

ICJI 401 FAILURE TO AFFIX TAX STAMP

INSTRUCTION NO.

In order for the defendant to be guilty of Failure to Affix Tax Stamp[s], the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] [possessed] [or] [distributed] [more than 42.5 grams of marijuana] [or] [1 or more growing marijuana plants] [or] [7 or more grams of a [counterfeit] controlled substance sold by weight] [or] [10 or more dosage units of any [counterfeit] controlled substance which is not sold by weight], and
4. failed to permanently affix to it the appropriate Idaho tax stamp.

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. §§ 63-4202, 63-4204, 63-4205 & 63-4207.

ICJI 402A POSSESSION OF MARIJUANA

INSTRUCTION NO.

In order for the defendant to be guilty of Felony Possession of Marijuana, the state must prove:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] possessed marijuana,
4. in an amount greater than three (3) ounces, and
5. knew it was marijuana.

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 37-2732(e).

If the defendant is charged with "second offense" possession of marijuana, I.C. § 37-2739, that issue should be presented in a bifurcated proceeding.

In order to establish possession of a controlled substance, a defendant need not have actual physical possession of the substance; the state need only prove that the defendant had such dominion and control over the substance to establish constructive possession. *State v. Kopsa*, 126 Idaho 512, 887 P.2d 57 (Ct. App. 1994). Constructive possession of a controlled substance exists where a nexus between the accused and the substance is sufficiently proven so as to give rise to the reasonable inference that the accused was not simply a bystander but, rather, had the power and intent to exercise dominion and control over the substance. *State v. Rozajewski*, 130 Idaho 644, 945 P.2d 1390 (Ct. App. 1997).

To be guilty, the defendant need not know that the substance possessed was a controlled substance. *State v. Fox*, 124 Idaho 924, 866 P.2d 181 (1993); *State v. Blake*, 133 Idaho 237, 985 P.2d 117 (1999).

In *State v. Fox*, 124 Idaho 924, 866 P.2d 181 (1993), the Supreme Court held that I.C. § 37-2732(c) does not set forth any mental state as an element of the crime of possession of a controlled substance. "Thus, as [this statute] does not expressly require any mental element and I.C. § 18-114 only requires a general intent, we conclude that the offense only requires a general intent, that is, the knowledge that one is in possession of the substance." The Court held that the defendant's lack of knowledge that the substance was illegal (as a controlled substance) was irrelevant.

The statute does not contain a mental element. The committee concluded, based upon *State v. Lamphere*, 130 Idaho 630, 945 P.2d 1 (1997), a mental element as set forth in element 4 should be included.

The state need not prove the absence of a prescription in prosecutions for the possession of marijuana. *State v. Sergovia*, 93 Idaho 594, 468 P.2d 660 (1970).

ICJI 402B POSSESSION OF MARIJUANA

INSTRUCTION NO.

In order for the defendant to be guilty of Possession of Marijuana, the state must prove:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] possessed marijuana, and
4. knew it was marijuana.

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. §§ 37-2732(c)(3).

If the defendant is charged with "second offense" possession of marijuana, I.C. § 37-2739, that issue should be presented in a bifurcated proceeding.

In order to establish possession of a controlled substance, a defendant need not have actual physical possession of the substance; the state need only prove that the defendant had such dominion and control over the substance to establish constructive possession. *State v. Kopsa*, 126 Idaho 512, 887 P.2d 57 (Ct. App. 1994). Constructive possession of a controlled substance exists where a nexus between the accused and the substance is sufficiently proven so as to give rise to the reasonable inference that the accused was not simply a bystander but, rather, had the power and intent to exercise dominion and control over the substance. *State v. Rozajewski*, 130 Idaho 644, 945 P.2d 1390 (Ct. App. 1997).

To be guilty, the defendant need not know that the substance possessed was a controlled substance. *State v. Fox*, 124 Idaho 924, 866 P.2d 181 (1993); *State v. Blake*, 133 Idaho 237, 985 P.2d 117 (1999).

In *State v. Fox*, 124 Idaho 924, 866 P.2d 181 (1993), the Supreme Court held that I.C. § 37-2732(c) does not set forth any mental state as an element of the crime of possession of a controlled substance. "Thus, as [this statute] does not expressly require any mental element and I.C. § 18-114 only requires a general intent, we conclude that the offense only requires a general intent, that is, the knowledge that one is in possession of the substance." The Court held that the defendant's lack of knowledge that the substance was illegal (as a controlled substance) was irrelevant.

The statute does not contain a mental element. The committee concluded, based upon *State v. Lamphere*, 130 Idaho 630, 945 P.2d 1 (1997), a mental element as set forth in element 4 should be included.

The state need not prove the absence of a prescription in prosecutions for the possession of marijuana. *State v. Sergovia*, 93 Idaho 594, 468 P.2d 660 (1970).

ICJI 403 POSSESSION OF A CONTROLLED SUBSTANCE

INSTRUCTION NO.

In order for the defendant to be guilty of Possession of a Controlled Substance, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] possessed any amount of [name of substance], and
4. the defendant either knew it was [name of substance] or believed it was a controlled substance.

If any of the above has not been proven beyond a reasonable doubt, you must find defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 37-2732(a). If the charge is possession of a controlled substance by an inmate, see ICJI 604.

If the defendant is charged with "second offense" drug possession, I.C. § 37-2739, that issue should be presented in a bifurcated proceeding.

In *State v. Fox*, 124 Idaho 924, 866 P.2d 181 (1993), the Supreme Court held that I.C. § 37-2732(c) does not set forth any mental state as an element of the crime of possession of a controlled substance. "Thus, as [this statute] does not expressly require any mental element and I.C. § 18-114 only requires a general intent, we conclude that the offense only requires a general intent, that is, the knowledge that one is in possession of the substance." The Court held that the defendant's lack of knowledge that the substance was illegal (as a controlled substance) was irrelevant.

In order to establish possession of a controlled substance, a defendant need not have actual physical possession of the substance; the state need only prove that the defendant had such dominion and control over the substance to establish

constructive possession. *State v. Kopsa*, 126 Idaho 512, 887 P.2d 57 (Ct. App. 1994). Constructive possession of a controlled substance exists where a nexus between the accused and the substance is sufficiently proven so as to give rise to the reasonable inference that the accused was not simply a bystander but, rather, had the power and intent to exercise dominion and control over the substance. *State v. Rozajewski*, 130 Idaho 644, 945 P.2d 1390 (Ct. App. 1997).

Even trace or residual quantities of cocaine fall within the scope of I.C. § 37-2732(c). *State v. Groce*, 133 Idaho 144, 983 P.2d 217 (Ct. App. 1999).

The statute does not contain a mental element. The committee concluded, based upon *State v. Lamphere*, 130 Idaho 630, 945 P.2d 1 (1997), a mental element as set forth in element 4 should be included.

ICJI 403A POSSESSION OF A CONTROLLED SUBSTANCE
WITH INTENT TO DELIVER/MANUFACTURE

INSTRUCTION NO.

In order for the defendant to be guilty of Possession of a Controlled Substance, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] possessed any amount of [name of substance], and
4. the defendant either knew it was [name of substance] or believed it was a controlled substance, and
5. the defendant intended to [deliver that substance to another] [manufacture that substance].

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

[The possession of [one or more] controlled substances[, even in multiple packages,] is not sufficient by itself to prove an intent to deliver. The state must prove one or more additional circumstances from which you can infer that intent. The additional circumstances could include, but are not limited to, the possession of controlled substances in quantities greater than would be kept for personal use; or the existence of items customarily used to weigh, package, or process controlled substances; or the existence of money and/or records which indicate sales or deliveries of controlled substances.

You are not required to infer an intent to deliver from any such additional circumstances. Whether any such additional circumstances have been proven, whether an intent to deliver should be inferred from them, and the weight to be given such inference are for you to decide. You should consider all of the evidence when deciding whether the state has proven an intent to deliver beyond a reasonable doubt.]

Comment

I.C. § 37-2732(a). See ICJI 428 for definition of "deliver."

If the defendant is charged with "second offense" drug possession, I.C. § 37-2739, that issue should be presented in a bifurcated proceeding.

Included Offense: ICJI 225. I.C. § 19-2132. Pursuant to the 1988 amendments to I.C. § 19-2132, a defendant has an obligation to request jury instruction on included offenses. The district court does not have a duty *sua sponte* to instruct the jury on included offenses. *State v. Porter*, 130 Idaho 772, 948 P.2d 127 (1997). Courts have inherent authority to instruct a jury on included offenses, and such authority does not infringe upon the power of charging and prosecuting, which is reserved to the executive branch. Accordingly, the district court has the authority, but not the duty, to *sua sponte* instruct on included offenses provided the giving of such instructions was reasonable based on the evidence presented. *State v. Rae*, 139 Idaho 650, 84 P.3d 586 (Ct. App. 2004)

In *State v. Fox*, 124 Idaho 924, 866 P.2d 181 (1993), the Supreme Court held that I.C. § 37-2732(c) does not set forth any mental state as an element of the crime of possession of a controlled substance. "Thus, as [this statute] does not expressly require any mental element and I.C. § 18-114 only requires a general intent, we conclude that the offense only requires a general intent, that is, the knowledge that one is in possession of the substance." The Court held that the defendant's lack of knowledge that the substance was illegal (as a controlled substance) was irrelevant.

In order to establish possession of a controlled substance, a defendant need not have actual physical possession of the substance; the state need only prove that the defendant had such dominion and control over the substance to establish constructive possession. *State v. Kopsa*, 126 Idaho 512, 887 P.2d 57 (Ct. App. 1994). Constructive possession of a controlled substance exists where a nexus between the accused and the substance is sufficiently proven so as to give rise to the reasonable inference that the accused was not simply a bystander but, rather, had the power and intent to exercise dominion and control over the substance. *State v. Rozajewski*, 130 Idaho 644, 945 P.2d 1390 (Ct. App. 1997).

Separate convictions for manufacturing a controlled substance and possession of a controlled substance with intent to deliver require different set of facts and thus do not violate state and federal constitutional protection against double jeopardy. *State v. Ledbetter*, 118 Idaho 8, 794 P.2d 278 (Ct. App. 1990).

Even trace or residual quantities of cocaine fall within the scope of I.C. § 37-2732(c). *State v. Groce*, 133 Idaho 144, 983 P.2d 217 (Ct. App. 1999).

The statute does not contain a mental element. The committee concluded, based upon *State v. Lamphere*, 130 Idaho 630, 945 P.2d 1 (1997), a mental element as set forth in element 4 should be included.

The bracketed paragraphs regarding the intent to deliver are prompted by *State v. O'Mealey*, 95 Idaho 202, 506 P.2d 99 (1973), and *State v. O'Campo*, 103 Idaho 62, 644 P.2d 985 (Ct. App. 1982).

ICJI 404 DELIVERY OF A CONTROLLED SUBSTANCE

INSTRUCTION NO.

In order for the defendant to be guilty of Delivery of a Controlled Substance, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] delivered any amount of [name of substance] to another, and
4. the defendant either knew it was [name of substance] or believed it was a controlled substance.

If any of the above has not been proven beyond a reasonable doubt, you must find defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 37-2732(a). See ICJI 428 for the definition of "deliver." If the charge is delivery of a controlled substance by an inmate, see ICJI 604.

If the defendant is charged with "second offense" drug delivery, I.C. § 37-2739, that issue should be presented in a bifurcated proceeding.

In *State v. Fox*, 124 Idaho 924, 866 P.2d 181 (1993), the Supreme Court held that I.C. § 37-2732(c) does not set forth any mental state as an element of the crime of possession of a controlled substance. "Thus, as [this statute] does not expressly require any mental element and I.C. § 18-114 only requires a general intent, we conclude that the offense only requires a general intent, that is, the knowledge that one is in possession of the substance." The Court held that the defendant's lack of knowledge that the substance was illegal (as a controlled substance) was irrelevant.

The statute does not contain a mental element. The committee concluded, based upon *State v. Lamphere*, 130

Idaho 630, 945 P.2d 1 (1997), a mental element as set forth in element 4 should be included.

ICJI 405 MANUFACTURING A CONTROLLED SUBSTANCE

INSTRUCTION NO.

In order for the defendant to be guilty of Manufacturing a Controlled Substance, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] manufactured [name of substance], and
4. the defendant either knew it was [name of substance] or believed it was a controlled substance.

If any of the above has not been proved beyond a reasonable doubt, must find the defendant not guilty. If each of the above has been proved beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 37-2732(a). If the defendant is charged with "second offense" drug manufacturing, IC § 37-2739, that issue should be presented in a bifurcated proceeding.

In *State v. Fox*, 124 Idaho 924, 866 P.2d 181 (1993), the Supreme Court held that IC § 37-2732(c) does not set forth any mental state as an element of the crime of possession of a controlled substance. "Thus, as [this statute] does not expressly require any mental element and IC § 18-114 only requires a general intent, we conclude that the offense only requires a general intent, that is, the knowledge that one is in possession of the substance." The Court held that the defendant's lack of knowledge that the substance was illegal (as a controlled substance) was irrelevant.

It was error for the verdict form, in combination with jury instruction for manufacturing, to fail to require a finding by the jury that the manufacturing was done knowingly. *State v. Palmer*, 138 Idaho 931, 71 P.3d 439 (Ct. App. 2003).

ICJI 406A TRAFFICKING IN MARIJUANA

INSTRUCTION NO.

In order for the defendant to be guilty of Trafficking in Marijuana, the state must prove:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] [possessed] [manufactured] [or] [delivered] marijuana,
4. knew it was marijuana, and
5. [possessed] [manufactured] [or] [delivered] [at least [] pound[s] of marijuana] [or] [at least [] marijuana plants].

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 37-2732B(a)(1).

If the defendant is charged with "second offense" drug trafficking, IC § 37-2732B(a)(7), that issue should be presented in a bifurcated proceeding.

It was error for the verdict form, in combination with jury instruction for manufacturing, to fail to require a finding by the jury that the manufacturing was done knowingly. *State v. Palmer*, 138 Idaho 931, 71 P.3d 439 (Ct. App. 2003).

ICJI 406B TRAFFICKING IN COCAINE

INSTRUCTION NO.

In order for the defendant to be guilty of Trafficking in cocaine, the state must prove:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] [possessed] [manufactured] [or] [delivered] cocaine,
4. the defendant knew it was cocaine, and
5. [possessed][manufactured] [or] [delivered] at least [] grams of cocaine or any mixture or substance with a detectable amount of cocaine.

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 37-2732B(a)(2).

If the defendant is charged with "second offense" drug trafficking, IC § 37-2732B(a)(7), that issue should be presented in a bifurcated proceeding.

The state need not prove the defendant's knowledge of the quantity of cocaine to sustain a trafficking conviction under I.C. § 37-2732B(a)(2). *State v. Barraza-Martinez*, 139 Idaho 624, 84 P.3d 560 (Ct. App. 2003).

It was error for the verdict form, in combination with jury instruction for manufacturing, to fail to require a finding by the jury that the manufacturing was done knowingly. *State v. Palmer*, 138 Idaho 931, 71 P.3d 439 (Ct. App. 2003).

ICJI 406C TRAFFICKING IN METHAMPHETAMINE AND/OR AMPHETAMINE
BY MANUFACTURING

INSTRUCTION NO.

In order for the defendant to be guilty of Trafficking in [methamphetamine] [or] [amphetamine] by manufacturing, the state must prove:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] [manufactured] [or] [attempted to manufacture] [methamphetamine] [and/or] [amphetamine], and
4. the defendant knew it was [methamphetamine] [and/or] [amphetamine].

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 37-2732B(a)(3).

If the defendant is charged with "second offense" drug trafficking, IC § 37-2732B(a)(7), that issue should be presented in a bifurcated proceeding as provided in ICJI 1601.

It was error for the verdict form, in combination with jury instruction for manufacturing, to fail to require a finding by the jury that the manufacturing was done knowingly. *State v. Palmer*, 138 Idaho 931, 71 P.3d 439 (Ct. App. 2003).

ICJI 406D TRAFFICKING IN METHAMPHETAMINE AND/OR AMPHETAMINE

INSTRUCTION NO.

In order for the defendant to be guilty of Trafficking in methamphetamine and/or amphetamine, the state must prove:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] [possessed] [or] [delivered] [methamphetamine] [and/or] [amphetamine],
4. the defendant knew it was [methamphetamine] [and/or] [amphetamine], and
5. [possessed] [or] [delivered] at least [] of [methamphetamine] [and/or] [amphetamine] or any mixture or substance with a detectable amount of [methamphetamine] [and/or] [amphetamine].

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 37-2732B(a)(4).

If the defendant is charged with "second offense" drug trafficking, IC § 37-2732B(a)(7), that issue should be presented in a bifurcated proceeding as provided in ICJI 1601.

It was error for the verdict form, in combination with jury instruction for manufacturing, to fail to require a finding by the jury that the manufacturing was done knowingly. *State v. Palmer*, 138 Idaho 931, 71 P.3d 439 (Ct. App. 2003).

ICJI 406E TRAFFICKING IN HEROIN

INSTRUCTION NO.

In order for the defendant to be guilty of Trafficking in heroin, the state must prove:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] [possessed] [manufactured] [or] [delivered] any amount of cocaine,
4. the defendant knew it was heroin, and
5. [possessed][manufactured] [or] [delivered] at least [] of heroin or any mixture or substance with a detectable amount of heroin.

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 37-2732B(a)(6).

If the defendant is charged with "second offense" drug trafficking, IC § 37-2732B(a)(7), that issue should be presented in a bifurcated proceeding as provided in ICJI 1601.

It was error for the verdict form, in combination with jury instruction for manufacturing, to fail to require a finding by the jury that the manufacturing was done knowingly. *State v. Palmer*, 138 Idaho 931, 71 P.3d 439 (Ct. App. 2003).

ICJI 407 CONTROLLED SUBSTANCE—CHILDREN PRESENT

INSTRUCTION NO.

In order for the defendant to be guilty of manufacture or delivery of controlled substance where children are present, the state must prove:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] [manufactured] [delivered] [or] [possessed with the intent to [manufacture] [deliver]] any amount of [name of substance],
4. the defendant either knew it was [name of substance] or believed it was a controlled substance, and
5. the [delivery] [manufacturing] [possession with intent to [manufacture] [deliver]] occurred upon premises where a child under the age of eighteen years was present.

"Premises" means a [motor vehicle] [vessel] [apartment] [townhouse] [condominium] [mobile home] [manufactured home] [motel room] [hotel room] [dwelling unit] [rental unit] [dwelling house, and its curtilage and any outbuildings].

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 37-2737A.

ICJI 408 POSSESSION OF DRUG PARAPHERNALIA

INSTRUCTION NO.

In order for the defendant to be guilty of Possession of Drug Paraphernalia, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] [used] [or] [possessed] [(description of alleged paraphernalia, e.g., a spoon)], intending
4. [insert description of use of paraphernalia, e.g., to plant or cultivate] a controlled substance.

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 37-2734A. Under the statute, the paraphernalia must be used or intended to be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body.

I.C. § 37-2701(n) contains the definition of drug paraphernalia.

Possession of drug paraphernalia is not an "included offense" of the crime of possession of cocaine. State v. Kodesh, 122 Idaho 756, 838 P.2d 885 (Ct. App. 1992).

ICJI 409 DELIVERY/MANUFACTURE DRUG PARAPHERNALIA

INSTRUCTION NO.

In order for the defendant to be guilty of [Delivery] [or] [Possession With Intent to Deliver] [or] [Manufacturing With Intent to Deliver] Drug Paraphernalia, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] [delivered] [or] [possessed with intent to deliver] [or] [manufactured with intent to deliver] [insert description of paraphernalia]
4. knowing, or under circumstances where the defendant reasonably should know, that it would be used to [insert description of use of paraphernalia] a controlled substance.

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 37-2734(B). Under the statute, the paraphernalia must be intended to be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body.

ICJI 410 BEING PRESENT WHERE THERE ARE CONTROLLED
SUBSTANCES

INSTRUCTION NO.

In order for the defendant to be guilty of Being Present Where There Are Controlled Substances, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] was present at [designation of place],
4. where the defendant knew illegal controlled substances were being [manufactured] [cultivated] [held] for [distribution] [transportation] [delivery] [administration] [use] [or to be given away].

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 37-2732(d)

ICJI 411 OBTAINING CONTROLLED SUBSTANCE BY FRAUD

INSTRUCTION NO.

In order for the defendant to be guilty of Obtaining a Controlled Substance by Fraud, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] knowingly and intentionally obtained possession of a controlled substance,
4. by [misrepresentation] [fraud] [forgery] [deception] [or] [subterfuge].

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 37-2734(a)(3). Fraud is defined in ICJI 420.

ICJI 412 POSSESSION OF A COUNTERFEIT SUBSTANCE WITH INTENT
TO DELIVER

INSTRUCTION NO.

In order for the defendant to be guilty of Possession of a Counterfeit Substance with Intent to Deliver, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] possessed [name of substance],
4. the defendant knew it was a counterfeit substance, and
5. the defendant intended to deliver or furnish the substance to another.

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, you must find the defendant guilty.

Comment

I.C. § 37-2732(b). See ICJI 424 for the definition of a counterfeit substance. See ICJI 428 for the definition of "deliver."

If the defendant is charged with "second offense" drug possession, I.C. § 37-2739, that issue should be presented in a bifurcated proceeding as provided in ICJI 1601.

In *State v. Fox*, 124 Idaho 924, 866 P.2d 181 (1993), the Supreme Court held that I.C. § 37-2732(c) does not set forth any mental state as an element of the crime of possession of a controlled substance. "Thus, as [this statute] does not expressly require any mental element and I.C. § 18-114 only requires a general intent, we conclude that the offense only requires a general intent, that is, the knowledge that one is in possession of the substance." The Court held that the defendant's lack of knowledge that the substance was illegal (as a controlled substance) was irrelevant.

ICJI 413 CREATING A COUNTERFEIT SUBSTANCE

INSTRUCTION NO.

In order for the defendant to be guilty of Creating a Counterfeit Substance, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] created a counterfeit substance.

If any of the above has not been proved beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proved beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 37-2732(b). See ICJI 424 for the definition of counterfeit substance. If the defendant is charged with "second offense," IC § 37-2739, that issue should be presented in a bifurcated proceeding as provided in ICJI 1601.

In *State v. Fox*, 124 Idaho 924, 866 P.2d 181 (1993), the Supreme Court held that IC § 37-2732(c) does not set forth any mental state as an element of the crime of possession of a controlled substance. "Thus, as [this statute] does not expressly require any mental element and IC § 18-114 only requires a general intent, we conclude that the offense only requires a general intent, that is, the knowledge that one is in possession of the substance." The Court held that the defendant's lack of knowledge that the substance was illegal (as a controlled substance) was irrelevant.

ICJI 414 DELIVERY OF A COUNTERFEIT SUBSTANCE

INSTRUCTION NO.

In order for the defendant to be guilty of Delivery of a Counterfeit Substance, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] delivered a substance to another, and
4. the defendant knew the substance was a counterfeit of [name of controlled substance].

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 37-2732(b). See ICJI 424 for the definition of counterfeit substance. If the defendant is charged with "second offense," I.C. § 37-2739, that issue should be presented in a bifurcated proceeding as provided in ICJI 1601.

The statute does not contain a mental element. The committee concluded, based upon State v. Lamphere, 130 Idaho 630, 945 P.2d 1 (1997), a mental element as set forth in element 4 should be included.

ICJI 415 POSSESSION OF A SIMULATED CONTROLLED SUBSTANCE

INSTRUCTION NO.

In order for the defendant to be guilty of Possession of a Simulated Controlled Substance, the state must prove each of the following:

1. On or about [date]
 2. in the state of Idaho
 3. the defendant [name] possessed [name of substance],
- and
4. the defendant either knew it was a simulated controlled substance or believed it was a controlled substance.

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 37-2732(g). If the charge is possession of a controlled substance by an inmate, see ICJI 604.

See ICJI 425 for the definition of a simulated controlled substance.

If the defendant is charged with "second offense" drug possession, I.C. § 37-2739, that issue should be presented in a bifurcated proceeding as provided in ICJI 1601.

In *State v. Fox*, 124 Idaho 924, 866 P.2d 181 (1993), the Supreme Court held that I.C. § 37-2732(c) does not set forth any mental state as an element of the crime of possession of a controlled substance. "Thus, as [this statute] does not expressly require any mental element and I.C. § 18-114 only requires a general intent, we conclude that the offense only requires a general intent, that is, the knowledge that one is in possession of the substance." The Court held that the defendant's lack of knowledge that the substance was illegal (as a controlled substance) was irrelevant.

Pursuant to the 1988 amendments to I.C. § 19-2132, a defendant has an obligation to request a jury instruction on included offenses. The district court does not have a duty sua sponte to instruct the jury on included offenses. *State v. Porter*, 130 Idaho 772, 948 P.2d 127 (1997). Courts have inherent authority to instruct a jury on included offenses, and such authority does not infringe upon the power of charging and prosecuting, which is reserved to the executive branch. Accordingly, the district court has the authority, but not the duty, to sua sponte instruct on included offenses provided the giving of such instructions was reasonable based on the evidence presented. *State v. Rae*, 139 Idaho 650, 84 P.3d 586 (Ct. App. 2004)

ICJI 415A POSSESSION OF A SIMULATED CONTROLLED SUBSTANCE
WITH INTENT TO DISTRIBUTE

INSTRUCTION NO.

In order for the defendant to be guilty of Possession of a Simulated Controlled Substance with the Intent to Distribute, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] possessed [name of substance],
4. the defendant either knew it was a simulated controlled substance or believed it was a controlled substance, and
5. the defendant intended to distribute that substance to another.

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 37-2732(g). If the charge is possession of a controlled substance by an inmate, see ICJI 604.

See ICJI 425 for the definition of a "simulated controlled substance."

If the defendant is charged with "second offense" drug possession, I.C. § 37-2739, that issue should be presented in a bifurcated proceeding as provided in ICJI 1601.

In *State v. Fox*, 124 Idaho 924, 866 P.2d 181 (1993), the Supreme Court held that I.C. § 37-2732(c) does not set forth any mental state as an element of the crime of possession of a controlled substance. "Thus, as [this statute] does not expressly require any mental element and I.C. § 18-114 only requires a general intent, we conclude that the offense only requires a general intent, that is, the knowledge that one is in possession of the substance." The Court held that the defendant's lack of knowledge that the substance was illegal (as a controlled substance) was irrelevant.

ICJI 416 DISTRIBUTION OF A SIMULATED CONTROLLED SUBSTANCE

INSTRUCTION NO.

In order for the defendant to be guilty of Distribution of a Simulated Controlled Substance, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] distributed a substance to another, and
4. the defendant represented the substance to be a controlled substance] [the defendant intended that the other person believe the substance was a controlled substance].

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 37-2732(g). If the charge is delivery of a controlled substance by an inmate, see ICJI 604.

See ICJI 425 for the definition of a simulated controlled substance.

The statute does not contain a mental element. The committee concluded, based upon State v. Lamphere, 130 Idaho 630, 945 P.2d 1 (1997), a mental element as set forth in element 4 should be included.

ICJI 417 MANUFACTURING A SIMULATED CONTROLLED SUBSTANCE

INSTRUCTION NO.

In order for the defendant to be guilty of Manufacturing a Simulated Controlled Substance, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] manufactured a simulated controlled substance, and
4. the defendant intended to manufacture a simulated controlled substance.

If any of the above has not been proved beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proved beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 37-2732(g). If the defendant is charged with "second offense" drug manufacturing, I.C. § 37-2739, that issue should be presented in a bifurcated proceeding as provided in ICJI 1601.

See ICJI 425 for the definition of a simulated controlled substance.

In *State v. Fox*, 124 Idaho 924, 866 P.2d 181 (1993), the Supreme Court held that I.C. § 37-2732(c) does not set forth any mental state as an element of the crime of possession of a controlled substance. "Thus, as [this statute] does not expressly require any mental element and I.C. § 18-114 only requires a general intent, we conclude that the offense only requires a general intent, that is, the knowledge that one is in possession of the substance." The Court held that the defendant's lack of knowledge that the substance was illegal (as a controlled substance) was irrelevant.

ICJI 418 POSSESSION OF AN INHALANT

INSTRUCTION NO.

In order for the defendant to be guilty of Possession of an Inhalant, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name]
4. possessed an inhalant and used it in a manner that
5. [was not pursuant to the instructions or prescription of a licensed health care provider] [or] [was not pursuant to the manufacturer's label instructions]
6. for the purpose of becoming under the influence of such inhalant, and
7. the defendant was at that time under eighteen years of age.

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 18-1502B. See ICJI 429 for the definition of 'inhalant'.

ICJI 420 FRAUD AND DECEIT (CONTROLLED SUBSTANCE)-DEFINED

INSTRUCTION NO.

As used in these instructions, the elements of fraud and deceit are as follows:

1. A statement of fact or presentation of a false document for the purpose of getting another party to act.
2. That fact must be untrue or document false.
3. The party making the statement must know or believe the fact to be untrue or document false.
4. The person to whom the statement was made or document presented must believe the statement or document to be true and rely upon it.
5. The statement or document must be material.

ICJI 421 POSSESSION DEFINED

INSTRUCTION NO.

A person has possession of something if the person knows of its presence and has physical control of it, or has the power and intention to control it. [For the charge of Failure to Affix Tax Stamp[s], the term "possession" also includes holding, selling, manufacturing, acquiring, producing, purchasing, shipping, transporting, transferring, or importing into Idaho a controlled substance.] [More than one person can be in possession of something if each knows of its presence and has the power and intention to control it.]

Comment

There is no need to attempt to distinguish further between actual and constructive possession and sole and joint possession. State v. Seitter, 127 Idaho 356, 900 P.2d 1367 (1995).

The first bracketed sentence is to be given only when a violation of the tax stamp law is charged. I.C. § 63-4202(3).

ICJI 422 CONTROLLED SUBSTANCE DEFINED

INSTRUCTION NO.

Under Idaho law, [name of substance(s)] [is a] [are] controlled substance[s].

Comment

I.C. §§ 37-2705 to 37-2713A.

The question whether a substance is designated in the Act as a controlled substance is a question of law for the court, not the jury. *State v. Hobbs*, 101 Idaho 262, 263, 611 P.2d 1047, 1048 (1980).

ICJI 423 MARIJUANA DEFINED

INSTRUCTION NO.

The term "marijuana" as used in these instructions means all parts of the plant of the genus Cannabis, whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin. It does not include the mature stalks of the plant unless the same are intermixed with prohibited parts thereof, fiber produced from the stalks, oil or cake made from the seeds or the achene of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom or where the same are intermixed with prohibited parts of such plant), fiber, oil, cake, or the sterilized seed of such plant which is incapable of germination.

Comment

I.C. § 37-2701(s).

This instruction should be given only when identity of the substance is at issue. Even then, it is recommended that it be modified to reflect the specific facts at issue.

ICJI 424 COUNTERFEIT SUBSTANCE DEFINED

INSTRUCTION NO.

"Counterfeit substance" means a controlled substance which, or the container or labeling of which, without authorization, bears the trademark, trade-name, or other identifying mark, imprint, number or device, or any likeness thereof, of a manufacturer, distributor, or dispenser other than the person who in fact, manufactured, distributed, or dispensed the substance.

Comment

I.C. § 37-2701(f).

When this instruction is given, it should be modified to reflect the specific facts at issue.

ICJI 425 SIMULATED CONTROLLED SUBSTANCE DEFINED

INSTRUCTION NO.

"Simulated controlled substance" means a substance that is not a controlled substance, but which by appearance or representation would lead a reasonable person to believe that the substance is a controlled substance.

Comment

I.C. § 37-2701(bb). The committee is of the opinion that the jury should not be instructed on the examples listed in the statute.

ICJI 426 MANUFACTURE DEFINED

INSTRUCTION NO.

"Manufacture" means the production, preparation, propagation, compounding, conversion or processing of a controlled substance, and includes extraction, directly or indirectly, from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container.

This term does not include the preparation or compounding of a controlled substance by an individual for his own use or the preparation, compounding, packaging, or labeling of a controlled substance:

(1) By a practitioner as an incident to his administering or dispensing of a controlled substance in the course of his professional practice, or

(2) By a practitioner, or by his authorized agent under his supervision, for the purpose of, or as an incident to, research, teaching, or chemical analysis and not for delivery.

Comment

I.C. § 37-2701(r).

The committee recommends that this instruction be modified to reflect the specific facts at issue. "Practitioners" are defined in IC § 37-2701(z).

Growing a controlled substance is the same as production of a controlled substance. Production of a controlled substance does not fall under the personal use exception and therefore growing a controlled substance is subject to punishment under I.C. §§ 37-2732, 37-2737A. State v. Griffith, 127 Idaho 8, 896 P.2d 334 (1995).

ICJI 427 PARAPHERNALIA DEFINED

INSTRUCTION NO.

"Drug Paraphernalia" means all equipment, products and materials of any kind which are used, intended for use, or designed for use, in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing a controlled substance into the human body.

Comment

I.C. § 37-2701(n). The committee recommends that this instruction be given only in unusual circumstances as the meaning of "drug paraphernalia" is implicit in the issue instruction. See ICJI 408 and ICJI 409.

ICJI 428 DELIVERY DEFINED

INSTRUCTION NO.

The term "deliver" means the transfer or attempted transfer, either directly or indirectly, from one person to another.

Comment

I.C. § 37-2701(g).

ICJI 429 INHALANT DEFINED

INSTRUCTION NO.

As used in the prior instruction, the term "inhalant" means any aerosol spray product or any glue, cement or other substance containing one or more of the following chemical compounds: acetone and acetate, amyl nitrite or amyl nitrate or their isomers, benzene, butyl alcohol, butyl nitrite, butyl nitrate or their isomers, ethyl alcohol, ethyl nitrite or ethyl nitrate, ethylene dichloride, isobutyl alcohol, methyl alcohol, methyl ethyl ketone, n-propyl alcohol, pentachlorophenol, petroleum ether, propyl nitrite or propyl nitrate or their isomers, toluene or xylene or other chemical substance capable of causing a condition or intoxication, inebriation, excitement, stupefaction or the dulling of the brain or nervous system as a result of the inhalation of the fumes or vapors of such chemical substances.

ICJI 440 DEFENSE: VALID PRESCRIPTION

INSTRUCTION NO.

It is not unlawful to possess [name of drug] if the person obtained it [by a valid prescription] [from a practitioner acting in the course of a professional practice]. The state must prove beyond a reasonable doubt that the defendant did not [have a valid prescription for [name of drug]] [obtain [name of drug] from a practitioner acting in the course of a professional practice].

Comment

I.C. §§ 19-1433, 37-2745.

The committee concludes that under IC § 19-1433, the state does not have to prove as an element of the offense that the defendant did not have a valid prescription or did not obtain the drug from a practitioner.

This instruction should be given only if there is evidence supporting the defense. See *State v. Nab*, 113 Idaho 168, 742 P.2d 423 (Ct. App. 1987).