livestock is punishable as a:

(a) class B misdemeanor if the aggregate value of the livestock is [~~\$300~~] \$500 or less;

(b) class A misdemeanor if the aggregate value of the livestock is more than [~~\$300~~] \$500, but does not exceed [~~\$1,000~~] \$1,500;

(c) third degree felony if the aggregate value of the livestock is more than [~~\$1,000~~] \$1,500, but does not exceed \$5,000; and

(d) second degree felony if the aggregate value of the livestock is more than \$5,000.

(4) A material, device, or vehicle used in violation of Subsection (2) is subject to forfeiture under the procedures and substantive protections established in Title 24, Chapter 1, Utah Uniform Forfeiture Procedures Act.

(5) A peace officer may seize a material, device, or vehicle used in violation of Subsection (2):

(a) upon notice and service of process issued by a court having jurisdiction over the property; or

(b) without notice and service of process if:

(i) the seizure is incident to an arrest under:

(A) a search warrant; or

(B) an inspection under an administrative inspection warrant;

(ii) the material, device, or vehicle has been the subject of a prior judgment in favor of the state in a criminal injunction or forfeiture proceeding under this section; or

(iii) the peace officer has probable cause to believe that the property has been used in

violation of Subsection (2).

(6) (a) A material, device, or vehicle seized under this section is not repleviable but is in custody of the law enforcement agency making the seizure, subject only to the orders and decrees of a court or official having jurisdiction.

(b) A peace officer who seizes a material, device, or vehicle under this section may:

(i) place the property under seal;

(ii) remove the property to a place designated by the warrant under which it was seized; or

(iii) take custody of the property and remove it to an appropriate location for disposition in accordance with law.

Section 10. Section **76-6-409.3** is amended to read:

76-6-409.3. Theft of utility or cable television services -- Restitution -- Civil action for damages.

(1) As used in this section:

(a) "Cable television service" means any audio, video, or data service provided by a cable television company over its cable system facilities for payment, but does not include the use of a satellite dish or antenna.

(b) "Owner" includes any part-owner, joint owner, tenant in common, joint tenant, or tenant by the entirety of the whole or a part of any building and the property on which it is located.

(c) "Person" means any individual, firm, partnership, corporation, company, association, or other legal entity.

(d) "Tenant or occupant" includes any person, including the owner, who occupies the whole or part of any building, whether alone or with others.

(e) "Utility" means any public utility, municipally-owned utility, or cooperative utility which provides electricity, gas, water, or sewer, or any combination of them, for sale to consumers.

(2) A person is guilty of theft of a utility or cable television service if the person

422 commits any prohibited acts which make gas, electricity, water, sewer, or cable television
423 available to a tenant or occupant, including himself, with intent to avoid due payment to the
424 utility or cable television company. Any person aiding and abetting in these prohibited acts is
425 a party to the offense under Section 76-2-202. Prohibited acts include:

426 (a) connecting any tube, pipe, wire, cable, or other instrument with any meter, device,
427 or other instrument used for conducting gas, electricity, water, sewer, or cable television in a
428 manner as permits the use of the gas, electricity, water, sewer, or cable television without its
429 passing through a meter or other instrument recording the usage for billing;

430 (b) altering, injuring, or preventing the normal action of a meter, valve, stopcock, or
431 other instrument used for measuring quantities of gas, electricity, water, or sewer service, or
432 making or maintaining any modification or alteration to any device installed with the
433 authorization of a cable television company for the purpose of intercepting or receiving any
434 program or other service carried by the company which the person is not authorized by the
435 company to receive;

436 (c) reconnecting gas, electricity, water, sewer, or cable television connections or
437 otherwise restoring service when one or more of those utilities or cable service have been
438 lawfully disconnected or turned off by the provider of the utility or cable service;

439 (d) intentionally breaking, defacing, or causing to be broken or defaced any seal,
440 locking device, or other part of a metering device for recording usage of gas, electricity, water,
441 or sewer service, or a security system for the recording device, or a cable television control
442 device;

443 (e) removing a metering device designed to measure quantities of gas, electricity,
444 water, or sewer service;

445 (f) transferring from one location to another a metering device for measuring
446 quantities of public utility services of gas, electricity, water, or sewer service;

447 (g) changing the indicated consumption, jamming the measuring device, bypassing the
448 meter or measuring device with a jumper so that it does not indicate use or registers use
449 incorrectly, or otherwise obtaining quantities of gas, electricity, water, or sewer service from

the utility without their passing through a metering device for measuring quantities of consumption for billing purposes;

(h) using a metering device belonging to the utility that has not been assigned to the location and installed by the utility;

(i) fabricating or using a device to pick or otherwise tamper with the locks used to deter utility service diversion, meter tampering, meter thefts, and unauthorized cable television service;

(j) assisting or instructing any person in obtaining or attempting to obtain any cable television service without payment of all lawful compensation to the company providing the service;

(k) making or maintaining a connection or connections, whether physical, electrical, mechanical, acoustical, or by other means, with any cables, wires, components, or other devices used for the distribution of cable television services without authority from the cable television company; or

(l) possessing without authority any device or printed circuit board designed in whole or in part to receive any cable television programming or services offered for sale over a cable television system with the intent that the device or printed circuit be used for the reception of the cable television company's services without payment. For purposes of this subsection, device or printed circuit board does not include the use of a satellite dish or antenna.

(3) The presence on property in the possession of a person of any device or alteration which permits the diversion or use of utility or cable service to avoid the registration of the use by or on a meter installed by the utility or to otherwise avoid the recording of use of the service for payment or otherwise avoid payment gives rise to an inference that the person in possession of the property installed the device or caused the alteration if:

(a) the presence of the device or alteration can be attributed only to a deliberate act in furtherance of an intent to avoid payment for utility or cable television service; and

(b) the person charged has received the direct benefit of the reduction of the cost of the utility or cable television service.

(4) A person who violates this section is guilty of the offense of theft of utility or cable television service.

(a) In the case of theft of utility services, if the value of the gas, electricity, water, or sewer service:

(i) is less than ~~[\$300]~~ \$500, the offense is a class B misdemeanor;

(ii) is or exceeds ~~[\$300]~~ \$500 but is not more than ~~[\$1,000]~~ \$1,500, the offense is a class A misdemeanor;

(iii) is or exceeds ~~[\$1,000]~~ \$1,500 but is not more than \$5,000, the offense is a third degree felony; and

(iv) is or exceeds \$5,000 or if the offender has previously been convicted of a violation of this section, the offense is a second degree felony.

(b) In the case of theft of cable television services, the penalties are prescribed in Section 76-6-412.

(5) A person who violates this section shall make restitution to the utility or cable television company for the value of the gas, electricity, water, sewer, or cable television service consumed in violation of this section plus all reasonable expenses and costs incurred on account of the violation of this section. Reasonable expenses and costs include expenses and costs for investigation, disconnection, reconnection, service calls, employee time, and equipment use.

(6) Criminal prosecution under this section does not affect the right of a utility or cable television company to bring a civil action for redress for damages suffered as a result of the commission of any of the acts prohibited by this section.

(7) This section does not abridge or alter any other right, action, or remedy otherwise available to a utility or cable television company.

Section 11. Section **76-6-412** is amended to read:

76-6-412. Theft -- Classification of offenses -- Action for treble damages.

(1) Theft of property and services as provided in this chapter ~~[shall be]~~ is punishable:

(a) as a second degree felony ~~[of the second degree]~~ if the:

- (i) value of the property or services is or exceeds \$5,000;
- (ii) property stolen is a firearm or an operable motor vehicle;
- (iii) actor is armed with a dangerous weapon, as defined in Section 76-1-601, at the time of the theft; or
- (iv) property is stolen from the person of another;
- (b) as a third degree felony [~~of the third degree~~] if:
- (i) the value of the property or services is or exceeds [~~\$1,000~~] \$1,500 but is less than \$5,000;
- (ii) the actor has been twice before convicted of any of the offenses listed in this Subsection (1)(b)(ii), if each prior offense was committed within 10 years of the date of the current conviction or the date of the offense upon which the current conviction is based:
- (A) theft, any robbery, or any burglary with intent to commit theft; [or]
- (B) any offense under Title 76, Chapter 6, Part 5, Fraud; or
- (C) any attempt to commit any offense under Subsection (1)(b)(ii)(A) or (B).
- (iii) in a case not amounting to a second-degree felony, the property taken is a stallion, mare, colt, gelding, cow, heifer, steer, ox, bull, calf, sheep, goat, mule, jack, jenny, swine, poultry, or a fur-bearing animal raised for commercial purposes;
- (c) as a class A misdemeanor if the value of the property stolen is or exceeds [~~\$300~~] \$500 but is less than [~~\$1,000~~] \$1,500; or
- (d) as a class B misdemeanor if the value of the property stolen is less than [~~\$300~~] \$500.
- (2) Any person who violates Subsection 76-6-408(1) or Section 76-6-413, or commits theft of property described in Subsection 76-6-412(1)(b)(iii), is civilly liable for three times the amount of actual damages, if any sustained by the plaintiff, and for costs of suit and reasonable [~~attorneys'~~] attorney fees.

Section 12. Section **76-6-505** is amended to read:

76-6-505. Issuing a bad check or draft -- Presumption.

- (1) (a) Any person who issues or passes a check or draft for the payment of money, for

the purpose of obtaining from any person, firm, partnership, or corporation, any money, property, or other thing of value or paying for any services, wages, salary, labor, or rent, knowing it will not be paid by the drawee and payment is refused by the drawee, is guilty of issuing a bad check or draft.

(b) For purposes of this Subsection (1), a person who issues a check or draft for which payment is refused by the drawee is presumed to know the check or draft would not be paid if he had no account with the drawee at the time of issue.

(2) Any person who issues or passes a check or draft for the payment of money, for the purpose of obtaining from any person, firm, partnership, or corporation, any money, property, or other thing of value or paying for any services, wages, salary, labor, or rent, payment of which check or draft is legally refused by the drawee, is guilty of issuing a bad check or draft if he fails to make good and actual payment to the payee in the amount of the refused check or draft within 14 days of his receiving actual notice of the check or draft's nonpayment.

(3) An offense of issuing a bad check or draft shall be punished as follows:

(a) If the check or draft or series of checks or drafts made or drawn in this state within a period not exceeding six months amounts to a sum that is less than [~~\$300~~] \$500, the offense is a class B misdemeanor.

(b) If the check or draft or checks or drafts made or drawn in this state within a period not exceeding six months amounts to a sum that is or exceeds [~~\$300~~] \$500 but is less than [~~\$1,000~~] \$1,500, the offense is a class A misdemeanor.

(c) If the check or draft or checks or drafts made or drawn in this state within a period not exceeding six months amounts to a sum that is or exceeds [~~\$1,000~~] \$1,500 but is less than \$5,000, the offense is a felony of the third degree.

(d) If the check or draft or checks or drafts made or drawn in this state within a period not exceeding six months amounts to a sum that is or exceeds \$5,000, the offense is a second degree felony.

Section 13. Section **76-6-506.5** is amended to read:

76-6-506.5. Financial transaction card offenses -- Classification -- Multiple

violations.

(1) Any person found guilty of unlawful conduct described in Section 76-6-506.2 or 76-6-506.6 is guilty of:

(a) a class B misdemeanor when the value of the property, money, or thing obtained or sought to be obtained is less than ~~[\$300]~~ \$500;

(b) a class A misdemeanor when the value of the property, money, or thing obtained or sought to be obtained is or exceeds ~~[\$300]~~ \$500 but is less than ~~[\$1,000]~~ \$1,500;

(c) a third degree felony when the value of the property, money, or thing obtained or attempted to be obtained is or exceeds ~~[\$1,000]~~ \$1,500 but is less than \$5,000; and

(d) a second degree felony when the value of the property, money, or thing obtained or attempted to be obtained is or exceeds \$5,000.

(2) Multiple violations of Subsection 76-6-506.2(1), Section 76-6-506.6, and this section may be aggregated into a single offense, and the degree of the offense is determined by the total value of all property, money, or things obtained or attempted to be obtained through the multiple violations.

(3) The court shall make appropriate findings in any prosecution under this section that the card holder did not commit the crime.

Section 14. Section **76-6-513** is amended to read:

76-6-513. Definitions -- Unlawful dealing of property by a fiduciary -- Penalties.

(1) As used in this section:

(a) "Fiduciary" is as defined in Section 22-1-1.

(b) "Financial institution" means "depository institution" and "trust company" as defined in Section 7-1-103.

(c) "Governmental entity" is as defined in Section 63G-7-102.

(d) "Person" does not include a financial institution whose fiduciary functions are supervised by the Department of Financial Institutions or a federal regulatory agency.

(e) "Property" is as defined in Section 76-6-401.

(f) "Public monies" is as defined in Section 76-8-401.

(2) A person is guilty of unlawfully dealing with property by a fiduciary if the person deals with property that has been entrusted to him as a fiduciary, or property of a governmental entity, public monies, or of a financial institution, in a manner which the person knows is a violation of the person's duty and which involves substantial risk of loss or detriment to the owner or to a person for whose benefit the property was entrusted. A violation of this Subsection (2) is punishable under Section 76-6-412.

(3) (a) A person acting as a fiduciary is guilty of a violation of this subsection if, without permission of the owner of the property or some other person with authority to give permission, the person pledges as collateral for a personal loan, or as collateral for the benefit of some party, other than the owner or the person for whose benefit the property was entrusted, the property that has been entrusted to the fiduciary.

(b) An offense under Subsection (3)(a) is punishable as:

(i) a felony of the second degree if the value of the property wrongfully pledged is or exceeds \$5,000;

(ii) a felony of the third degree if the value of the property wrongfully pledged is or exceeds ~~[\$1,000]~~ \$1,500 but is less than \$5,000;

(iii) a class A misdemeanor if the value of the property is or exceeds ~~[\$300]~~ \$500, but is less than ~~[\$1,000]~~ \$1,500 or the actor has been twice before convicted of theft, robbery, burglary with intent to commit theft, or unlawful dealing with property by a fiduciary; or

(iv) a class B misdemeanor if the value of the property is less than ~~[\$300]~~ \$500.

Section 15. Section **76-6-518** is amended to read:

76-6-518. Criminal simulation.

(1) A person is guilty of criminal simulation if, with intent to defraud another:

(a) he makes or alters an object in whole or in part so that it appears to have value because of age, antiquity, rarity, source, or authorship that it does not have;

(b) he sells, passes, or otherwise utters an object so made or altered;

(c) he possesses an object so made or altered with intent to sell, pass, or otherwise utter it; or

(d) he authenticates or certifies an object so made or altered as genuine or as different from what it is.

(2) Criminal simulation is punishable as follows:

(a) If the value defrauded or intended to be defrauded is less than [~~\$300~~] \$500, the offense is a class B misdemeanor.

(b) If the value defrauded or intended to be defrauded is or exceeds [~~\$300~~] \$500 but is less than [~~\$1,000~~] \$1,500, the offense is a class A misdemeanor.

(c) If the value defrauded or intended to be defrauded is or exceeds [~~\$1,000~~] \$1,500 but is less than \$5,000, the offense is a felony of the third degree.

(d) If the value defrauded or intended to be defrauded is or exceeds \$5,000, the offense is a felony of the second degree.

Section 16. Section **76-6-608** is amended to read:

76-6-608. Theft detection shielding devices prohibited -- Penalties.

(1) A person may not knowingly:

(a) make or possess any container or device used for, intended for use for, or represented as having the purpose of shielding merchandise from any electronic or magnetic theft alarm sensor, with the intent to commit a theft of merchandise;

(b) sell, offer to sell, advertise, give, transport, or otherwise transfer to another any container or device intended for use for or represented as having the purpose of shielding merchandise from any electronic or magnetic theft alarm sensor;

(c) possess any tool or instrument designed to remove any theft detection device from any merchandise, with the intent to use the tool or instrument to remove any theft detection device from any merchandise without the permission of the merchant or the person owning or in possession of the merchandise; or

(d) intentionally remove a theft detection device from merchandise prior to purchase and without the permission of the merchant.

(2) (a) A violation of Subsection (1)(a), (b), or (c) is a class A misdemeanor.

(b) A violation of Subsection (1)(d) is a:

(i) class B misdemeanor if the value of the merchandise from which the theft detection device is removed is less than [~~\$300~~] \$500; or

(ii) class A misdemeanor if the value of the merchandise from which the theft detection device is removed is or exceeds [~~\$300~~] \$500.

(3) A violation of Subsection (1) is a separate offense from any offense listed in Title 76, Chapter 6, Part 4, Theft, or Part 6, Retail Theft.

(4) Criminal prosecutions under this section do not affect any person's right of civil action for redress for damages suffered as a result of any violation of this section.

Section 17. Section **76-6-703** is amended to read:

76-6-703. Computer crimes and penalties.

(1) A person who without authorization gains or attempts to gain access to and alters, damages, destroys, discloses, or modifies any computer, computer network, computer property, computer system, computer program, computer data or software, and thereby causes damage to another, or obtains money, property, information, or a benefit for any person without legal right, is guilty of:

(a) a class B misdemeanor when:

(i) the damage caused or the value of the money, property, or benefit obtained or sought to be obtained is less than [~~\$300~~] \$500; or

(ii) the information obtained is not confidential;

(b) a class A misdemeanor when the damage caused or the value of the money, property, or benefit obtained or sought to be obtained is or exceeds [~~\$300~~] \$500 but is less than [~~\$1,000~~] \$1,500;

(c) a third degree felony when the damage caused or the value of the money, property, or benefit obtained or sought to be obtained is or exceeds [~~\$1,000~~] \$1,500 but is less than \$5,000;

(d) a second degree felony when the damage caused or the value of the money, property, or benefit obtained or sought to be obtained is or exceeds \$5,000; or

(e) a third degree felony when:

- 574 (i) the property or benefit obtained or sought to be obtained is a license or entitlement;
575 (ii) the damage is to the license or entitlement of another person; or
576 (iii) the information obtained is confidential; or
577 (iv) in gaining access the person breaches or breaks through a security system.

578 (2) (a) Except as provided in Subsection (2)(b), a person who intentionally or
579 knowingly and without authorization gains or attempts to gain access to a computer, computer
580 network, computer property, or computer system under circumstances not otherwise
581 constituting an offense under this section is guilty of a class B misdemeanor.

582 (b) Notwithstanding Subsection (2)(a), a retailer that uses an electronic product
583 identification or tracking system, or other technology to identify, track, or price goods is not
584 guilty of a violation of Subsection (2)(a) if the equipment designed to read the electronic
585 product identification or tracking system data and used by the retailer to identify, track, or
586 price goods is located within the retailer's location.

587 (3) A person who uses or knowingly allows another person to use any computer,
588 computer network, computer property, or computer system, program, or software to devise or
589 execute any artifice or scheme to defraud or to obtain money, property, services, or other
590 things of value by false pretenses, promises, or representations, is guilty of an offense based on
591 the value of the money, property, services, or things of value, in the degree set forth in
592 Subsection 76-10-1801(1).

593 (4) A person who intentionally or knowingly and without authorization, interferes with
594 or interrupts computer services to another authorized to receive the services is guilty of a class
595 A misdemeanor.

596 (5) It is an affirmative defense to Subsections (1) and (2) that a person obtained access
597 or attempted to obtain access in response to, and for the purpose of protecting against or
598 investigating, a prior attempted or successful breach of security of a computer, computer
599 network, computer property, computer system whose security the person is authorized or
00 entitled to protect, and the access attempted or obtained was no greater than reasonably
01 necessary for that purpose.

Section 18. Section **76-6-1204** is amended to read:

76-6-1204. Classification of offense.

(1) Notwithstanding any other administrative, civil, or criminal penalties, a person who violates Section 76-6-1203 is guilty of a:

(a) class A misdemeanor when the value is or exceeds [~~\$300~~] \$500 but is less than [~~\$1,000~~] \$1,500;

(b) third degree felony when the value is or exceeds [~~\$1,000~~] \$1,500 but is less than \$5,000;

(c) second degree felony when the value is or exceeds \$5,000; and

(d) second degree felony when the object or purpose of the commission of an act of mortgage fraud is the obtaining of sensitive personal identifying information, regardless of the value.

(2) The determination of the degree of any offense under Subsection (1) is measured by the total value of all property, money, or things obtained or sought to be obtained by a violation of Section 76-6-1203, except as provided in Subsection (1)(d).

(3) Each residential or commercial property transaction offense under this part constitutes a separate violation.

Section 19. Section **76-8-1206** is amended to read:

76-8-1206. Penalties for public assistance fraud.

(1) The severity of the offense of public assistance fraud is classified in accordance with the value of payments, assistance, or other benefits received, misappropriated, claimed, or applied for as follows:

(a) second degree felony if the value is or exceeds \$5,000;

(b) third degree felony if the value is or exceeds [~~\$1,000~~] \$1,500 but is less than \$5,000;

(c) class A misdemeanor if the value is or exceeds [~~\$300~~] \$500 but is less than [~~\$1,000~~] \$1,500; and

(d) class B misdemeanor if the value is less than [~~\$300~~] \$500.

(2) For purposes of Subsection (1), the value of an offense is calculated by aggregating the values of each instance of public assistance fraud committed by the defendant as part of the same facts and circumstances or a related series of facts and circumstances.

(3) Incidents of trafficking in food stamps that occur within a six-month period, committed by an individual or coconspirators, are deemed to be a related series of facts and circumstances regardless of whether the transactions are conducted with a variety of unrelated parties.

Section 20. Section **76-8-1301** is amended to read:

76-8-1301. False statements regarding unemployment compensation -- Penalties.

(1) (a) A person who makes a false statement or representation knowing it to be false or knowingly fails to disclose a material fact, to obtain or increase a benefit or other payment under Title 35A, Chapter 4, Employment Security Act, or under the Unemployment Compensation Law of any state or of the federal government for any person is guilty of unemployment insurance fraud.

(b) A violation of Subsection (1)(a) is:

(i) a class B misdemeanor when the value of the money obtained or sought to be obtained is less than [~~\$300~~] \$500;

(ii) a class A misdemeanor when the value of the money obtained or sought to be obtained is or exceeds [~~\$300~~] \$500 but is less than [~~\$1,000~~] \$1,500;

(iii) a third degree felony when the value of the money obtained or sought to be obtained is or exceeds [~~\$1,000~~] \$1,500 but is less than \$5,000; or

(iv) a second degree felony when the value of the money obtained or sought to be obtained is or exceeds \$5,000.

(c) The determination of the degree of an offense under Subsection (1)(b) shall be measured by the total value of all money obtained or sought to be obtained by the unlawful conduct.

(2) (a) An officer or agent of an employing unit as defined in Section 35A-4-202 or any other person who makes a false statement or representation knowing it to be false, or who

758 knowingly fails to disclose a material fact, to prevent or reduce the payment of unemployment
759 compensation benefits to an individual entitled to those benefits, or to avoid becoming or
760 remaining a subject employer or to avoid or reduce any contribution or other payment required
761 from an employing unit under Title 35A, Chapter 4, Employment Security Act, or under the
762 Unemployment Compensation Law of any state or of the federal government, or who willfully
763 fails or refuses to make a contribution or other payment or to furnish any report required in
764 Title 35A, Chapter 4, Employment Security Act, or to produce or permit the inspection or
765 copying of records as required under that chapter is guilty of unemployment insurance fraud.

766 (b) A violation of Subsection (2)(a) is:

767 (i) a class B misdemeanor when the value of the money obtained or sought to be
768 obtained is less than [~~\$300~~] \$500;

769 (ii) a class A misdemeanor when the value of the money obtained or sought to be
770 obtained is or exceeds [~~\$300~~] \$500 but is less than [~~\$1,000~~] \$1,500;

771 (iii) a third degree felony when the value of the money obtained or sought to be
772 obtained is or exceeds [~~\$1,000~~] \$1,500 but is less than \$5,000; or

773 (iv) a second degree felony when the value of the money obtained or sought to be
774 obtained is or exceeds \$5,000.

775 (3) (a) A person who willfully violates any provision of Title 35A, Chapter 4,
776 Employment Security Act, or any order made under that chapter, the violation of which is
777 made unlawful or the observance of which is required under the terms of that chapter, and for
778 which a penalty is neither prescribed in that chapter nor provided by any other applicable
779 statute is guilty of a class A misdemeanor.

780 (b) Each day a violation of Subsection (3)(a) continues shall be a separate offense.

781 (4) A person is guilty of a class C misdemeanor if:

82 (a) as an employee of the Department of Workforce Services, in willful violation of
83 Section 35A-4-312, the employee makes a disclosure of information obtained from an
84 employing unit or individual in the administration of Title 35A, Chapter 4, Employment
85 Security Act; or

(b) the person has obtained a list of applicants for work or of claimants or recipients of benefits under Title 35A, Chapter 4, Employment Security Act, and uses or permits the use of the list for any political purpose.

Section 21. Section **76-10-1801** is amended to read:

76-10-1801. Communications fraud -- Elements -- Penalties.

(1) Any person who has devised any scheme or artifice to defraud another or to obtain from another money, property, or anything of value by means of false or fraudulent pretenses, representations, promises, or material omissions, and who communicates directly or indirectly with any person by any means for the purpose of executing or concealing the scheme or artifice is guilty of:

(a) a class B misdemeanor when the value of the property, money, or thing obtained or sought to be obtained is less than ~~[\$300]~~ \$500;

(b) a class A misdemeanor when the value of the property, money, or thing obtained or sought to be obtained is or exceeds ~~[\$300]~~ \$500 but is less than ~~[\$1,000]~~ \$1,500;

(c) a third degree felony when the value of the property, money, or thing obtained or sought to be obtained is or exceeds ~~[\$1,000]~~ \$1,500 but is less than \$5,000;

(d) a second degree felony when the value of the property, money, or thing obtained or sought to be obtained is or exceeds \$5,000; and

(e) a second degree felony when the object or purpose of the scheme or artifice to defraud is the obtaining of sensitive personal identifying information, regardless of the value.

(2) The determination of the degree of any offense under Subsection (1) shall be measured by the total value of all property, money, or things obtained or sought to be obtained by the scheme or artifice described in Subsection (1) except as provided in Subsection (1)(e).

(3) Reliance on the part of any person is not a necessary element of the offense described in Subsection (1).

(4) An intent on the part of the perpetrator of any offense described in Subsection (1) to permanently deprive any person of property, money, or thing of value is not a necessary element of the offense.

(5) Each separate communication made for the purpose of executing or concealing a scheme or artifice described in Subsection (1) is a separate act and offense of communication fraud.

(6) (a) To communicate as described in Subsection (1) means to:

(i) bestow, convey, make known, recount, or impart;

(ii) give by way of information;

(iii) talk over; or

(iv) transmit information.

(b) Means of communication include use of the mail, telephone, telegraph, radio, television, newspaper, computer, and spoken and written communication.

(7) A person may not be convicted under this section unless the pretenses, representations, promises, or material omissions made or omitted were made or omitted intentionally, knowingly, or with a reckless disregard for the truth.

(8) As used in this section, "sensitive personal identifying information" means information regarding an individual's:

(a) Social Security number;

(b) driver's license number or other government issued identification number;

(c) financial account number or credit or debit card number;

(d) password or personal identification number or other identification required to gain access to a financial account or a secure website;

(e) automated or electronic signature;

(f) unique biometric data; or

(g) any other information that can be used to gain access to an individual's financial accounts or to obtain goods or services.

Section 22. Section **78A-6-703** is amended to read:

78A-6-703. Certification hearings -- Juvenile court to hold preliminary hearing -- Factors considered by juvenile court for waiver of jurisdiction to district court.

(1) If a criminal information filed in accordance with Subsection 78A-6-602(3) alleges

the commission of an act which would constitute a felony if committed by an adult, the juvenile court shall conduct a preliminary hearing.

(2) At the preliminary hearing the state shall have the burden of going forward with its case and the burden of establishing:

(a) probable cause to believe that a crime was committed and that the defendant committed it; and

(b) by a preponderance of the evidence, that it would be contrary to the best interests of the minor or of the public for the juvenile court to retain jurisdiction.

(3) In considering whether or not it would be contrary to the best interests of the minor or of the public for the juvenile court to retain jurisdiction, the juvenile court shall consider, and may base its decision on, the finding of one or more of the following factors:

(a) the seriousness of the offense and whether the protection of the community requires isolation of the minor beyond that afforded by juvenile facilities;

(b) whether the alleged offense was committed by the minor under circumstances which would subject the minor to enhanced penalties under Section 76-3-203.1 if the minor were adult and the offense was committed:

(i) in concert with two or more persons [~~under circumstances which would subject the minor to enhanced penalties under Section 76-3-203.1 were he an adult~~];

(ii) for the benefit of, at the direction of, or in association with any criminal street gang as defined in Section 76-9-802; or

(iii) to gain recognition, acceptance, membership, or increased status with a criminal street gang as defined in Section 76-9-802;

(c) whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner;

(d) whether the alleged offense was against persons or property, greater weight being given to offenses against persons, except as provided in Section 76-8-418;

(e) the maturity of the minor as determined by considerations of [his] the minor's home, environment, emotional attitude, and pattern of living;

870 (f) the record and previous history of the minor;
871 (g) the likelihood of rehabilitation of the minor by use of facilities available to the
872 juvenile court;
873 (h) the desirability of trial and disposition of the entire offense in one court when the
874 minor's associates in the alleged offense are adults who will be charged with a crime in the
875 district court;
876 (i) whether the minor used a firearm in the commission of an offense; and
877 (j) whether the minor possessed a dangerous weapon on or about school premises as
878 provided in Section 76-10-505.5.

879 (4) The amount of weight to be given to each of the factors listed in Subsection (3) is
880 discretionary with the court.

881 (5) (a) Written reports and other materials relating to the minor's mental, physical,
882 educational, and social history may be considered by the court.

883 (b) If requested by the minor, the minor's parent, guardian, or other interested party,
884 the court shall require the person or agency preparing the report and other material to appear
885 and be subject to both direct and cross-examination.

886 (6) At the conclusion of the state's case, the minor may testify under oath, call
887 witnesses, cross-examine adverse witnesses, and present evidence on the factors required by
888 Subsection (3).

889 (7) If the court finds the state has met its burden under Subsection (2), the court may
890 enter an order:

891 (a) certifying that finding; and
892 (b) directing that the minor be held for criminal proceedings in the district court.

893 (8) If an indictment is returned by a grand jury, the preliminary examination held by
894 the juvenile court need not include a finding of probable cause, but the juvenile court shall
895 proceed in accordance with this section regarding the additional consideration referred to in
896 Subsection (2)(b).

897 (9) The provisions of Section 78A-6-115, Section 78A-6-1111, and other provisions

relating to proceedings in juvenile cases are applicable to the hearing held under this section to the extent they are pertinent.

(10) A minor who has been directed to be held for criminal proceedings in the district court is not entitled to a preliminary examination in the district court.

(11) A minor who has been certified for trial in the district court shall have the same right to bail as any other criminal defendant and shall be advised of that right by the juvenile court judge. The juvenile court shall set initial bail in accordance with Title 77, Chapter 20, Bail.

(12) When a minor has been certified to the district court under this section or when a criminal information or indictment is filed in a court of competent jurisdiction before a committing magistrate charging the minor with an offense described in Section 78A-6-702, the jurisdiction of the Division of Juvenile Justice Services and the jurisdiction of the juvenile court over the minor is terminated regarding that offense, any other offenses arising from the same criminal episode, and any subsequent misdemeanors or felonies charged against ~~him~~ the minor, except as provided in Subsection (14).

(13) If a minor enters a plea to, or is found guilty of any of the charges filed or on any other offense arising out of the same criminal episode, the district court retains jurisdiction over the minor for all purposes, including sentencing.

(14) The juvenile court under Section 78A-6-103 and the Division of Juvenile Justice Services regain jurisdiction and any authority previously exercised over the minor when there is an acquittal, a finding of not guilty, or dismissal of all charges in the district court.

Section 23. Section **78B-6-1101** is amended to read:

78B-6-1101. Definitions -- Nuisance -- Right of action.

(1) A nuisance is anything which is injurious to health, indecent, offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property. A nuisance may be the subject of an action.

(2) A nuisance may include the following:

(a) drug houses and drug dealing as provided in Section 78B-6-1107;

- 926 (b) gambling as provided in Title 76, Chapter 10, Part 11;
- 927 (c) criminal activity committed in concert with two or more persons as provided in
- 928 Section 76-3-203.1;
- 929 (d) criminal activity committed for the benefit of, at the direction of, or in association
- 930 with any criminal street gang as defined in Section 76-9-802;
- 931 (e) criminal activity committed to gain recognition, acceptance, membership, or
- 932 increased status with a criminal street gang as defined in Section 76-9-802;
- 933 ~~[(d)]~~ (f) party houses which frequently create conditions defined in Subsection (1);
- 934 and
- 935 ~~[(e)]~~ (g) prostitution as provided in Title 76, Chapter 10, Part 13.
- 936 (3) A nuisance under this part includes tobacco smoke that drifts into any residential
- 937 unit a person rents, leases, or owns, from another residential or commercial unit and the
- 938 smoke:
- 939 (a) drifts in more than once in each of two or more consecutive seven-day periods; and
- 940 (b) creates any of the conditions under Subsection (1).
- 941 (4) Subsection (3) does not apply to:
- 942 (a) residential rental units available for temporary rental, such as for vacations, or
- 943 available for only 30 or fewer days at a time; or
- 944 (b) hotel or motel rooms.
- 945 (5) Subsection (3) does not apply to any unit that is part of a timeshare development,
- 946 as defined in Section 57-19-2, or subject to a timeshare interest as defined in Section 57-19-2.
- 947 (6) An action may be brought by any person whose property is injuriously affected, or
- 948 whose personal enjoyment is lessened by the nuisance.
- 949 (7) "Agricultural operation" means any activity engaged in the commercial production
- 950 of crops, orchards, aquaculture, livestock, poultry, livestock products, poultry products, and
- 951 the facilities, equipment, and property used to facilitate the activity.
- 952 (8) "Manufacturing facility" means any factory, plant, or other facility including its
- 953 appurtenances, where the form of raw materials, processed materials, commodities, or other

physical objects is converted or otherwise changed into other materials, commodities, or physical objects or where such materials, commodities, or physical objects are combined to form a new material, commodity, or physical object.

Section 24. Section **78B-6-1107** is amended to read:

78B-6-1107. Nuisance -- Right of action to abate nuisances -- Drug houses and drug dealing -- Gambling -- Criminal activity -- Prostitution -- Weapons.

(1) Every building or place is a nuisance where:

(a) the unlawful sale, manufacture, service, storage, distribution, dispensing, or acquisition occurs of any controlled substance, precursor, or analog specified in Title 58, Chapter 37, Utah Controlled Substances Act;

(b) gambling is permitted to be played, conducted, or dealt upon as prohibited in Title 76, Chapter 10, Part 11, Gambling, which creates the conditions of a nuisance as defined in Subsection 78B-6-1101(1);

(c) criminal activity is committed in concert with two or more persons as provided in Section 76-3-203.1;

(d) criminal activity is committed for the benefit of, at the direction of, or in association with any criminal street gang as defined in Section 76-9-802;

(e) criminal activity is committed to gain recognition, acceptance, membership, or increased status with a criminal street gang as defined in Section 76-9-802;

~~[(f)]~~ (f) parties occur frequently which create the conditions of a nuisance as defined in Subsection 78B-6-1101(1);

~~[(g)]~~ (g) prostitution or promotion of prostitution is regularly carried on by one or more persons as provided in Title 76, Chapter 10, Part 13, Prostitution; and

~~[(h)]~~ (h) a violation of Title 76, Chapter 10, Part 5, Weapons, occurs on the premises.

(2) It is a defense to nuisance under Subsection (1)(a) if the defendant can prove that the defendant is lawfully entitled to possession of a controlled substance.

(3) Sections 78B-6-1108 through 78B-6-1114 govern only an abatement by eviction of the nuisance as defined in Subsection (1).

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982 Section 25. **Effective date.**

983 This bill takes effect on November 1, 2010.