

PENALTY ENHANCEMENT AMENDMENTS

2021 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Todd D. Weiler

House Sponsor: Brady Brammer

LONG TITLE

General Description:

This bill modifies provisions relating to convictions that can be used to enhance penalties for certain controlled substances offenses.

Highlighted Provisions:

This bill:

- ▶ provides that in order to be used as a penalty enhancement for certain controlled substances offenses, a prior offense must be committed within seven years before the date of the current offense; and
- ▶ makes technical changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

58-37-8, as last amended by Laws of Utah 2020, Chapters 12, 117, 131, 191, and 354

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **58-37-8** is amended to read:

58-37-8. Prohibited acts -- Penalties.

(1) Prohibited acts A -- Penalties and reporting:

(a) Except as authorized by this chapter, it is unlawful for a person to knowingly and

30 intentionally:

31 (i) produce, manufacture, or dispense, or to possess with intent to produce,
32 manufacture, or dispense, a controlled or counterfeit substance;

33 (ii) distribute a controlled or counterfeit substance, or to agree, consent, offer, or
34 arrange to distribute a controlled or counterfeit substance;

35 (iii) possess a controlled or counterfeit substance with intent to distribute; or

36 (iv) engage in a continuing criminal enterprise where:

37 (A) the person participates, directs, or engages in conduct that results in a violation of
38 Chapter 37, Utah Controlled Substances Act, Chapter 37a, Utah Drug Paraphernalia Act,
39 Chapter 37b, Imitation Controlled Substances Act, Chapter 37c, Utah Controlled Substance
40 Precursor Act, or Chapter 37d, Clandestine Drug Lab Act, that is a felony; and

41 (B) the violation is a part of a continuing series of two or more violations of Chapter
42 37, Utah Controlled Substances Act, Chapter 37a, Utah Drug Paraphernalia Act, Chapter 37b,
43 Imitation Controlled Substances Act, Chapter 37c, Utah Controlled Substance Precursor Act,
44 or Chapter 37d, Clandestine Drug Lab Act, on separate occasions that are undertaken in concert
45 with five or more persons with respect to whom the person occupies a position of organizer,
46 supervisor, or any other position of management.

47 (b) A person convicted of violating Subsection (1)(a) with respect to:

48 (i) a substance or a counterfeit of a substance classified in Schedule I or II, a controlled
49 substance analog, or gammahydroxybutyric acid as listed in Schedule III is guilty of a second
50 degree felony, punishable by imprisonment for not more than 15 years, and upon a second or
51 subsequent conviction is guilty of a first degree felony;

52 (ii) a substance or a counterfeit of a substance classified in Schedule III or IV, or
53 marijuana, or a substance listed in Section 58-37-4.2 is guilty of a third degree felony, and
54 upon a second or subsequent conviction is guilty of a second degree felony; or

55 (iii) a substance or a counterfeit of a substance classified in Schedule V is guilty of a
56 class A misdemeanor and upon a second or subsequent conviction is guilty of a third degree
57 felony.

58 (c) A person who has been convicted of a violation of Subsection (1)(a)(ii) or (iii) may
59 be sentenced to imprisonment for an indeterminate term as provided by law, but if the trier of
60 fact finds a firearm as defined in Section 76-10-501 was used, carried, or possessed on the
61 person or in the person's immediate possession during the commission or in furtherance of the
62 offense, the court shall additionally sentence the person convicted for a term of one year to run
63 consecutively and not concurrently; and the court may additionally sentence the person
64 convicted for an indeterminate term not to exceed five years to run consecutively and not
65 concurrently.

66 (d) (i) A person convicted of violating Subsection (1)(a)(iv) is guilty of a first degree
67 felony punishable by imprisonment for an indeterminate term of not less than:

68 (A) seven years and which may be for life; or

69 (B) 15 years and which may be for life if the trier of fact determined that the defendant
70 knew or reasonably should have known that any subordinate under Subsection (1)(a)(iv)(B)
71 was under 18 years [~~of age~~] old.

72 (ii) Imposition or execution of the sentence may not be suspended, and the person is
73 not eligible for probation.

74 (iii) Subsection (1)(d)(i)(B) does not apply to any defendant who, at the time of the
75 offense, was under 18 years [~~of age~~] old.

76 (e) The Administrative Office of the Courts shall report to the Division of
77 Occupational and Professional Licensing the name, case number, date of conviction, and if
78 known, the date of birth of each person convicted of violating Subsection (1)(a).

79 (2) Prohibited acts B -- Penalties and reporting:

80 (a) It is unlawful:

81 (i) for a person knowingly and intentionally to possess or use a controlled substance
82 analog or a controlled substance, unless it was obtained under a valid prescription or order,
83 directly from a practitioner while acting in the course of the person's professional practice, or as
84 otherwise authorized by this chapter;

85 (ii) for an owner, tenant, licensee, or person in control of a building, room, tenement,

86 vehicle, boat, aircraft, or other place knowingly and intentionally to permit them to be occupied
87 by persons unlawfully possessing, using, or distributing controlled substances in any of those
88 locations; or

89 (iii) for a person knowingly and intentionally to possess an altered or forged
90 prescription or written order for a controlled substance.

91 (b) A person convicted of violating Subsection (2)(a)(i) with respect to:

92 (i) marijuana, if the amount is 100 pounds or more, is guilty of a second degree felony;
93 or

94 (ii) a substance classified in Schedule I or II, or a controlled substance analog, is guilty
95 of a class A misdemeanor on a first or second conviction, and on a third or subsequent
96 conviction if each prior offense was committed within seven years before ~~[the date of the~~
97 ~~current conviction or]~~ the date of the offense upon which the current conviction is based is
98 guilty of a third degree felony.

99 (c) Upon a person's conviction of a violation of this Subsection (2) subsequent to a
100 conviction under Subsection (1)(a), that person shall be sentenced to a one degree greater
101 penalty than provided in this Subsection (2).

102 (d) A person who violates Subsection (2)(a)(i) with respect to all other controlled
103 substances not included in Subsection (2)(b)(i) or (ii), including a substance listed in Section
104 58-37-4.2, or marijuana, is guilty of a class B misdemeanor.

105 (i) Upon a third conviction the person is guilty of a class A misdemeanor, if each prior
106 offense was committed within seven years before ~~[the date of the current conviction or]~~ the
107 date of the offense upon which the current conviction is based.

108 (ii) Upon a fourth or subsequent conviction the person is guilty of a third degree felony
109 if each prior offense was committed within seven years ~~[of the date of the current conviction~~
110 ~~or]~~ before the date of the offense upon which the current conviction is based.

111 (e) A person convicted of violating Subsection (2)(a)(i) while inside the exterior
112 boundaries of property occupied by a correctional facility as defined in Section 64-13-1 or a
113 public jail or other place of confinement shall be sentenced to a penalty one degree greater than

114 provided in Subsection (2)(b), and if the conviction is with respect to controlled substances as
115 listed in:

116 (i) Subsection (2)(b), the person may be sentenced to imprisonment for an
117 indeterminate term as provided by law, and:

118 (A) the court shall additionally sentence the person convicted to a term of one year to
119 run consecutively and not concurrently; and

120 (B) the court may additionally sentence the person convicted for an indeterminate term
121 not to exceed five years to run consecutively and not concurrently; and

122 (ii) Subsection (2)(d), the person may be sentenced to imprisonment for an
123 indeterminate term as provided by law, and the court shall additionally sentence the person
124 convicted to a term of six months to run consecutively and not concurrently.

125 (f) A person convicted of violating Subsection (2)(a)(ii) or (iii) is:

126 (i) on a first conviction, guilty of a class B misdemeanor;

127 (ii) on a second conviction, guilty of a class A misdemeanor; and

128 (iii) on a third or subsequent conviction, guilty of a third degree felony.

129 (g) A person is subject to the penalties under Subsection (2)(h) who, in an offense not
130 amounting to a violation of Section 76-5-207:

131 (i) violates Subsection (2)(a)(i) by knowingly and intentionally having in the person's
132 body any measurable amount of a controlled substance, except for
133 11-nor-9-carboxy-tetrahydrocannabinol; and

134 (ii) (A) if the controlled substance is not marijuana, operates a motor vehicle as defined
135 in Section 76-5-207 in a negligent manner, causing serious bodily injury as defined in Section
136 76-1-601 or the death of another; or

137 (B) if the controlled substance is marijuana, operates a motor vehicle as defined in
138 Section 76-5-207 in a criminally negligent manner, causing serious bodily injury as defined in
139 Section 76-1-601 or the death of another.

140 (h) A person who violates Subsection (2)(g) by having in the person's body:

141 (i) a controlled substance classified under Schedule I, other than those described in

142 Subsection (2)(h)(ii), or a controlled substance classified under Schedule II is guilty of a second
143 degree felony;

144 (ii) except as provided in Subsection (2)(g)(ii)(B), marijuana, tetrahydrocannabinols, or
145 equivalents described in Subsection 58-37-4(2)(a)(iii)(S) or (AA), or a substance listed in
146 Section 58-37-4.2 is guilty of a third degree felony; or

147 (iii) a controlled substance classified under Schedules III, IV, or V is guilty of a class A
148 misdemeanor.

149 (i) A person is guilty of a separate offense for each victim suffering serious bodily
150 injury or death as a result of the person's negligent driving in violation of Subsection(2)(g)
151 whether or not the injuries arise from the same episode of driving.

152 (j) The Administrative Office of the Courts shall report to the Division of Occupational
153 and Professional Licensing the name, case number, date of conviction, and if known, the date
154 of birth of each person convicted of violating Subsection (2)(a).

155 (3) Prohibited acts C -- Penalties:

156 (a) It is unlawful for a person knowingly and intentionally:

157 (i) to use in the course of the manufacture or distribution of a controlled substance a
158 license number which is fictitious, revoked, suspended, or issued to another person or, for the
159 purpose of obtaining a controlled substance, to assume the title of, or represent oneself to be, a
160 manufacturer, wholesaler, apothecary, physician, dentist, veterinarian, or other authorized
161 person;

162 (ii) to acquire or obtain possession of, to procure or attempt to procure the
163 administration of, to obtain a prescription for, to prescribe or dispense to a person known to be
164 attempting to acquire or obtain possession of, or to procure the administration of a controlled
165 substance by misrepresentation or failure by the person to disclose receiving a controlled
166 substance from another source, fraud, forgery, deception, subterfuge, alteration of a
167 prescription or written order for a controlled substance, or the use of a false name or address;

168 (iii) to make a false or forged prescription or written order for a controlled substance,
169 or to utter the same, or to alter a prescription or written order issued or written under the terms

170 of this chapter; or

171 (iv) to make, distribute, or possess a punch, die, plate, stone, or other thing designed to
172 print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or
173 device of another or any likeness of any of the foregoing upon any drug or container or labeling
174 so as to render a drug a counterfeit controlled substance.

175 (b) (i) A first or second conviction under Subsection (3)(a)(i), (ii), or (iii) is a class A
176 misdemeanor.

177 (ii) A third or subsequent conviction under Subsection (3)(a)(i), (ii), or (iii) is a third
178 degree felony.

179 (c) A violation of Subsection (3)(a)(iv) is a third degree felony.

180 (4) Prohibited acts D -- Penalties:

181 (a) Notwithstanding other provisions of this section, a person not authorized under this
182 chapter who commits any act that is unlawful under Subsection (1)(a) or Section 58-37b-4 is
183 upon conviction subject to the penalties and classifications under this Subsection (4) if the trier
184 of fact finds the act is committed:

185 (i) in a public or private elementary or secondary school or on the grounds of any of
186 those schools during the hours of 6 a.m. through 10 p.m.;

187 (ii) in a public or private vocational school or postsecondary institution or on the
188 grounds of any of those schools or institutions during the hours of 6 a.m. through 10 p.m.;

189 (iii) in or on the grounds of a preschool or child-care facility during the preschool's or
190 facility's hours of operation;

191 (iv) in a public park, amusement park, arcade, or recreation center when the public or
192 amusement park, arcade, or recreation center is open to the public;

193 (v) in or on the grounds of a house of worship as defined in Section 76-10-501;

194 (vi) in or on the grounds of a library when the library is open to the public;

195 (vii) within an area that is within 100 feet of any structure, facility, or grounds included
196 in Subsections (4)(a)(i), (ii), (iii), (iv), (v), and (vi);

197 (viii) in the presence of a person younger than 18 years of age, regardless of where the

198 act occurs; or

199 (ix) for the purpose of facilitating, arranging, or causing the transport, delivery, or
200 distribution of a substance in violation of this section to an inmate or on the grounds of a
201 correctional facility as defined in Section 76-8-311.3.

202 (b) (i) A person convicted under this Subsection (4) is guilty of a first degree felony
203 and shall be imprisoned for a term of not less than five years if the penalty that would
204 otherwise have been established but for this Subsection (4) would have been a first degree
205 felony.

206 (ii) Imposition or execution of the sentence may not be suspended, and the person is
207 not eligible for probation.

208 (c) If the classification that would otherwise have been established would have been
209 less than a first degree felony but for this Subsection (4), a person convicted under this
210 Subsection (4) is guilty of one degree more than the maximum penalty prescribed for that
211 offense. This Subsection (4)(c) does not apply to a violation of Subsection (2)(g).

212 (d) (i) If the violation is of Subsection (4)(a)(ix):

213 (A) the person may be sentenced to imprisonment for an indeterminate term as
214 provided by law, and the court shall additionally sentence the person convicted for a term of
215 one year to run consecutively and not concurrently; and

216 (B) the court may additionally sentence the person convicted for an indeterminate term
217 not to exceed five years to run consecutively and not concurrently; and

218 (ii) the penalties under this Subsection (4)(d) apply also to a person who, acting with
219 the mental state required for the commission of an offense, directly or indirectly solicits,
220 requests, commands, coerces, encourages, or intentionally aids another person to commit a
221 violation of Subsection (4)(a)(ix).

222 (e) It is not a defense to a prosecution under this Subsection (4) that:

223 (i) the actor mistakenly believed the individual to be 18 years [~~of age~~] old or older at
224 the time of the offense or was unaware of the individual's true age; or

225 (ii) the actor mistakenly believed that the location where the act occurred was not as

226 described in Subsection (4)(a) or was unaware that the location where the act occurred was as
227 described in Subsection (4)(a).

228 (5) A violation of this chapter for which no penalty is specified is a class B
229 misdemeanor.

230 (6) (a) For purposes of penalty enhancement under Subsections (1) and (2), a plea of
231 guilty or no contest to a violation or attempted violation of this section or a plea which is held
232 in abeyance under Title 77, Chapter 2a, Pleas in Abeyance, is the equivalent of a conviction,
233 even if the charge has been subsequently reduced or dismissed in accordance with the plea in
234 abeyance agreement.

235 (b) A prior conviction used for a penalty enhancement under Subsection (2) shall be a
236 conviction that is:

237 (i) from a separate criminal episode than the current charge; and

238 (ii) from a conviction that is separate from any other conviction used to enhance the
239 current charge.

240 (7) A person may be charged and sentenced for a violation of this section,
241 notwithstanding a charge and sentence for a violation of any other section of this chapter.

242 (8) (a) A penalty imposed for violation of this section is in addition to, and not in lieu
243 of, a civil or administrative penalty or sanction authorized by law.

244 (b) When a violation of this chapter violates a federal law or the law of another state,
245 conviction or acquittal under federal law or the law of another state for the same act is a bar to
246 prosecution in this state.

247 (9) In any prosecution for a violation of this chapter, evidence or proof that shows a
248 person or persons produced, manufactured, possessed, distributed, or dispensed a controlled
249 substance or substances, is prima facie evidence that the person or persons did so with
250 knowledge of the character of the substance or substances.

251 (10) This section does not prohibit a veterinarian, in good faith and in the course of the
252 veterinarian's professional practice only and not for humans, from prescribing, dispensing, or
253 administering controlled substances or from causing the substances to be administered by an

254 assistant or orderly under the veterinarian's direction and supervision.

255 (11) Civil or criminal liability may not be imposed under this section on:

256 (a) a person registered under this chapter who manufactures, distributes, or possesses
257 an imitation controlled substance for use as a placebo or investigational new drug by a
258 registered practitioner in the ordinary course of professional practice or research; or

259 (b) a law enforcement officer acting in the course and legitimate scope of the officer's
260 employment.

261 (12) (a) Civil or criminal liability may not be imposed under this section on any Indian,
262 as defined in Section 58-37-2, who uses, possesses, or transports peyote for bona fide
263 traditional ceremonial purposes in connection with the practice of a traditional Indian religion
264 as defined in Section 58-37-2.

265 (b) In a prosecution alleging violation of this section regarding peyote as defined in
266 Section 58-37-4, it is an affirmative defense that the peyote was used, possessed, or transported
267 by an Indian for bona fide traditional ceremonial purposes in connection with the practice of a
268 traditional Indian religion.

269 (c) (i) The defendant shall provide written notice of intent to claim an affirmative
270 defense under this Subsection (12) as soon as practicable, but not later than 10 days before
271 trial.

272 (ii) The notice shall include the specific claims of the affirmative defense.

273 (iii) The court may waive the notice requirement in the interest of justice for good
274 cause shown, if the prosecutor is not unfairly prejudiced by the lack of timely notice.

275 (d) The defendant shall establish the affirmative defense under this Subsection (12) by
276 a preponderance of the evidence. If the defense is established, it is a complete defense to the
277 charges.

278 (13) (a) It is an affirmative defense that the person produced, possessed, or
279 administered a controlled substance listed in Section 58-37-4.2 if the person was:

280 (i) engaged in medical research; and

281 (ii) a holder of a valid license to possess controlled substances under Section 58-37-6.

282 (b) It is not a defense under Subsection (13)(a) that the person prescribed or dispensed
283 a controlled substance listed in Section 58-37-4.2.

284 (14) It is an affirmative defense that the person possessed, in the person's body, a
285 controlled substance listed in Section 58-37-4.2 if:

286 (a) the person was the subject of medical research conducted by a holder of a valid
287 license to possess controlled substances under Section 58-37-6; and

288 (b) the substance was administered to the person by the medical researcher.

289 (15) The application of any increase in penalty under this section to a violation of
290 Subsection (2)(a)(i) may not result in any greater penalty than a second degree felony. This
291 Subsection (15) takes precedence over any conflicting provision of this section.

292 (16) (a) It is an affirmative defense to an allegation of the commission of an offense
293 listed in Subsection (16)(b) that the person or bystander:

294 (i) reasonably believes that the person or another person is experiencing an overdose
295 event due to the ingestion, injection, inhalation, or other introduction into the human body of a
296 controlled substance or other substance;

297 (ii) reports, or assists a person who reports, in good faith the overdose event to a
298 medical provider, an emergency medical service provider as defined in Section 26-8a-102, a
299 law enforcement officer, a 911 emergency call system, or an emergency dispatch system, or the
300 person is the subject of a report made under this Subsection (16);

301 (iii) provides in the report under Subsection (16)(a)(ii) a functional description of the
302 actual location of the overdose event that facilitates responding to the person experiencing the
303 overdose event;

304 (iv) remains at the location of the person experiencing the overdose event until a
305 responding law enforcement officer or emergency medical service provider arrives, or remains
306 at the medical care facility where the person experiencing an overdose event is located until a
307 responding law enforcement officer arrives;

308 (v) cooperates with the responding medical provider, emergency medical service
309 provider, and law enforcement officer, including providing information regarding the person

310 experiencing the overdose event and any substances the person may have injected, inhaled, or
311 otherwise introduced into the person's body; and

312 (vi) is alleged to have committed the offense in the same course of events from which
313 the reported overdose arose.

314 (b) The offenses referred to in Subsection (16)(a) are:

315 (i) the possession or use of less than 16 ounces of marijuana;

316 (ii) the possession or use of a scheduled or listed controlled substance other than
317 marijuana; and

318 (iii) any violation of Chapter 37a, Utah Drug Paraphernalia Act, or Chapter 37b,
319 Imitation Controlled Substances Act.

320 (c) As used in this Subsection (16) and in Section 76-3-203.11, "good faith" does not
321 include seeking medical assistance under this section during the course of a law enforcement
322 agency's execution of a search warrant, execution of an arrest warrant, or other lawful search.

323 (17) If any provision of this chapter, or the application of any provision to any person
324 or circumstances, is held invalid, the remainder of this chapter shall be given effect without the
325 invalid provision or application.

326 (18) A legislative body of a political subdivision may not enact an ordinance that is
327 less restrictive than any provision of this chapter.

328 (19) If a minor who is under 18 years ~~[of age]~~ old is found by a court to have violated
329 this section, the court may order the minor to complete:

330 (a) a screening as defined in Section 41-6a-501;

331 (b) an assessment as defined in Section 41-6a-501 if the screening indicates an
332 assessment to be appropriate; and

333 (c) an educational series as defined in Section 41-6a-501 or substance use disorder
334 treatment as indicated by an assessment.