STATE DRUG LAWS

FOR THE '90s

First Edition

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prepared by the

NATIONAL DRUG PROSECUTION CENTER
AMERICAN PROSECUTORS RESEARCH INSTITUTE

in cooperation with the

NATIONAL DISTRICT ATTORNEYS ASSOCIATION
ALEXANDRIA, VIRGINIA

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STATE DRUG LAWS FOR THE '90s

TABLE OF CONTENTS

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James C. Shine
Director

July 5, 1991

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HOW TO USE THIS BOOK

This reference book is divided into five sections:

- *Overview*
- *Uniform Controlled Substances Act (UCSA)(1990)*
- *Model Asset Seizure and Forfeiture Act (MASFA)(1991)*
- *User Accountability*
- *Drug Precursors*

The first section outlines the drug policies encompassed within the various acts discussed in the book. Each of the remaining sections:

- *introduces the subject matter*
- *provides statutory language*
- *summarizes the statutes*
- *highlights key provisions*
- *analyzes relevant legal issues*
- *contains hypothetical and examples to illustrate the application of the statutes*

There are two special features contained in the book:

- *Individual table of contents for the UCSA, MASFA, and Introduction to Basic Concepts of Forfeiture in addition to the overall table of contents*

- *UCSA and MASFA highlights and summaries with page references where statutory provisions are located within the sections*

After each section appears an appendix with general reference information to help explain and provide background for the acts. An appendix is also identified with its corresponding section by the section reference at the bottom of each appendix page.

The last appendix contains biographical sketches of the book's co-authors and organizational information about the American Prosecutors Research Institute (APRI) and its affiliate, the National District Attorneys Association (NDAA).

State and local policymakers may choose to include one or more of the uniform and model statutes as part of their comprehensive legislative drug strategy. To facilitate their task, we have tried to make each section as self-contained as possible.

OVERVIEW OF RECOMMENDED STATE DRUG LAWS FOR THE '90s

UNIFORM CONTROLLED SUBSTANCES ACT (1990)
MODEL ASSET SEIZURE AND FORFEITURE ACT (1991)
MODEL DENIAL OF FEDERAL BENEFITS ACT (1991)
SELECTED STATE DRIVER'S AND PROFESSIONAL LICENSE SUSPENSION ACT
SELECTED STATE DRUG PRECURSOR CONTROL ACTS

IN THIS SECTION: PAGE

"Since war starts in the mind of men it is in the mind of men that it has to be fought." [UNESCO preamble] Such a metaphor illustrates the importance of fighting the erroneous ideas, prejudices, and ignorance which generate major conflicts throughout the world, including the drug wars.

The battle ahead of us will be primarily one of the mind and waged on two fronts. It will have to rebut the arguments of the modern sophists who wish to turn the clock back and relegalize all addictive drugs by propagating pseudo-scientific rhetoric and social nihilism. And, foremost, it will uphold the rules which have to be accepted by citizens of a progressive society dedicated "to freedom under the law." [excerpted from Cocaine: The Great White Plague]

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DRUG REMOVALS FROM THE DOMESTIC MARKET BY THE DRUG ENFORCEMENT ADMINISTRATION

By type of drug, fiscal years 1978–89

	OPIUM (lbs.)	HEROIN (lbs.)	COCAINE (lbs.)	MARIJUANA (lbs.)	HASHISH (lbs.)	HALLUCINO-GENS(d.u.)	DEPRESSANTS (d.u.)	STIMULANTS (d.u.)
1978	27	442	1,009	1,117,422	3,004	4,349,917	311,044	2,901,948
1979	4	160	1,139	887,302	43,261	6,439,136	5,671,379	7,711,628
1980	NA	201	2,590	994,468	5,993	7,522,905	8,337,806	6,434,742
1981	NA	332	4,352	1,935,202	30,162	36,064,329	21,701,603	47,475,580
1982	NA	608	12,493	2,814,787	3,086	1,978,617	5,739,423	4,482,404
1983	263	662	19,625	1,795,875	31,339	58,542,610	2,535,040	11,345,783
1984	18	850	25,344	2,909,393	2,059	596,999	688,491	16,500,791
1985	45	985	39,969	1,641,626	21,858	4,593,867	664,589	20,709,871
1986	6	801	59,699	1,819,764	577	16,748,616	1,627,315	27,846,419
1987	65	826	82,291	1,429,616	2,368	6,056,880	643,177	26,924,731
1988	73	1,828	127,970	1,244,180	83,542	17,530,667	192,215	95,972,547
1989	13	1,712	181,906	751,396	1,601	13,548,027	563,027	97,172,132

* Sourcebook of Criminal Justice Statistics (1989). Date provided by U.S. Department of Justice, particularly the Drug Enforcement Administration, *Drug Enforcement Statistical Report, 1978,* p.3; *1979,* p.3 (Washington, DC: U.S. Department of Justice).

** As of 1981, domestic drug removals have been kept in the aggregate only. This differs slightly from the data formerly maintained in the *Statistical Report,* which is no longer published. The notation "d.u." means dosage unit.

*** Removal figures include joint investigations with other federal agencies and state and local agencies.

**** Data have been revised by the Source and may differ from previous editions of Sourcebook.

TASK FORCE NUMBER OF DRUG REMOVALS – FEDERAL FISCAL YEAR 1988/89

STATE	COCAINE (kg.)		CANNABIS (kg.)		OPIATES (kg.)		HALLUC. (d.u.)		AMPHETS. (kg.)		BARBITS. (d.u.)	
	1988	1989	1988	1989	1988	1989	1988	1989	1988	1989	1988	1989
ARIZONA	1684.02	827.11	14342.3	41283.41	1.49	2	65	9393	16.22	19.17	18	15.54
CONNECTICUT	15.08	NA	26.01	NA	0.26	NA	0	NA	0	NA	0	NA
DIST.OF.COLUMBIA	223	0	33.5	0	0.71	0	6.5	0	0	0	0	0
INDIANA	89.81	34.99	833.26	1451.51	0.59	.183	818	11335	0.22	2.8	543	1000
MASSACHUSETTS	8.42	39.8	620.35	441.97	0.1	.214	241	5586.5	0.31	0.3	1708	1566
MICHIGAN	209.51	106.63	22905.8	7595.6	0.87	11.44	5585	14713.4	120.24	512.57	842	1762
MINNESOTA	6.24	4.62	3899.22	2394.13	0.02	0.01	6348	174	16.36	0.37	302	82
MONTANA	10.39	10	54.73	158.76	0	1.79	134	352	3.78	16.58	56	157
N. CAROLINA	39.77	40.86	13757.67	6989.25	0.28	11.12	1068	3781	2.17	8.22	6305.5	1888
NEW JERSEY	54.16	92.49	189.85	1601.91	1.19	1.66	0	5	1.24	9.54	113.25	7297
OHIO	17.67	305.18	253.73	1719.16	0.21	0.65	3401.94	9415.34	0.38	0.58	151.48	1151
PENNSYLVANIA	11.96	43.35	2395.05	320.99	0.03	0.68	686	1752	0.03	0.44	72	613
SOUTH DAKOTA	0.13	1.52	104.74	10.8	0	0	660	566	0.23	0.81	0	2
TEXAS	2147.2	550.62	111128.26	111777.67	4.68	11.48	1694.5	2521.18	404.54	116.55	5377	2573
UTAH	17.04	27.88	1200.06	402.5	0	0.31	7701	8757	4	24.67	144	1176
VIRGINIA	3.74	1.1	811.35	33	0.16	0	15	10	0.01	0.01	2	0
WASHINGTON	794.62	775.76	10.68	0	0.81	0.65	941.9	201	2.41	0.32	13	10.6
TOTAL	5111.98	2861.89	105566.56	176180.65	11.41	45.77	29365.84	68562.42	712.91	572.15	15647.23	20821.6

* CJSA consortium for Drug Strategy Impact Analysis, 1990.

** Data from 261 task forces, 16 states, and the District of Columbia.

*** Hallucinogens and Barbiturates measured in dosage units, all others in KG .

OVERVIEW
OF
RECOMMENDED STATE DRUG LAWS FOR THE '90s

TARGETING THOSE TRAFFICKING in LARGE QUANTITIES of the MOST DANGEROUS CONTROLLED SUBSTANCES

UCSA(1990) SECTION 401. PROHIBITED ACTS A–; PENALTIES. SUBSECTION (g)

The Size and Impact of the Drug Industry is Massive

The U.S. State Department estimates that, in 1987, the worldwide production of opium was between 1,902 and 3,107 metric tons, production of cocaine hydrochloride (the powder form of cocaine) was between 324 and 422 metric tons, and the production of marijuana was between 10,930 and 17,645 metric tons. (A metric ton is equal to 2,200 lbs.) Most of this production was destined for U.S. markets.[1] Each year federal and state officials seize significant amounts of cocaine, heroin, marijuana, hallucinogens, amphetamines, and other drugs. (See Tables on page ii). Yet these amounts undoubtedly represent but a tiny fraction of the drugs that are destined for U.S. markets. Indeed, the estimated value of the illegal drug trade worldwide is as high as $500 billion; the American illegal drug market alone – comprised primarily of cocaine, heroin and marijuana – accounts for between $50 billion and $100 billion at the retail level **each year.**[2]

Those Handling Large Quantities of Drugs Must Receive a Tougher Response Than Low Level Dealers.

Clearly, something must be done to deter those who traffic in large quantities of the most commonly abused controlled substances and thus supply – or assist in supplying – the American drug markets. **There was no provision in the UCSA (1970) to differentiate these major traffickers from the smaller-scale retailers or "street dealers" who constitute their clientele.** Indeed, those who deal in major amounts of controlled substances were subject to the same range of penalties as those who traffic in minor amounts. Both groups were eligible for probation, parole, or suspension of sentence and it was possible for the large-scale trafficker to avoid prison altogether while his client, a minor dealer, was sentenced to a substantial prison term.

Federal and State Governments Have Responded

In 1986 and 1988, Congress enacted legislation which required the imposition of specified mandatory minimum prison terms on all persons convicted of trafficking in major amounts of the most commonly abused controlled substances. These traffickers are not eligible for probation, parole or suspension of sentence during the entire prison term imposed unless the court determines they have provided substantial assistance in bringing others to justice. These mandatory minimum prison terms have been consistently upheld by the federal courts and recommended by the White House Conference for a Drug Free America.[3] Many states have followed the federal lead in mandating incarceration for those trafficking in large quantities of the most dangerous drugs. Among those states are the following: Alabama, Arkansas, Colorado, California, Florida, Maryland, Massachusetts, Montana, North Carolina, Oklahoma, Rhode Island, and Wisconsin.

These Provisions Do Not Automatically Overcrowd Court Dockets or Prisons.

States can minimize or even eliminate the fiscal impact of these provisions by determining median sentences presently being given in their state. States such as Oklahoma and Colorado have used the median sentences already being given as the minimum sentence to provide certainty -- a far more powerful tool against traffickers than severity -- with a minimum fiscal impact. Contrary to the claim of mandatory minimum opponents that more trials will result, according to the Administrative Office of U.S. Courts, defendants in the Southern District of Florida's federal courts entered guilty pleas in 65 percent of all criminal cases in fiscal year 1989. In fiscal year 1980, only 56 percent pled guilty.[4]

Section 401(g) of the UCSA (1990) give states the option to impose a similar "mandatory minimum" sentencing scheme on those convicted of trafficking in major amounts of controlled substances. The "quantity" and "prison term" provisions are left bracketed to allow the states to set levels which reflect the realities of their respective drug markets and the capacity of their respective prison systems. The UCSA (1990) gives the court discretion to depart downward from the mandatory minimum for those defendants who provide substantial assistance to law enforcement. Unlike the federal provisions, the UCSA (1990) permits the defendant to resolve disputed cases.

The certainty of mandatory minimum sentences has been essential in the federal government's success in breaking the drug business "code of silence." Defense attorneys agree with prosecutors that the federal sentencing framework guaranteeing incarceration for those not cooperating has resulted in defendants increasingly entering pleas and cooperating with the government in hopes of gaining leniency from the court. One defense lawyer told the New Orleans Times Picayune:

> The 5-K letter [from the prosecutor advising the Court of the defendant's cooperation] is the hot item. The code of silence has lost out to the 5-K letter.

Further, those drug dealers who once refused to cooperate against the industry and instead relied on high priced legal talent to avoid prison are dwindling in number.

Miami criminal defense specialist, Samuel Rabin, Jr. told the Palm Beach Review:

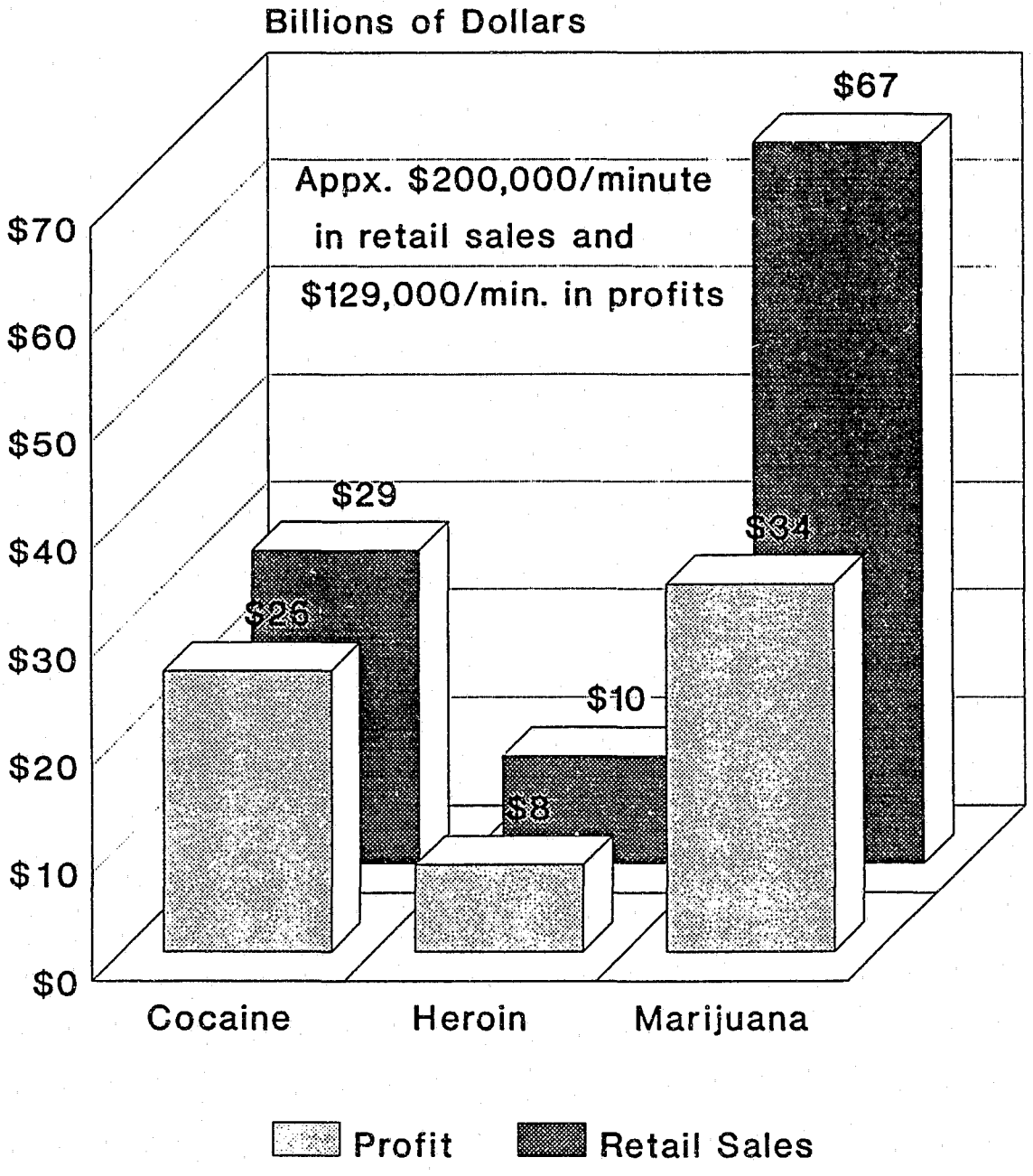
> You're down to a much smaller group of guys who have the motivation and resources to fight than in the past. New sentencing guidelines have made people realize that in many cases, a lawyer is not going to make a big difference. There is a much higher number of people pleading and cooperating, and as a result, they don't need a high priced lawyer.[5]

South Florida Federal Public Defender James Gailey agrees:

> It makes logical sense that if you get busted, you're going to do a minimum mandatory and it's not going to matter who your lawyer is.[6]

Another south Florida defense attorney cited the case of a client charged with importing over two pounds of cocaine into Miami. Before federal sentencing reform, "I would have been extremely optimistic that I would have been able to secure a probation sentence." Instead, the lawyer's client pled guilty and cooperated with the government's investigation of her employer.[7]

DRUG TRAFFICKING IN THE UNITED STATES
Annual Retail Sales/Profits by Drug Type



(*) FBI Law Enforcement Bulletin;
Money Laundering Alert (G-7 Financial Action Task Force)

TARGETING DRUG KINGPINS, MONEY LAUNDERERS and DRUG MONIES

UCSA (1990) SECTION 411. CONTINUING CRIMINAL ENTERPRISE; PENALTY

SECTION 412. MONEY LAUNDERING AND ILLEGAL INVESTMENT; PENALTY

A Drug Dealer and His Enterprise

"Drugs dealers no longer count their money, they weigh it," claims Houston Police Lieutenant, Joe Kunkel.

Carlos Lehder Rivas, Miguel Felix Gallardo, Roberto Suarez Gomez. Who are these men? They are leaders of some of the world's most infamous drug enterprises. Drug dealing has become a business activity conducted through organized cartels.

Carlos Lehder Rivas is a 38-year-old founder of the Columbian Medellin Cartel. According to law enforcement, the Medellin and Cali Cartels control approximately 70 percent of the cocaine processed in Columbia and supply 80 percent of the cocaine imported into the United States.[8] Rivas, a billionaire, was convicted of various drug counts based on importing three tons of cocaine into the United States. The jury also voted to strip Rivas of his drug empire which consisted of a Bahamanian Island and millions of dollars worth of property.[9]

Columbia holds no monopoly on cartels. The Mexican cartels are also providing delivery systems for vast amounts of cocaine, heroin and marijuana. According to newspaper accounts, Miguel Felix Gallardo, 43, smuggled four tons of cocaine a month into the United States and laundered $30 million a month. His net worth is estimated to be $500 million.[10]

Robert Suarez Gomez, a top cocaine trafficker in South America, even offered to pay $2 million of Bolivia's foreign debt.[11]

Awash in Drug Monies and Drug Assets

While the numbers associated with Rivas, Gallardo, and Gomez are striking, they are not unusual. As the Figure on page 4 indicates, drug trafficking is a lucrative business. "Operation Polar Cap," a local, state and federal task force investigating an international and national money laundering organization, discovered **over $1 billion** from cocaine sales had been laundered by the criminal enterprise. "Operation C-Chase" identified **$32 million** laundered by major international financial institutions.[12]

The La Mina jewelry operation in Los Angeles was discovered by federal agents in early 1988. A 14-month investigation exposed a nationwide ring that allegedly laundered **$1.2 billion** in cocaine profits in three years.[13]

From 1986 through 1988, the Drug Enforcement Administration (DEA) seized approximately $1,500,000 in drug assets. In 1989, $970 million dollars in drug assets were seized. Preliminary estimates indicate that 1990 DEA seizures totalled over $1 billion.[14]

Drug Capitalized Businesses

What does a money laundering business look like? Stereotypical images of restaurants filled with organized crime figures often come to mind. However, many types of business intentionally or unintentionally fall prey to the drug industry. Money Laundering Alert described an investigation conducted by the General Accounting Office (GAO) of the availability of businesses willing to circumvent federal reporting requirements:

> Two GAO agents, Barney Gomez and Leigh Jackson, began an odyssey in July, 1990. Their mission was to see how many businessmen were "willing to accept cash in excess of $10,000" in a sale and "not report it to the IRS." Of the 79 businesses they contacted, 76 were more than willing. The GAO team attempted to launder about $4.2 million. It found no difficulty doing so. Many of the business persons even suggested ways to avoid having the reports filed. The investigators visited businesses in Atlanta, Boston, Denver, Detroit, Indianapolis, Minneapolis, New York, San Antonio and Washington, D.C. Included were national firms selling well-known products, such as Rolex watches and Porche cars, and local unaffiliated businesses selling antiques and Chevrolets...

Here is what some of the merchants told the GAO when the possibility of a large cash sale was put before them:

- "You should pay with cashier's checks, notes, and money orders, that's how you get around reporting. I've already found you an attorney who works with cash purchases...I want you to work with him," said a Washington, D.C. realtor anxious to sell a $259,500 condominium.
- "Well, I have to put a name down and a telephone number, but whatever name and phone number you give me is okay. You can even use Mickey Mouse," said a Minneapolis car dealer selling a $23,000 restored Corvette.
- "We'll show the sale as being made to an auction house...so the sale won't be associated with you. That's how we'll handle it at this end so you won't have to worry about us reporting the cash," said an Indianapolis antique dealer hoping to make a $23,000 sale.
- "No problem, remember we sell Porches here. If you pay cash the only name on the invoice is ours and you can put anyone's name on the registration," said a San Antonio car dealer wishing to sell a $30,000 Audi 100.[15]

The following composite of several actual investigations illustrates a common money laundering scheme.

An owner of a car dealership does not deal in drugs. However, he is aware of the value of drug dealers as customers and the dealership owner hires a drug trafficker for the purpose of drawing in business from drug dealers. The employee drug trafficker is also connected with a stolen property network. The dealership owner allows the employee to use the business to

distribute stolen property as well as drugs, although the dealership owner does not participate in the activity. In a short period of time the dealership lot is a network for criminals.

A substantial portion of the dealership owner's business of selling vehicles is due to the financial support of the drug trafficker. Over time the dealership owner has become dependent on the trafficker's business. The dealership owner is willing to participate in a number of illegal activities to assist the trafficker. He carries ghost employees on his payroll. The drug trafficker pays the salary of the ghost employee to the dealership owner, who in turn repays the salary to the trafficker. The ghost employee is a real person who is on probation. A term of probation is to be gainfully employed. By being on the dealership owner's payroll, the probationer appears to have a job even though he does not. The dealership owner is willing to lie to the probation officer that the ghost employee is in fact an employee.

The dealership owner also assists the drug trafficker to launder drug proceeds. He creates loan documents to make it appear that the vehicles purchased are financed when in reality the vehicles have been paid in full. The dealership owner volunteers his services to launder money and agrees to inflate the price of the vehicles.

The dealership owner eventually agrees to sell one half of his business to the traffickers in exchange for $100,000 worth of drugs. The dealership owner does not request a financial statement nor proof of the traffickers' financial solvency. While the trafficker is contented to become an owner in half the business, the trafficker will have no responsibilities for the operation of the business.

The trafficker decides to open his own car business. The trafficker is a resident of Mexico. He hires a salesman who has had experience selling cars for a legitimate business. The salesman puts no financial capital into the newly created car dealership; however, he is listed on the title as the owner of the business. The drug trafficker wires over $200,000 from Mexico for the purchase of the buildings, the inventory and the lease of the land. This money is drug proceeds. At no time during the operation of the business does the trafficker pay taxes.

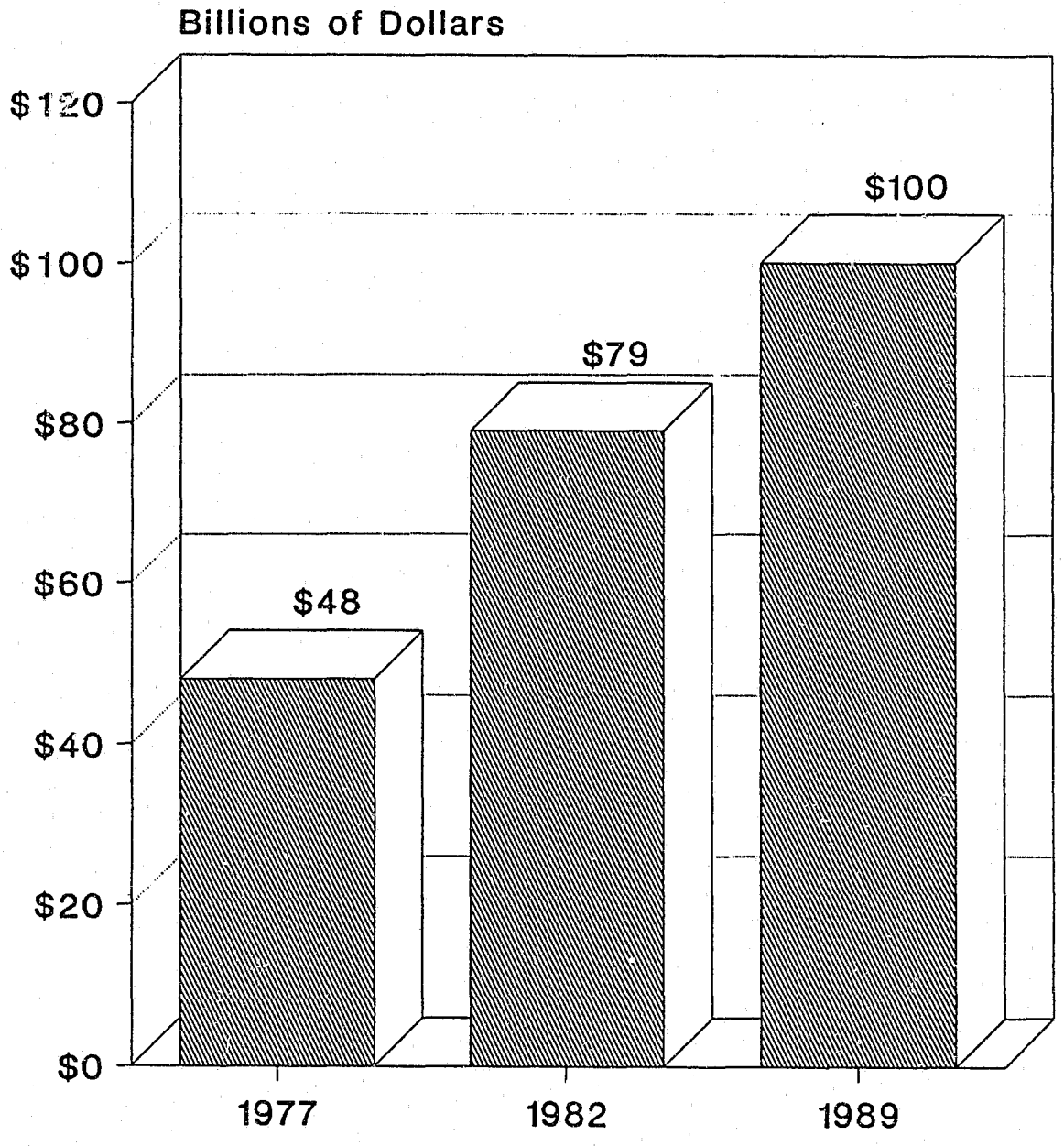
The trafficker, by having a ready and continuous source of drug proceeds never had to qualify for a loan, could absorb financial variances with relative ease, and had no need for collateral. He continued to pour money into the car dealership and then took $200,000 to a large metropolitan city to have it laundered. On the books, the $200,000 in cash became a $200,000 loan, minus a money laundering fee. This "loan" money was then invested into a mobile phone company.

The car dealership business was virtually abandoned. No one was left to honor warranties. Many of the titles were not transferred to the names of the purchaser which caused problems with the Department of Motor Vehicles. The car dealership did carry one $100,000 lien, which the lien holder has been unable to satisfy in full because of lack of adequate inventory. Few records were kept. Of those records kept, they are so disorganized as to be almost valueless.

The Money Laundering Process

The drug war is not just about fighting individuals, it is about fighting systems. Only by reaching the power brokers can we hope to dismantle and cripple these drug systems. Simultaneously, we must attack the financial base of the drug industry. Money is the Achilles's heel of these power brokers. One does not buy drugs with a check or credit card. The illegal drug business deals with cold, hard cash. This presents a tremendous problem for the drug

GROWTH IN DRUG TRAFFICKING
Estimated value of drug business



(*)Organized Crime Consulting Committee;
FBI Law Enforcement Bulletin

dealer. How can he convert his drug money to make it look legitimate? This is no small feat because his industry is billions upon billions of dollars rich. (See the Figure on page 8).

Money Laundering Alert recently summarized a report issued by the 15 nations participating in the G-7 Financial Action Task Force. The report offers the most comprehensive analysis of the money laundering – drug trafficking problem within the existing statutory and regulatory framework:

> The "most basic" problem of the money launderer, the Task Force says, is the conversion of large amounts of cash in small denominations into "more manageable monetary instruments or other assets..." The Task Force says the laundering process has three basic steps: placement, layering and integration.
>
> **Placement**
>
> "Placement" is the physical disposal of bulk cash proceeds. It is the weakest link and the point where drug proceeds "are most easily detected." It takes many forms from smuggling to deposits in financial institutions to the purchase of retail assets. Some principal placement methods:
>
> - Structuring or smurfing, by which transactions are divided into smaller units to avoid detection or suspicion;
> - Correspondent banks and central bank deposits by misstating the purpose of the bank-to-bank transfers;
> - Bank complicity;
> - False currency transaction reports;
> - Use of "non traditional" financial institutions including currency exchanges, securities brokers, precious metals dealers, and commodities brokers;
> - Commingling of licit and illicit funds through front businesses; and
> - Purchase of assets such as automobiles, boats, or real estate with bulk cash.
>
> **Layering**
>
> "Layering" is the creation of "complex layers of financial transactions designed to disguise the audit trail of the illicit proceeds." It takes these forms:
>
> - Cash converted into monetary instruments such as traveler's and cashier's checks, letters of credit, stocks and bonds;
> - Assets purchased and sold with cash; and
> - Electronic funds transfers which are called "probably the most important layering method available to money launderers," because of "speed, distance, minimal audit trails and increased anonymity..."

Integration

The final step, "integration," comes from the launderer's need "to provide a legitimate-looking explanation for his wealth." It permits him to route his money back into the banking system making it appear as "normal business earnings." These are examples of integration:

- Real estate sales – Several variations can "integrate laundered money back into the economy." For example, it can be purchased by a failing business to create the illusion "that proceeds derived from illicit sources are actually the proceeds of the business";

- Front companies and sham loans – "A criminal enterprise can loan itself its own laundered proceeds in an apparently legitimate transaction" and get a double dividend by "paying itself interest on the loan and...declaring the interest as a business expense on its income tax return, thereby reducing its tax liability";

- False export-import invoices – This involves the "overvaluation of entry documents" to justify funds later deposited in U.S. banks or the "overvaluation of exports" to justify received funds from sources abroad."[16]

Targeting Drug Kingpins and Drug Wealth

States must provide tools which address this financial aspect of the drug industry. The UCSA (1990) does just that. It provides new criminal sanctions and civil remedies which target drug kingpins and drug wealth. There is a Continuing Criminal Enterprise (CCE) provision modeled after federal statutes. It reaches the leader of the drug operations, who, in concert with at least five other persons, obtains substantial income from a continuing series of drug violations.

The UCSA (1990) also includes a money laundering provision which imposes criminal penalties for financing, investing, acquiring, or expending finances or assets derived from or intended to further narcotics transactions.

These provisions are necessary to fill the breach in our lines of defense against mid-level traffickers left as federal agencies target international traffickers. As Money Laundering Alert concluded:

> The new state laws represent a serious threat to the activities and fortunes of mid-level drug traffickers, whose upper class colleagues are the focus of federal attention.[17]

FORFEITING PROPERTY USED IN OR ACQUIRED THROUGH DRUG DEALING

MODEL ASSET SEIZURE AND FORFEITURE ACT (MASFA) (1991)

The Upper Echelon – Targeting Drug Kingpins

Ernesto Benevento, a New York organized crime figure, re-established the French Connection in 1986. He brought European heroin chemists to the United States, supplied them with morphine base, and sold the finished heroin on the streets of New York. The first cycle produced $24 million at wholesale prices, and his organization moved millions of dollars back to Switzerland to fund a second cycle.

The government brought charges against Benevento under the Racketeer Influenced and Corrupt Organizations (RICO) Act, seeking to forfeit the seed money for the second cycle. Benevento argued that because the seed money had made it to Switzerland unseized, it was beyond the reach of RICO forfeiture. To his dismay, the Second Circuit disagreed. Because RICO forfeiture operates against the person rather than being limited to *in rem* application, the court ordered Benevento to pay the amount of the seed money from any available assets, as personal judgment.[18]

Drug businesses are no longer local operations. They span several counties, districts, states, and even countries. Personal jurisdiction allows judicial remedies to be brought to bear on a person, who can be ordered to turn over assets located out of the state or country. The Model Asset Seizure and Forfeiture Act (MASFA) (1991) incorporates *in personam* jurisdiction with its concomitant benefits.

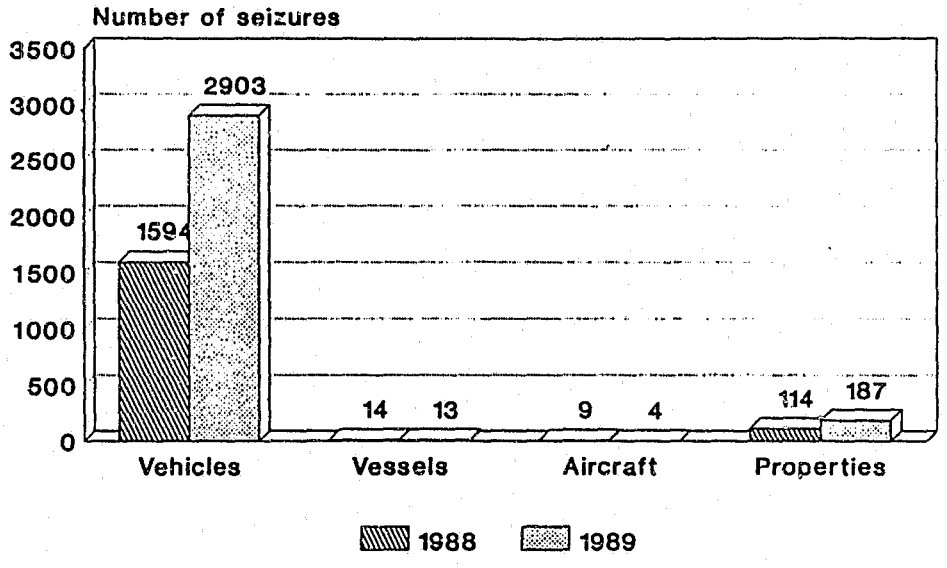
An adjunct to *in personam* remedies is the substitute asset provision. To avoid losing their drug wealth, drug dealers hide their money, use offshore banking, make tracing difficult through commingling, heavily encumbering the asset, and using leased or rented properties. The substitute asset provision allows the court to order the forfeiture of any other property up to the value of the original property subject to forfeiture which is no longer available. Several states have enacted substitute assets provisions as tools to rid criminals of their undeserved wealth. (See Appendix).

Two additional provisions provide civil remedies specifically designed to reach the upper echelon of the drug industry. First, conduct giving rise to forfeiture includes conduct that occurs outside but impacts on the state initiating forfeiture, as long as the forfeiting state has jurisdiction. This provision recognizes the national scope of drug trafficking.

For example, a drug dealer has a multi-state cocaine importation and distribution business, but chooses to invest his drug wealth in State A. State A could institute a forfeiture action against the drug wealth even though the conduct giving rise to forfeiture occurred outside State A.

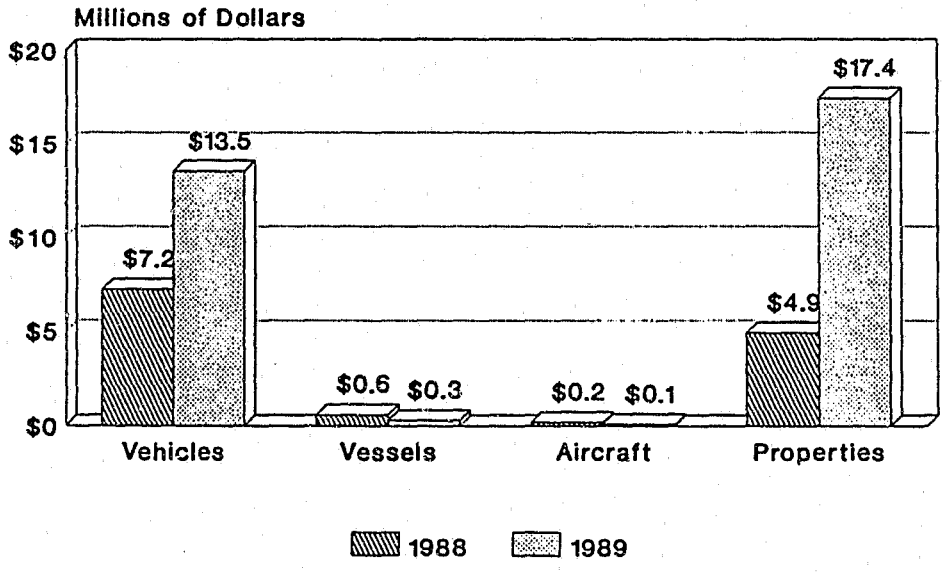
Second, a rebuttable presumption exists for the forfeiture of property if the person has engaged in conduct giving rise to forfeiture; the property was acquired during the period of time he engaged in this conduct; and there was no other likely source for the property. This provision is a common sense solution to the masked currency transaction by the dealer when he has unexplained wealth.

ASSET SEIZURES BY NARCOTICS TASK FORCES
FEDERAL FISCAL YEARS 1988 - 1989



(•)CJSA Consortium for Drug Strategy
Impact Assessment, 1990
(••)Data from 261 task forces, 16 states

ESTIMATED VALUE OF ASSETS SEIZED BY
NARCOTICS TASK FORCES
FEDERAL FISCAL YEARS 1988 - 1989



(•)CJSA Consortium for Drug Strategy
Impact Assessment, 1990
(••)Data from 261 task forces, 16 states

Reducing Waste – Proper Management of Seized Assets

In 1983 the General Accounting Office (GAO) sharply criticized federal forfeiture efforts for wasting seized assets. Photos of long lines of boats, cars, and planes rotting and rusting in Florida's tropical air depicted the need for administrative and even legislative reform.

The GAO found that vehicles resold for 58 percent of their seizure value, boats for 43 percent and aircraft for only 35 percent. Long delays in the completion of forfeiture proceedings extend over time, seized assets which have been put in storage continue to depreciate. Congress amended federal statutes in 1984[19], 1986[20], and 1988[21], to provide for proper management of seized assets.

State's experience with waste is comparable. As the drug industry has expanded, aggressive enforcement efforts seize significant amounts of property which require proper maintenance. (See the Figure on page 12). The MASFA (1991) addresses these concerns. It provides three state of the art techniques to speed the forfeiture process, eliminate non-meritorious cases, and reduce waste.

First, it permits substitute custodianship of seized assets – the power to let assets remain in the physical custody of the owner or of a contractor. This allows the owner or contractor to properly maintain the assets while awaiting the outcome of the forfeiture proceedings.

Second, a new "quick release" provision allows owners to substitute a bond for their property, addressing the desire of all parties to minimize storage charges.

Third, another provision also permits the return of seized property. It allows persons whose interests are exempt from forfeiture, generally lenders, to foreclose immediately if the owner defaults. They can sell the property to satisfy their interest, and return any excess monies to the court to be securely deposited in an interest-bearing account pending completion of the forfeiture process.

These simple yet effective techniques benefit all parties involved in the forfeiture action. Owners or interest holders are free to reasonably use the property pending a final determination. Concomitantly, state enforcement officers spend less time on property management issues. The state also spends less on maintenance costs which increase the already significant amount of expenditures for forfeiture investigations.

Freedom from Forfeiture– Exemptions

In 1974 the U.S. Supreme Court reaffirmed its long support of forfeiture, holding that the U.S. Constitution's protection against the taking of property without due process does not require exemption of wholly innocent interests.[22] The Supreme Court's decision, however, has been tempered by legislative restraint. Legislatures have perceived the role of civil remedies as freeing legitimate commerce from the effects of criminal influences. The remedies are effective in inverse proportion to the economic disruption they cause; a truly effective civil remedy fosters an alliance between business and law enforcement. These perceptions have been shared by law enforcement and reflected in federal and state legislation since the Supreme Court's decision.

Statutes generally provide limited, piecemeal exemptions from forfeiture to protect commercial interests. The MASFA (1991) provides a unified, comprehensive approach that clearly establishes a priority for commercial continuity while preventing manipulation by drug network participants and their agents. The exemptions function as a series of tests, each designed to eliminate non-qualifying claimants, leaving those who are, for example, good faith purchasers for value.

Speedy Probable Cause Determination– Right to a Hearing

The MASFA (1991) creates a new right to a speedy judicial determination of probable cause, right now found in only a few states. Even federal statutes provide no right to a speedy hearing. The U.S. Supreme Court has held that delays of months or even years between seizure and a judicial determination of probable cause at a forfeiture hearing do not violate due process.[23] While delays due to ongoing criminal trials are often desirable to people accused of crime, they are economically damaging to lienholders and other commercial interest holders.

The new speedy hearing right also benefits those accused of crime. For example, a person is alleged to have used his warehouse as a drug stash house. He wants to encumber his interest in the seized warehouse to a financial institution as part of a business deal. He has no other substantial assets. The new right to a speedy probable cause hearing assures that the mere untested allegation of the forfeitability of the warehouse will not kill the business deal; he will get a review of probable cause right away.

Protecting Property Interests– Procedural Safeguards

A bank has accepted a customer's pledge of a certificate of deposit as collateral for a large loan. The certificate is later seized as the proceeds of drug dealing. The bank is drawn into a massive legal battle, and faced with attorney's fees and expenses for what promises to be years of monitoring the litigation.

The MASFA creates a careful balance between removing the profit from drug crime and protecting the legitimate interests of owners and interestholders like the bank. It provides numerous procedural safeguards. First, it places time limits on the state in which to initiate and pursue forfeiture, in addition to the quick probable cause hearing. They mandate filing in far less time than federal procedure.

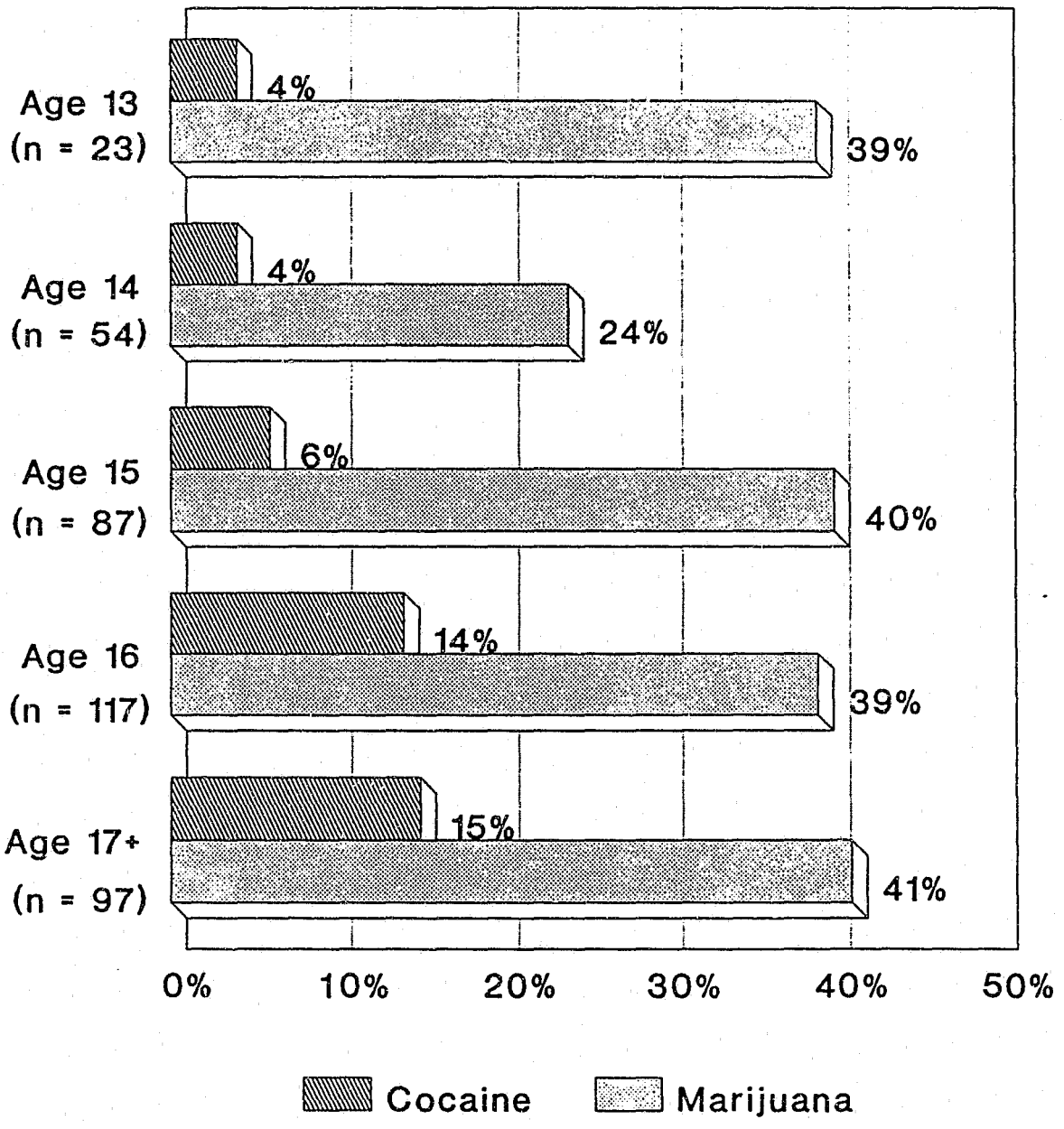
Second, it specifically authorizes and sets forth a procedure that encourages the government to stipulate to the exempt status of particular interests in seized property. The commercial interest holder is protected, and the prosecutor is not forced to make tactical decisions under the pressure of knowing that some courses of action may harm commercial interests.

Third, an individual whose interest the state recognizes as exempt or a regulated interest holder, such as the bank, may take advantage of a "quick sale" provision. The interest holder may apply to have seized property sold, leased, rented, or operated to satisfy or preserve a specified interest. The remaining proceeds, after payment of costs, are deposited into an interest-bearing account subject to further proceedings. Like the stipulation procedure, this provision allows legitimate interest holders to obtain a speedy exit from the

forfeiture action. Interestholders know their interests are protected without incurring costly legal expenses. The state spends scarce resources only on claims truly in dispute.

Fourth, the MASFA (1991) further protects property interests by requiring an immediate inventory, and requires that the state give notice of its pending forfeiture, protecting potential purchasers from becoming involved in possible fraudulent or voidable conveyances.

DRUG USE AMONG JUVENILE DETAINEES
Percent Testing Positive by Age Group



(*) NIJ Research in Brief, May 1990

TARGETING DRUG TRAFFICKERS WHO EXPLOIT JUVENILES OR WHO DEAL THEIR DRUGS NEAR SCHOOLS AND PLAYGROUNDS

UCSA (1990) SECTION 409. DISTRIBUTION TO INDIVIDUAL UNDER 18; DISTRIBUTION NEAR SCHOOLS OR COLLEGES; PENALTIES

SECTION 410. EMPLOYMENT OR USE OF INDIVIDUAL UNDER 18 YEARS OF AGE IN DRUG OPERATIONS; PENALTIES

One of the most tragic consequences of our national drug abuse crisis has been the exploitation of juveniles by drug traffickers and the corruption of young people. Particularly in our inner cities, our youth are exposed each day to the allure of the illegal drug trade, the "good times" to be had by abusing controlled substances, and the "good life" that can be had by the enormous profits to be made by dealing drugs. The age of children enticed into a drug filled life becomes younger and younger with each year. Juvenile detainees as young as 13 or 14 are testing positive for cocaine and marijuana. (See the Figure on page 16).

To try and protect our youth, forty–three jurisdictions have enacted in some form a drug–free school zone provision. Over 45 others enhance penalties for employing minors.[24] Special provisions addressing sales to juveniles exist in 50 jurisdictions, including the District of Columbia.[25] (See Appendix). However, few jurisdictions contain the language in the UCSA (1990) § 410 (a), borrowed from federal law, specifically prohibiting the use of juveniles "to assist in avoiding detection or apprehension" for a violation of the Act.

The Use of Juveniles by Traffickers is Deliberate and Devastating

A study of the impact of the crack epidemic on black teens concluded:

> . . . the marketing of crack has been unique. Crack is sold through diffuse networks in which teenage dealers play an important role. Crack selling has become a major source of employment in neighborhoods where there are limited legitimate jobs. The large sums of money being made by very young people is contributing to the social disruption and social chaos found in communities where crack use occurs. Legal services providers report, for example, that criminal activity related to crack is beginning to overwhelm the legal system. A substantial proportion of all adolescent offenders are being arrested for crack–related offenses.[26]

Juveniles are Recruited to Avoid Adult Penalties

In 1989, a 17–year–old youth named Donnell Winley was murdered on the streets of Washington, D.C., to prevent him from giving damaging testimony against two men who were charged in a drug–related killing. The *Washington Post* reported that Winley had been employed as a "gofer" for the Rayful Edmond drug organization which controls a large part of the cocaine and crack market in Washington when Edmond and another man committed the earlier drug–

related murder in a dispute with the victim over payment for cocaine. According to a report in the *Washington Post*, Winley "was sent by Edmond to confess to [the] killing **because, as a juvenile, Winley would not have been sentenced to more than two years in prison**" (emphasis added). Winley later recanted his confession and agreed to testify against Edmond and the other assailant. As a result, Winley became Washington's 184th homicide victim of 1989.

Another *Washington Post* article tells of the arrest of a star quarterback at Washington's Cardozo High School on drug charges, jeopardizing the youth's scholarship to the University of West Virginia. A coach at the inner city high school was quoted as saying:

> "It doesn't shock me at all. Nowadays, drugs rival athletics as the way to get out [of urban ghettos]. The thinking is, "If you can't be an athlete be a drug dealer." You get big-time respect as a drug dealer. It's horrible but it's reality."

He added:

> "It's a helpless feeling. How many times you think I talk to these kids in one week about who not to associate with? These dealers have money and BMWs. The high school dropouts are driving better cars than the teachers. It's difficult for all the kids."

The same coach stated that, on the same day he learned of the quarterback's arrest, he had another encounter.

> "This one kid at school is the nicest, most clean-cut kid. A smart kid. I saw him wearing a beeper and I said to him, "What the hell are you doing with that on?" And he said, just as calm as day, "I can pay my car off and pay my tuition [to college]. It's a victimless crime, just like prostitution."[27]

Another article in *Newsweek* magazine described the inner-working of a "street drug organization." It stated that:

> Every dealer, or "pitcher," has a support staff. Most critical is the lookout, often a minor. A good lookout goes to the police station and jots down description of the unmarked cars parked there. In the block, he stands guard. "Nobody could get on that block unless [the lookout] knew about it, "says the Professor, a former dealer. "If my lookouts saw the cops, they'd yell 'Five-O rolling,' from the Hawaii Five-O TV show."[28]

Juveniles are Used to Deal to Other Juveniles

A study published by the National Institute of Justice described recent findings about how adults use juveniles to gain access to the adolescent market.

> Although most youngsters who sporadically distribute small amounts of drugs are not seriously delinquent, **a small number, most often multiple-drug users or heroin or cocaine users, are high-rate dealers who link the adult world of drug distribution**

and the sporadic adolescent distributors. Although many of them are daily users of drugs, they may not meet the stereotype of the "strung-out junkie." Like many other adolescents, their lives revolve around getting out of school, hanging out and socializing, fast food, and movies. They also perform a central role among kids who regularly get high.

Youngsters who distribute drugs weekly often have an adult dealer who "fronts" or supplies them with drugs on credit. They in turn supply other youngsters who pay in cash. Most of the money is returned to the adult supplier; the rest is a commission that the youngster rapidly spends for cigarettes, beer, and other adolescent accoutrements. Also, the youngster often keeps some drugs for personal use and shares drugs offered by the other adolescents he supplies. Youngsters who distribute drugs weekly are more likely to sell drugs in public than children who sporadically sell small amounts. Although most drug distribution takes place in cars or homes, more public spots commonly used are schools, parks, swimming areas, and other places where teenagers congregate. (footnotes omitted) (emphasis added)[29]

The only provision in the UCSA (1970) regarding exploitation of minors provided enhanced penalties only for those who actually distribute drugs to minors. In recommending measures to address the drug problem, the White House Conference for a Drug Free America acknowledged the need to protect the Donnell Winleys of this country. Conferees urged states to adopt stiff mandatory minimum sentences for those using minors to distribute drugs, or those selling drugs to minors.[30] Sections 409 and 410 of the UCSA (1990) authorize imposition of enhanced penalties, including an option for mandatory minimum sentences, on those who deal drugs to minors, those who deal drugs within 1,000 feet of schools or playgrounds, and those who employ juveniles in their drug-dealing organizations.

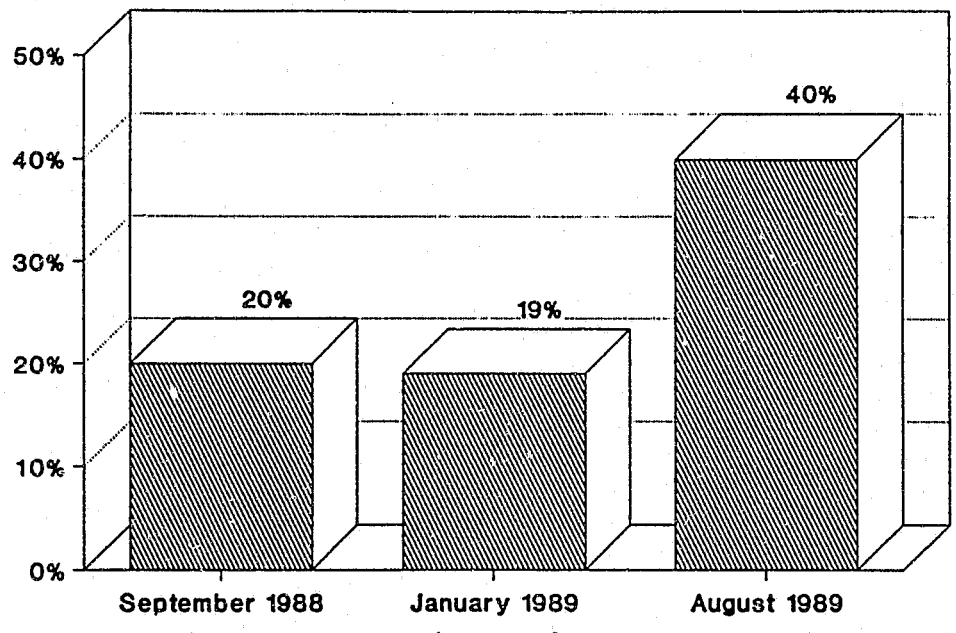
Civil asset forfeiture provisions of the MASFA (1991) remove the financial incentives and rewards for juvenile drug dealers. Because the civil provisions of MASFA (1991) are remedial and non-criminal, they may be used even when adult criminal sanctions are unavailable or existing juvenile proceedings are inadequate.

The preceding paragraphs have referred to a key incentive to young people. The "... large sums of money being made by very young people.... [w]hich says "BMW's" and lets them drive "better cars than the teachers," and pays for tuition, jewelry, clothes and "other adolescent accoutrements."

While it is neither desirable nor possible to deter juveniles by using adult criminal sanctions, MASFA (1991) can realistically deprive adults of the bait they use to entice many juveniles into the drug trade.

PUBLIC CONCERN ABOUT DRUGS

Percent Ranking Drugs as Most Serious Problem Facing the United States

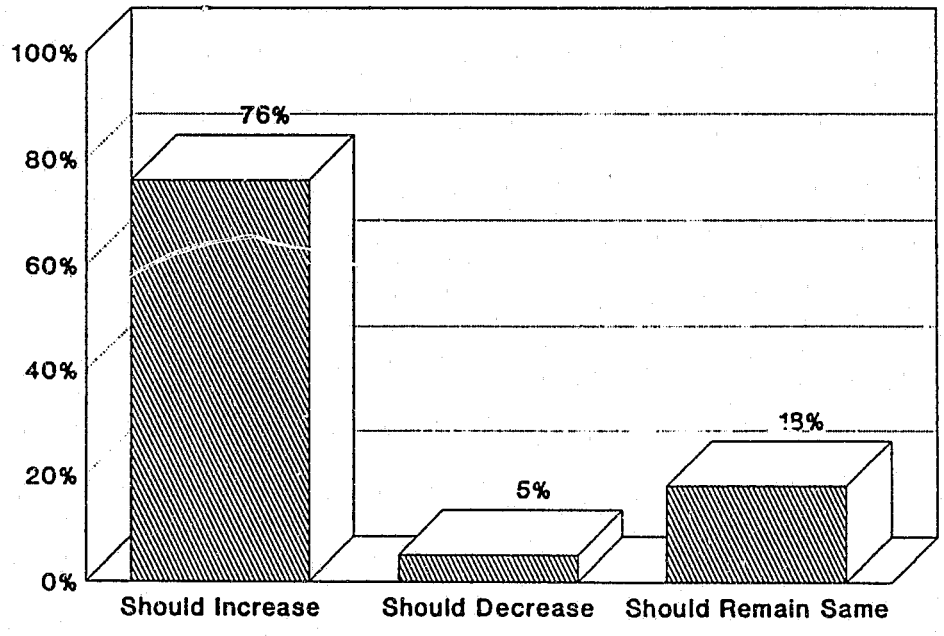


(•) BJA NCTAP Newsletter, 1990

(n = 1,509)

FEDERAL ANTI-DRUG PROGRAM EXPENDITURES

Public Attitudes Regarding Funding Level for Enforcement and Treatment Measures



(•) BJA NCTAP Newsletter, 1990

(n = 1,509)

HOLDING USERS ACCOUNTABLE

UCSA (1990) SECTION 402. PROHIBITED ACTS B–; PENALTIES

SECTION 406. POSSESSION AS PROHIBITED ACT; PENALTIES

SECTION 408. SOLICITATION; [ATTEMPT;] PENALTY

SECTION 414. CONDITIONAL DISCHARGE FOR POSSESSION AS FIRST OFFENSE

SECTION 415. TREATMENT OPTION FOR VIOLATION OF [ACT]

SECTION 416. ASSESSMENT FOR EDUCATION AND TREATMENT; APPROPRIATION OF MONEYS

MASFA (1991)

MODEL DENIAL OF FEDERAL BENEFITS ACT (1991)

SUSPENSION OF DRIVER'S AND PROFESSIONAL LICENSES

Statutory Approaches for Demand Reduction

Drug abuse is considered by many Americans to be this nation's most serious problem. (See the top Figure on page 20). In a time of government belt tightening, the public favors increased spending for drug enforcement and treatment measures. (See the bottom Figure on page 20). People are frightened about their children's future in a world filled with drug–related crime, violence, and death. They want the country's leaders to take action which will control widespread drug abuse and its devastating consequences.

A comprehensive drug control strategy will include many components, some of which cannot be legislated. Nevertheless, when Congress mandated America's "Drug Czar" to develop such a plan, legislative strategies supporting demand reduction were prominently prioritized. The UCSA (1990) contains a number of provisions which warrant examination by all persons interested in demand reduction.

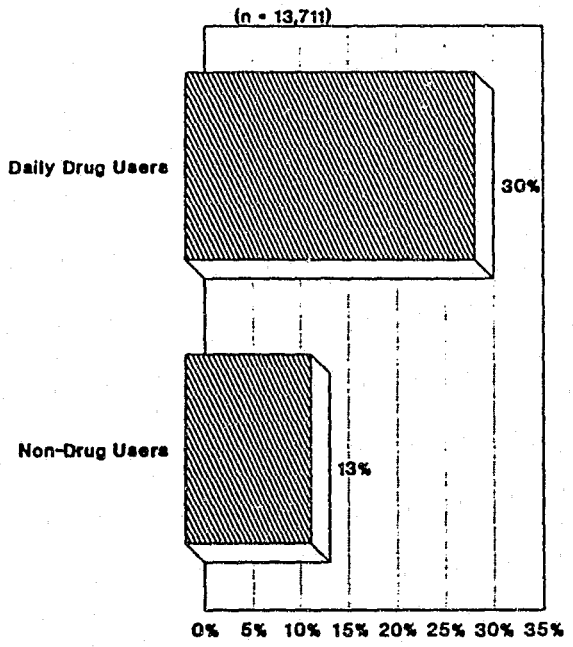
The key to all demand reduction strategies is to hold users accountable for the harms they are inflicting on themselves and our society. However, tolerant views toward drug use undermines user accountability as well as overall drug control measures.

This tolerance is partially borne out of a lack of understanding and recognition of the harms associated with drug use. While our most severe statutory responses are directed towards those who illegally distribute drugs, we must not forget those who create the demand for illegal drugs are ultimately those responsible for the drug problem which impacts our children, our schools, our neighborhoods and our way of life.

Drug Addicts Commit More Crimes for Financial Gain

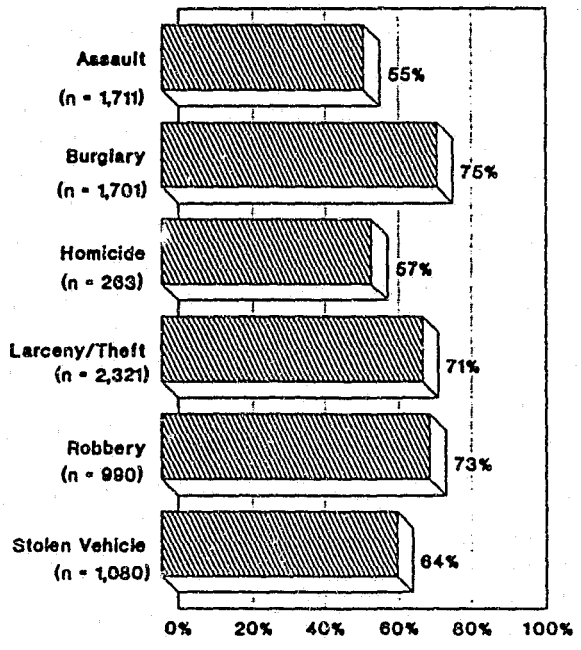
According to the studies collected by the National Institute of Justice's report, ***Characteristics of Different Types of Drug Involved Offenders***, users/addicts commit many of the robberies and burglaries that threaten and sometimes take our lives and those of our families. Users/addicts commit car thefts, shoplifting, and frauds which boost the costs of insurance, goods,

PERCENTAGE OF DAILY DRUG USER AND NON-DRUG USER INMATES WITH 6 OR MORE PRIOR CONVICTIONS



(•)BJS State Inmate Survey, 1986

DRUG USE AMONG ARRESTED MALES PERCENT TESTING POSITIVE AT ARREST BY OFFENSE TYPE



(•)NIJ Drug Use Forecasting Annual Report 1989

and services by billions of dollars each year.[31] A 1986 survey of state prisoners conducted by the Bureau of Justice Statistics (BJS) found that 30 percent of the inmates who were daily users of a major drug had six or more prior convictions compared with less than 13 percent of those who had never used a major drug. (See the top Figure on page 22). [32] The BJS survey revealed further striking indications of the link between drug use and crime:

- While daily users of a major drug represented a minority of the prison population they committed a disproportionate share of crimes. Three-quarters of daily users were in prison for property crimes such as larceny and burglary.

- Of the state prisoners who were sentenced for robbery, burglary, larceny or a drug offense, half were daily drug users, and about 40 percent were under the influence of an illegal drug at the time they committed the crime. These proportions were higher than those reported by inmates convicted of other crimes.

- Users of major drugs were substantially more likely than non-users to report that they received income from illegal activities during the time they were last free. (48 percent versus 10 percent)

Substantial numbers of prisoners convicted of profit motivated crimes acknowledge being daily drug users during the time prior to their arrest; robbery 50.3 percent; burglary 52.3 percent; larceny 40.2 percent; auto theft 46 percent; drug trafficking 52.4 percent.[33] As the bottom Figure 2 on page 22 illustrates, these numbers are lower than those based on drug testing of arrestees in 21 major cities. Test results confirm that those charged with profit crimes and report drug use prior to or at the time they commit the offense.[34]

Drug Addicts Commit Violent Crimes and Crimes Against Children

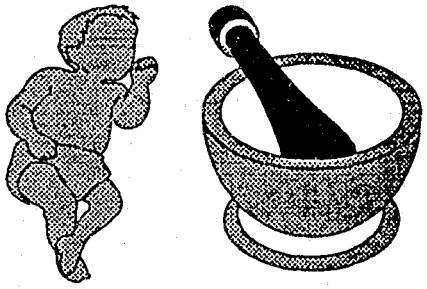
Often the attention focused on crimes committed by drug users to support a habit or life style ignores another class of crimes even more inextricably connected to drug use. Because one of the chief effects of drug use is a reduction of inhibitions, persons under the influence of drugs commit acts of violence against family members, friends and often total strangers. The number of abused children reported in New York rose dramatically, from 2600 in 1986 to 8500 in 1988. While no direct correlation to drug abuse has been empirically established it is noteworthy that parental drug abuse escalated during the same period. Over 73% of cases involving children killed as a result of child neglect in New York in 1988 were tied to parental drug abuse.[35]

Nationally, the recent jump in reports of child abuse and neglect – reaching an all-time high of 2.4 million –was directly related to parental and caretaker drug use, according to the National Committee for the Prevention of Child Abuse.[36] In Pennsylvania and Louisiana for instance, as many as 90 percent of caretakers abusing children are also substance abusers – numbers 10 times higher than those reported in the National Institute for Drug Abuse (NIDA) surveys of the general population.[37]

The impact of drugs is devastating even in states such as Wyoming, where although only 23 percent of child abuse reports involve substance abuse, these cases account for over half of their child abuse deaths.[38]

Another survey by the Bureau of Justice Statistics revealed that 46 percent of all rape victims believed their attacker was under the influence of drugs or alcohol.[39] Even more chilling is the admission by one-third of the rapists in the state prison inmates survey that they were under the influence of a drug at the time they raped their victim.[40]

DRUG AFFECTED INFANTS



An average of 375,000 (11%) U.S. newborns a year are perinatally exposed to drugs.

Los Angeles: An estimated 915 drug affected infants will cost approximately $32 million in medical and foster care.

New York City: Child welfare caseloads increased from 2,627 in 1986 to 8,521 in 1988 due in part to drug exposed babies.

California: 8,974 perinatally exposed infants will cost $500 million in perinatal and foster care.

(*) U.S. Senate Hearing Proceedings

Drug Users Commit More Crimes as Their Drug Use Increases

Studies in Baltimore, California, and Harlem show increased criminal involvement with more drug usage. Ball, Shaffer, and Nurco found that over a 9-year period, the crime rate of 354 black and white heroin addicts dropped with less narcotics use and rose 4 to 6 times with active narcotics use.[41] Similarly, Anglin and Speckart compared criminal involvement of 753 white and Hispanic addicts before and after addiction. Results showed that 21-30% more persons were involved in crimes the year after addiction began, arrests increased substantially, and the number of days addicts were involved in crime increased 3 to 5 times their number prior to the first addiction.[42]

In a study of behaviors and economic impacts of 201 street heroin users in Harlem between 1980 and 1982, researchers revealed that daily heroin users reported the highest crime rates, 209 non-drug crimes per year compared with 162 among regular users, and 116 among irregular users. Daily heroin users committed about twice the number of robberies and burglaries as regular users and about 5 times as many as irregular users.[43]

Not surprisingly, successful arrests result in a reduction of drug connected criminal activity. In mid-June of 1989, *Newsweek* stated that Washington, D.C. police officers reported a 25 percent drop in the murder rate after the arrests of members of Rayful Edmond's drug organization supplying more than 20 percent of the cocaine consumed in our nation's capitol. Lynn, Massachusetts, reported a reduction in the robbery rate of 35 percent following street level enforcement strategies. Burglaries were down 41 percent.[44] After Santa Cruz, California officials implemented a street level enforcement program targeting heroin users, they experienced a county wide property crime reduction in excess of 20 percent.[45]

Drug Affected Infants

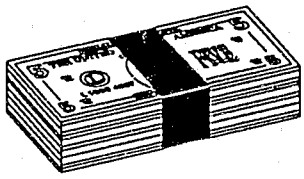
Female users/addicts give birth to infants who are themselves addicted. The National Association for Perinatal Addiction Research and Education reports that 11 percent of all births are producing drug-exposed infants. That means 375,000 babies a year.[46]

For those who don't see the human tragedy involved in what they term a "victimless crime," consider the plight of drug-addicted infants. They are typically premature and suffer from low birth-weight, hypertonicity and low Apgar scores. Crack babies run an increased risk of mortality, morbidity, and developmental problems. They are often irritable, easily distracted, and display less affectionate, expressive behavior.[47] Drug-exposed infants are 5-10 times more susceptible to Sudden Infant Death Syndrome (SIDS) commonly known as crib death.[48]

The short-term and long-term care of these infants is costly, and strains our social care systems. (See the Figure on page 24). Dr. Neal Halfon of Children's Hospital in Oakland, California estimated that hospital costs for the anticipated 15,000 – 30,000 drug-exposed infants born in California in 1989 would range from $500 million to $1 billion.[49] Longer hospital stays for these newborns contribute to the skyrocketing costs. An average length of stay for boarder babies at Howard University Hospital in Washington, D.C. in 1988 was a minimum of 12 days. In contrast, a normal stay for newborns was three days. The longest-stay infant had been in the hospital for 245 days at a cost in excess of $250,000.[50]

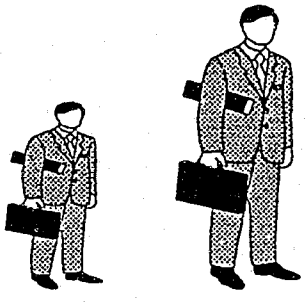
It is impossible to calculate with certainty the long-term suffering these children will endure or the long-term costs society will bear for their care. However, health officials are beginning to see an impact on already overburdened foster care and educational systems. The

COSTS OF EMPLOYEE DRUG USE



Productivity loss, medical claims, injuries, theft, absenteeism, and medical disability costs exceed $60 billion a year.

Drug using employees incur 300% higher medical costs and medical benefits.



Recreational drug users are 1/3 as productive as an average worker.

(*) U.S. Chamber of Commerce Report

number of children in foster care in New York City doubled from 1987 to 1989 – 27,000 to more than 50,000 – partially due to parental drug abuse. Los Angeles County experienced a 500 percent increase in the number of foster care children between 1981 and 1987 partially because of parental drug abuse.[51] Because of physical problems and learning disabilities, drug–affected children will require special attention and care. The Florida Department of Human Resources has estimated that to prepare a crack baby for school will cost $40,000 annually. While Los Angeles annually spends $3,500 to educate a child, the amount increases to $15,000 annually for a child in its drug–exposed baby project.[52] Maryland health officials estimate that 60 percent of drug affected infants will require attention from child protective services and 40 percent will require foster care. Conservative estimates for care, therapy, and special education for the 7,400 drug–exposed infants born in Maryland in 1989 through age 18, are almost $387,000,000.[53]

Drug Abuse in the Work Force

Non–addicted, so called "recreational" users are often gainfully employed in the early stages of abuse. NIDA's latest studies show that among 18 to 34 year old full–time employed Americans, 24.4 percent used an illicit drug in the past year, and 10.5 percent used an illicit drug in the past month.[54] One of four full–time employed males uses marijuana at least once a month and one of twenty full–time employed males uses cocaine.[55] Of individuals entering the work–force for the first time, 42 percent used illegal drugs in the past year.[56]

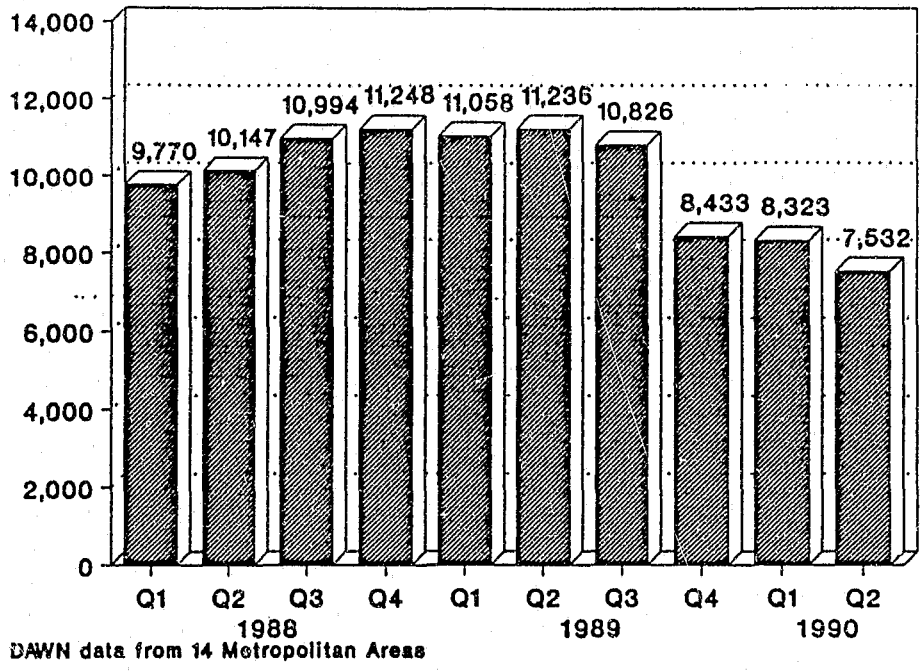
Drug use on–the–job is a common occurrence. Three–quarters of callers to a cocaine hot–line sometimes used cocaine during working hours while one–quarter were daily users. Seventy–five percent (75%) of drug users surveyed admitted they had used drugs on–the–job and 44 percent said they had sold drugs to co–workers.[57]

Drug–abusing employees sap the strength of the American economy with decreased productivity, increased use of sick leave, increased on–the–job accidents and as a consequence, increased demands on the worker compensation system. The U.S. Chamber of Commerce reports drug abuse annually costs businesses $60 billion.[58] (See the Figure on page 26). Roger Smith, Chairman of the Board of General Motors, says drug abuse costs General Motors alone more than $1 billion a year: up to $430 per car it manufactures.[59]

Self–reports by drug users revealed that 64 percent believed drugs adversely affected their job performance.[60] Their beliefs are supported by available research on the work characteristics of "recreational" drug users. According to a U.S. Chamber of Commerce study, compared with average employees, a typical "recreational" drug user is:

- 2.2 times more likely to request early dismissal or time off;
- 2.5 times more likely to have absences of eight days or more;
- 3 times more likely to be late for work;
- 3.6 times more likely to injure themselves or another person in a work–place accident;
- 5 times more likely to be involved in an accident off the job (which affects attendance or performance on the job);
- 5 times more likely to file a worker's compensation claim;

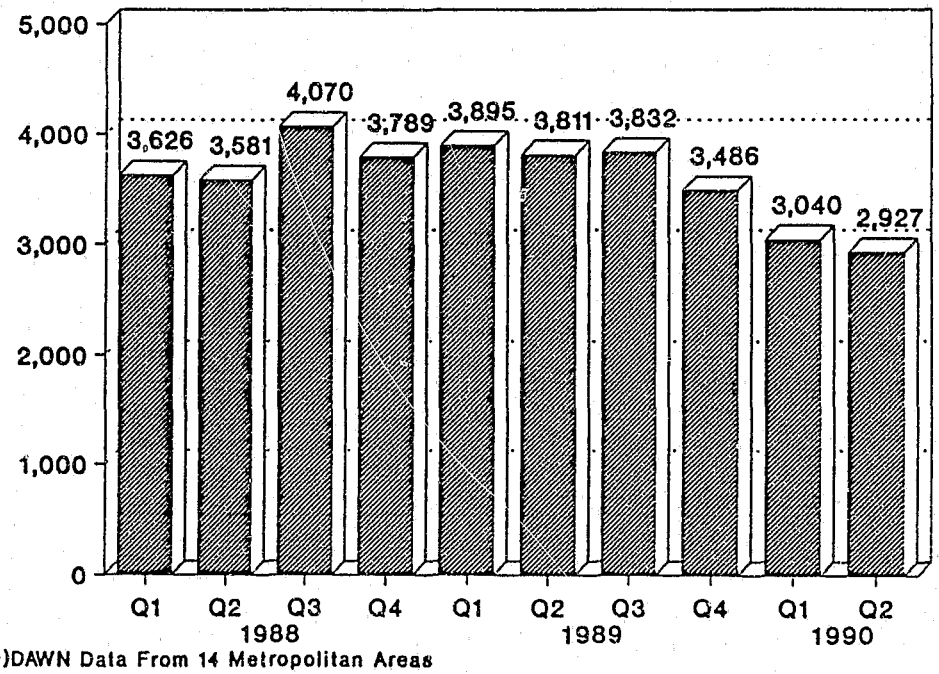
COCAINE-RELATED EMERGENCY ROOM CASES
Quarterly Trends (1988-1990)



(•) DAWN data from 14 Metropolitan Areas

The impact of drug use on hospital emergency rooms throughout the United States poses a serious problem.

HEROIN-RELATED EMERGENCY ROOM CASES
Quarterly Trends (1988-1990)



(•)DAWN Data From 14 Metropolitan Areas

- 7 times more likely to have wage garnishments; and
- One-third less productive.[61]

The costs of drug abuse in terms of decreased morale, lower quality products, and poorer service, while less quantifiable, are just as real. Equally real are the obstacles they place in the path of American businesses struggling to compete in an international economy.

Drug Use Invades Our Hospitals, Homes, and Schools

Users/addicts are flooding our emergency rooms. Hospitals have reported staggering numbers of cocaine emergencies, according to the Drug Abuse Warning Network (DAWN). From 1985 to 1988, cocaine emergency room related cases increased 400 percent. Phoenix and Detroit experienced even greater increases during the same period. Phoenix went from 15 to 296 emergency room visits while Detroit jumped from 186 to over 1000 visits.[62]

Fourteen of nineteen cities had record cocaine cases from June, 1988 to June, 1989. Eleven of those cities had increases in heroin emergency room cases; eight had record marijuana cases.[63]

While 1990 figures indicate a decline in emergency room mentions related to cocaine and heroin, the numbers stay intolerably high. (See the Figures on page 28). Similar decreases in overall drug use reported by the National Household Survey also must be met with cautious optimism. (See the bottom Figure on page 30). Frequent or intense cocaine use among the general population remains high. The Household Survey reports that more than 10 percent of cocaine using respondents in 1990 used the drug weekly, and one in twenty used it daily.[64] Illegal drugs are widely available in our schools. Fifty percent of high school students use an illegal drug before they graduate. Cocaine is the drug of choice for one out of ten students.[65] Drug use does not stop with high school graduation. Almost 20 percent of college students regularly use an illegal drug.[66]

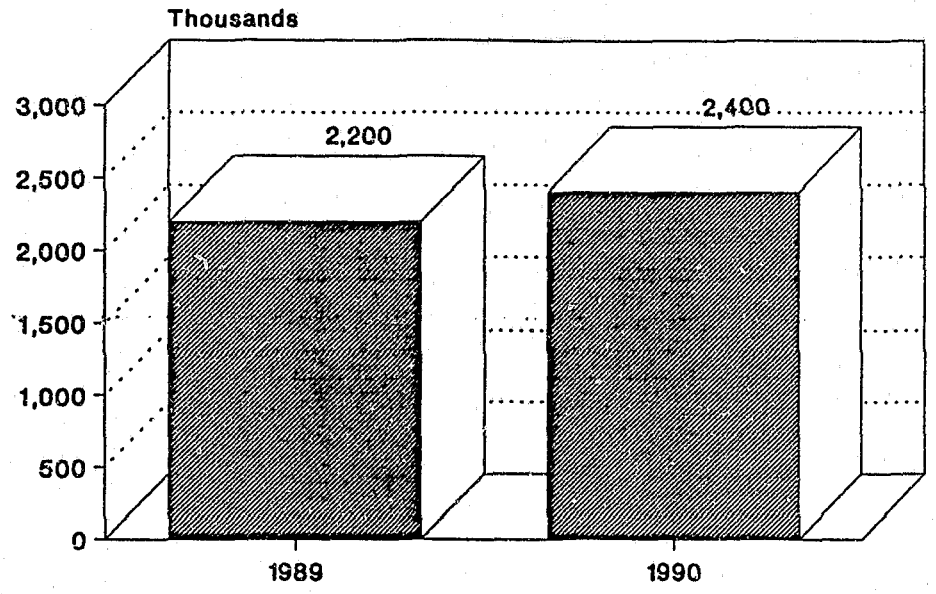
Even more alarming are the findings reported by a recent U.S. Senate Judiciary Committee report on drug use in America: (See the top figure on page 30)

- Weekly cocaine users total 2,400,000 individuals;
- Regular heroin users total almost 1 million persons; and
- Hard-core addiction increased in states which missed the first wave of the drug epidemic, such as Alabama, Indiana, Nebraska, and Utah.[67]

Drug enforcement, prevention, and treatment efforts to date may partially account for the slight downward trend in drug use, but we have a long way to go. As Dr. Lewis Sullivan, Secretary of Health and Human Services, warns:

> In spite of our individual and national efforts, there are still millions of Americans trapped in the web of addiction, poor health, violence, crime and death. As a result, their families and friends confront a living nightmare, and the drug users and drug dealers constitute a severe threat to themselves, their communities and our country.[68]

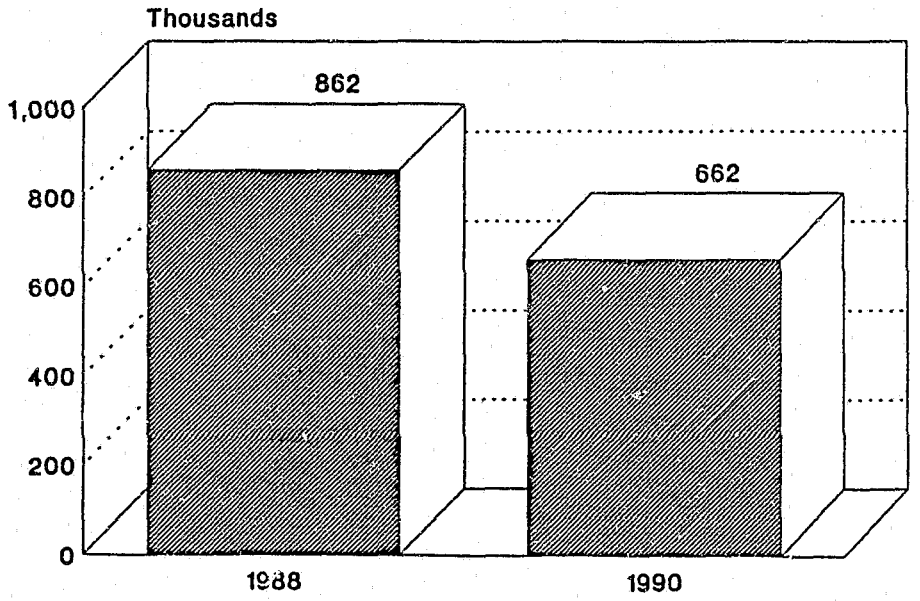
"HARDCORE" COCAINE USE IN U.S.
Increase in Estimated Number of Users



(•) U.S. Senate Judiciary Comm. Report
(••) Hardcore = weekly use

Despite differences in reported numbers of users, weekly cocaine use remains a serious problem throughout the United States.

FREQUENT COCAINE USE IN THE U.S.
Decrease in Estimated Number of Users



(•) NIDA Household Survey
(••) Frequent = weekly use

Drug Users Fund the Narco-Terrorists

Further, all users –regardless of their level of addiction –provide the cash used to support the drug trade. The U.S. Chamber of Commerce reported in 1987 that more than $100 billion a year is grossed annually from the illegal sale of drugs in the United States –more than the total American farmers take in from *all* crops and more than *double* the combined profits of Fortune 500 companies.[69]

It is the drug user who provides the cash for the guns and the bullets, turning American cities into war zones; the cash for the bribes and the hush money corrupting police officers and other public officials. Drug users provide the cash which supports the kinds of lifestyles led by drug dealers that tell young people they don't need the work ethic or their family to succeed – easy money is a drug deal away.

Users are funding a new kind of American Imperialism. Columbia, Latin America's oldest democracy, is under siege by, narco-terrorists, in the Columbian cartels. Why? So that the cartels may freely feed America's monstrous cocaine and marijuana habit. The rule of law is being replaced with the offer of "plomo o plata," lead or silver, a bullet or bribe.

Columbia has paid for resisting this coerced corruption in blood. Traffickers have murdered a justice minister, an attorney general, four presidential candidates, dozens of judges, journalists, hundreds of police officers and their families.[70] These murders were financed in large part by the billions of dollars provided each year by American drug users. These murders were committed to protect that market. Murders will continue because violence is simply a cost of doing business. As Carlos Lehder Rivas succinctly stated, "Every so often in this business, someone has to die."[71]

Eduardo Moya Tovar, the first Columbian federal judge assassinated by the cartel, was presiding over a drug lab case. His daughter told *Barrister*, "Everybody reacted to his death, a judge being killed was unheard of. Now it is everyday. We barely react when a judge is killed. The cartels have numbed us." It may be impossible for Americans to conceive of a nation's political process being so subverted but the narco-terrorists calling themselves the "Extraditables" have hijacked the Columbian Constitutional convention in order to ban extraditions of drug traffickers to the U.S. The narco-terrorists kidnapped five prominent citizens in a bid to gain concessions from the convention. By the first week of the convention two hostages, a magazine publisher and the 65 year old sister of a Columbian diplomat were executed by multiple gunshots to the head.[72]

DEA Agent Enrique "Kiki" Camerena was kidnapped, tortured, mutilated and finally murdered by a Mexican Cartel. But when Camarena's widow was asked who she blamed for her husband's death her finger pointed north not south, American drug buyers, she said, killed Kiki Camarena.

Reducing Drug Use Would Deal a Blow to Narcotic Trafficking

Indeed, because 4.1 million of all cocaine users are non-addicted "recreational" (less than once-a-month) users the cash they provide constitutes a continuing source of fuel to the fire.[73] These are the persons who could inflict a serious blow to the drug lords by cutting off that which they themselves are addicted to–money. The members of the Drug Cartel, like OPEC's Oil Cartel, have become dependent on a heavy flow of American dollars. Just as a significant reduction of America's demand for oil wreaked havoc with OPEC, reducing America's demand

for drugs by those recreational users, who could quit tomorrow, might well turn these thugs loose on one another.

Americans who quickly rally to boycott cosmetics tested in a cruel manner on animals, South African investments, products from nations killing whales as well as those citizens who recycle, plant trees, buy "dolphin safe" tuna, all understand the power of the individual consumer on markets and industries. These same Americans and millions more must become just as strident in fighting those consumers supporting an industry so destructive to the lives, environment and political institutions in this country and around the world.

To Reduce Demand We Must Make More Arrests for Possession Possible

Because our objective is to reduce demand, the concept of user accountability cannot simply be punitive. We must, however, begin with the premise that the illegal use and possession of drugs is a criminal wrong subject to punishment absent a demonstrated willingness by the defendant to make a better choice in his or her life. In an economic study of drug dealing in Washington, D.C., the Rand corporation noted that a substantial proportion of persons charged with drug possession, **42 percent**, were non–residents. A third of these were white.[74] Many were reversing the "white flight" to the surrounding suburbs by returning to D.C.'s open air drug markets where purchasers, the Rand study found, are largely responsible for enticing a generation of inner city black youth into drug selling.[75]

Neighborhoods where police are successful in clearing out the **customers** find that the sellers go away also. Street by street, citizens reclaim their neighborhoods. The most effective way to deter the buyers is to make uncertain whether the seller is going to give them drugs or their **Miranda** rights. Law enforcement strategies such as "reverse stings" targeting the drug customers flowing into drug houses and open air markets are provided for in Section 408 of the UCSA (1990). This provision punishes those persons who solicit or attempt to purchase what they believe to be drugs. Without this provision, police departments in Miami, Florida; Inglewood, California; and Seattle, Washington, for example, are forced to sell real drugs in their otherwise very successful efforts. Already states have begun to signal users that their efforts to buy drugs will be met with serious sanctions. The Office of National Drug Control Policy (ONDCP) reports that 19 states punish attempts and either offers or solicitations to buy or sell drugs the same as for the completed offense.[76] Section 402 of the UCSA (1990) contains powerful new language designed to create disincentives for persons who provide the apartments and rental houses where drugs are so often dealt. Similar provisions exist in over 40 states.[77] (See Appendix).

Sanctions in Addition to Incarceration Must Be Created

We must recognize that scarce prison space should be reserved for those committing the most serious offenses and those repeat offenders who have failed to demonstrate a willingness to alter their criminal conduct. Thus, the White House Conference for a Drug–Free America recommended that judges use more innovative measures to deal with first–time and youthful drug possessors. Conferees encouraged judges to use fines, forfeitures, and supervised rehabilitation to tailor sentences which have meaningful sanctions for individual offenders.[78] The National Drug Control Strategy also recommends suspension of driver's and occupational licenses as well as federal benefits of drug offenders subject to their successful completion of treatment.[79]

Virtually all agree that disincentives, other than incarceration, and programs encouraging rehabilitation must be made available to courts sentencing drug users. For example, disincentives

should include forfeiture of assets used or intended to be used to buy drugs. Vehicles used to transport or purchase drugs should be forfeited, subject to the interests of protected persons. These are the vehicles which permit suburbanites to contribute to inner city decay by driving into open air drug markets. The MASFA (1991) contains such provisions.

Suspending privileges such as driver's and occupational licenses and federal benefits are particularly important intermediate sanctions for those offenders who have no reason to fear a prison sentence. For example, the Bureau of Justice Statistics reports that approximately five percent of all state prison inmates are first time, non-violent offenders of **any** type.[80] Thus, these types of intermediate sanctions establish a meaningful deterrent for those who do not realistically face a threat of prison. These provisions make the consequences of drug crime serious and provide the often necessary incentive to comply with court ordered treatment. Contrasted with imprisonment, fines and forfeitures provide a realistic and meaningful deterrent to the purchasing, transportation and use of illegal drugs.

Court-Ordered Treatment, As a Condition of Release, Works.

Treatment can also help stop the downward spiral towards addiction and its self-destructive, criminal behavior. The National Association of State Alcohol Drug Abuse Directors report that 40% of all persons presently in treatment are referrals from the Criminal Justice System. A study of treatment facilities in New York found that about a third of residential clients were criminal justice referrals and had extensive criminal histories. **These clients tended to stay longer and have as good or better outcomes than clients with similar pretreatment criminal and drug abuse histories who were not referred by the criminal justice system.**[81] Court ordered treatment can aid the rehabilitative process. Holding individuals accountable for their drug use helps them take that first step towards recovery: self-acknowledgement and acceptance of responsibility for their behavior. This sound reasoning underlies the National Council of Family and Juvenile Court Judge's (NCJFCJ) recommendation that courts hold families and children accountable for their drug use, notwithstanding the belief by some that substance abuse is an illness.[82] As Courtland Milloy of the *Washington Post* has observed:

> It is a great paradox that the arrest of many drug suspects has given them time – as in the case of former Washington, D.C. mayor Marion Barry – to save their lives.[83]

Mr. Milloy's observation is supported by a series of studies collected by the National Institute of Justice which concluded:

> Although criminal justice sanctions alone may have uncertain value in reducing the criminality of drug involved offenders, those sanctions can serve a powerful role by facilitating effective drug treatment. There are a variety of pressures that bring hardcore drug abusers into treatment: parents, employers, loved ones, and friends may all apply psychological and social pressures. The most powerful pressure, however, may be the threat of legal sanction – the threat of arrest and conviction, and most importantly, the threat of incarceration. The leverage created by this threat, and by the sanction itself, permits treatment to be considered as a viable option by serious abusers. Moreover, by reducing early program termination, it allows the treatment and aftercare to continue for the length of the permissible custody.
>
> Cocaine-heroin abusers typically want to avoid the "hassles" associated with changing their lives. When the alternative is lengthy incarceration, cocaine-

heroin abusers may be more willing to be referred to drug treatment. If, however, the alternative is a short jail sentence, detainees and jail inmates may prefer the incarceration rather than diversion to long term drug abuse treatment.

Unfortunately, relatively few arrested offenders voluntarily seek treatment. Many offenders are referred by the criminal justice system to drug treatment as the result of negotiated plea bargains in which the offender agrees to enter treatment instead of receiving a substantial sentence. . . .although these offenders may not be completely sincere at admission, there is an opportunity for the program to engage them in an effective treatment experience. In short, the threat of substantial sanctions (for arrestees) or the promise of better in-prison conditions (for those in custody) can operate as extremely useful incentives for treatment. (footnotes omitted)[84]

Court-Ordered Treatment Reduces Criminality

Success and even partial success in treating criminal justice referrals results in reduced criminality of even the most serious abusers:

> . . . several studies of drug treatment outcomes with criminal justice clients (mainly probationers) show substantial post-treatment reductions in both drug use and criminality. Outpatient clients in methadone treatment report less than half as much criminal activity as heroin abusers not in treatment compared with their pre-treatment criminality, methadone clients report 50 to 80 percent less crime during treatment. Even among those who continue criminal activity during treatment, methadone clients report reduced involvement in serious crimes such as robbery, burglary, or dealing of heroin or cocaine; they report mainly low-level property crimes, con games, and sale of marijuana or pills. Residential drug programs have sizable proportions (frequently over half) of clients who are on probation or parole or under related legal pressure, and whose criminality is near zero while in the residential program. This near-zero criminality of cocaine-heroin abusers while in residential programs is documented for therapeutic communities in several cities. (footnotes omitted)[85]

> The criminal process plays an important role in bringing hard core drug abusers into treatment. "The coercive power surveillance potential, and time offered through criminal justice sanctions, open significant opportunities for effectively treating cocaine-heroin abusers."[86]

Users Fees Can Help Fund Treatment and Education

The UCSA (1990) has both a deterrent and a remedial effect. Drug education is a key to demand reduction. President Bush summarized public sentiment when he remarked, "[I]f we want to stop our kids from putting drugs in their bodies, we must ensure that they have good ideas in their heads and moral character in their hearts."[87]

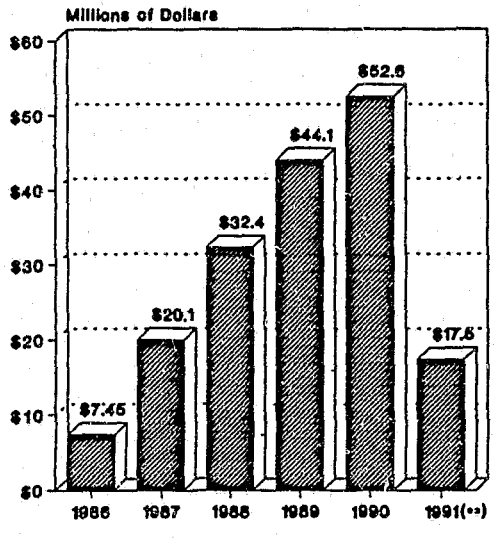
Nevertheless, education and treatment programs remain seriously under-funded. States like New Jersey have decided that those committing drug offenses are the most appropriate persons to fund drug education and treatment services. New Jersey assesses convicted drug offenders, and offenders placed on probation for drug offenses, a fee in addition to other fines and penalties. The demand reduction fee program has been collecting $9-10 million per year.

The National Commission on Drug-Free Schools and the National Drug Control Strategy cite the New Jersey program with approval and recommend that all states establish an assessment fund.[88]

With a realistic and reliable funding base modeled after New Jersey law, the UCSA (1990) helps provide for education and treatment programs and a conditional discharge provision for first offenders which gives those ready to take responsibility for their lives a true second chance. The UCSA (1990) strikes an appropriate balance of maintaining substantial disincentives for drug use while leaving the door open for treatment and rehabilitation. Providing an independent funding base for education and treatment service also allows states to allocate forfeiture proceeds to law enforcement purposes. Drug enterprises use complicated, sophisticated techniques to conceal their illegal activity and its profits. Unraveling these enterprises requires expenditure of tremendous amounts of resources over several months, even years. Return of proceeds to enforcement and prosecution assures availability for resources to undertake protracted cases. This assurance provides prosecutors and law enforcement officers incentive to pursue forfeiture actions under state law.

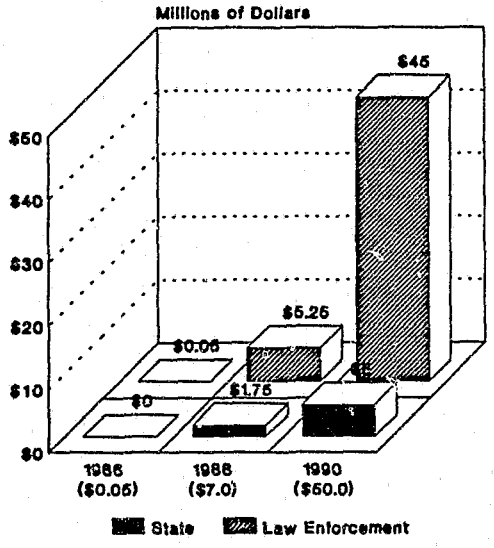
As California's experience illustrates, distribution of all or 90 percent of proceeds to enforcement (including prosecution) can also benefit non-enforcement purposes. As California allocated a higher and higher percentage of proceeds to enforcement, the amount of state forfeitures increased significantly. (See the Figures below). California enforcement indicated an increased use of the state forfeiture statute coinciding with the re-allocation. In 1990, 90 percent went to enforcement, leaving 10 percent for other state uses. State forfeitures reached $50 million that year. The state's 10 percent share equalled $5 million. As the Figures below indicate, while the state's percentage decreased over the years, its share in actual dollars steadily increased.

EQUITABLE SHARING DISBURSEMENTS FOR CALIFORNIA STATE LAW ENFORCEMENT FROM FEDERAL FORFEITURES



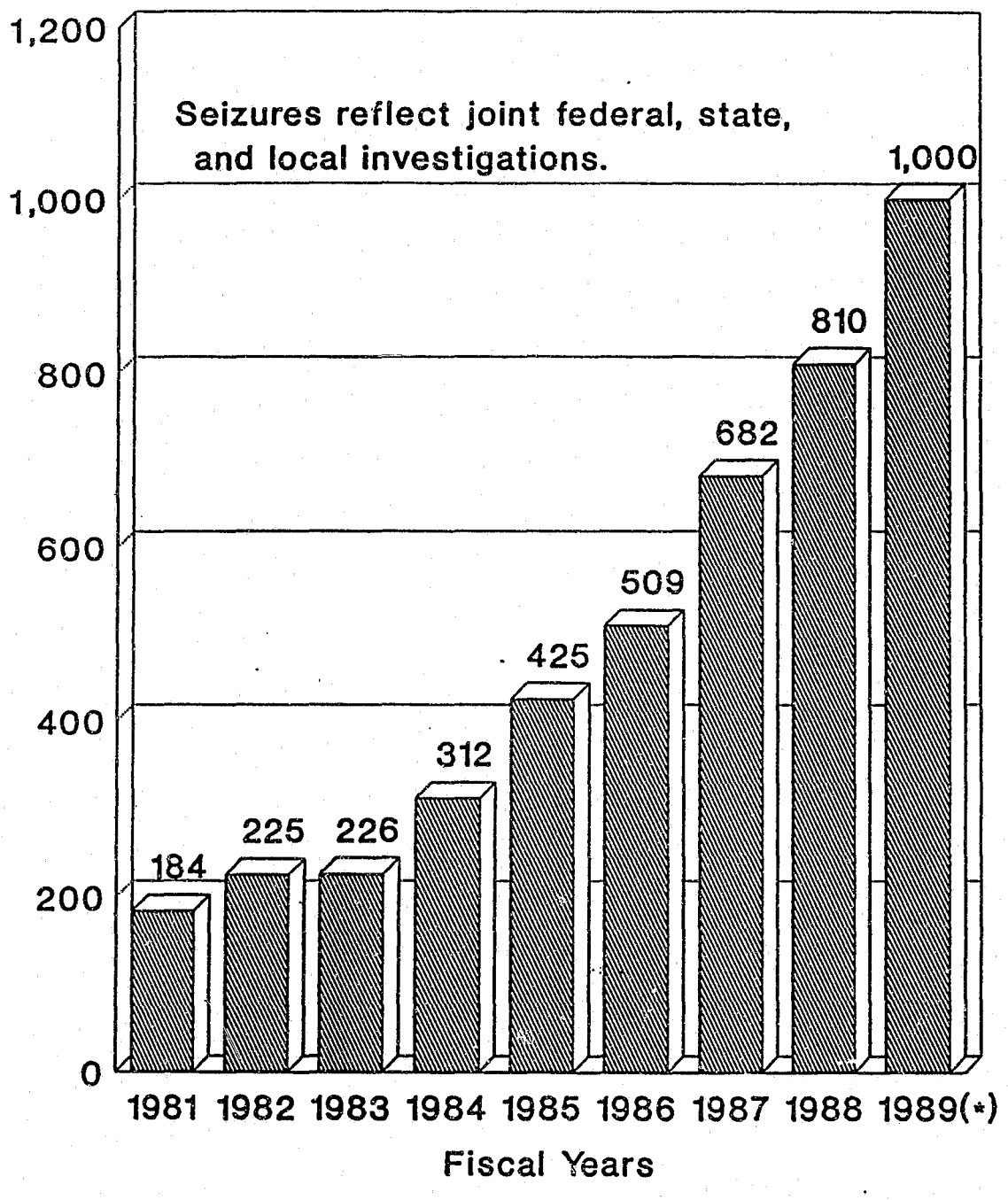
(•) Office of the U.S. Deputy Attorney General, Exec. Off. for Asset Forfeiture
(••) Year to Date

INCREASES IN CALIFORNIA LAW ENFORCEMENT'S SHARE AS A FACTOR IN INCREASED FORFEITURES



(•) Cal. Attorney General's Asset Forfeiture Program

CLANDESTINE DRUG LABORATORY SEIZURES



(*) Preliminary estimates
(**) Drug Enforc. Admin.; Environmental Protection Agency

"DESIGNER DRUGS" or CONTROLLED SUBSTANCE ANALOGS

UCSA (1990) SECTION 101. DEFINITIONS PARAGRAPH (3)

SECTION 201. AUTHORITY TO CONTROL. SUBSECTION (g)

SECTION 214. CONTROLLED SUBSTANCE ANALOG TREATED AS SCHEDULE I

The drug abuse problem in the United States has been marked by the growing popularity of new and very potentially dangerous substances called "designer drugs" or controlled substance analogs. For example, an analog of the controlled substance fentanyl, sold on the streets as "China White," proved to be more than **3,000 times** more potent than heroin and resulted in hundreds of drug overdoses in Southern California and other areas. Similarly, an analog of the controlled substance meperidine (Demerol) was marketed with processing impurities believed to be linked to Parkinson's disease which resulted in the near total paralysis of dozens of users and the identification of over 400 users who are believed to be at serious risk of developing Parkinson's disease. Over the past several years, Drug Enforcement Administration (DEA) seizures of clandestine laboratories have steadily increased in number. (See the Figure on page 36). Between 1972 and 1985, the DEA laboratories identified 41 seizures of the then–controlled stimulant/hallucinogen MDMA or "Ecstasy"– an analog of the controlled substance MDA – consisting of **over 60,000 dosage units** and, in 1984, DEA discovered that this substance was being distributed in Dallas in 100–tablet bottles. Users of MDMA report that it has the same addictive potential as cocaine. A recent Washington Post article linked the deaths of 11 people in the New York – New Jersey – Connecticut area to a potent designer drug called "Tango and Cash." The heroin based drug is laced with a powerful tranquilizer, methyl fentanyl, which makes it **27 times more potent**. More than 100 people have been taken to hospitals in the tri–state area. Even as the death toll increases, police report that at least one dealer simply changed the drug's name and continued to sell it to unsuspecting users.[89]

The "designer drug" problem has its origins in the 1970s, when certain drug dealers began to understand that unlawful conduct under both the federal drug statutes and the UCSA (1970) was restricted entirely to the use and abuse of "controlled substances" i.e., which were listed in a "schedule" with a very precise chemical definition. With this understanding came the realization that the drug laws could be easily evaded by creating drugs having molecular structures which varied in only the slightest degree from those of the more commonly abused controlled substances. These "analog substances" could then be manufactured, distributed and abused without fear of criminal prosecution until and unless the substance was placed on a schedule, and thus "controlled". Soon, "chemists" possessing only the most rudimentary scientific ability– and no appreciation whatsoever for the public health consequences of their actions– began to produce "legal" variations of controlled substances which came to be known as "designer drugs" or controlled substance analogs. The results of this clandestine activity have been devastating.

There were no provisions in the UCSA (1970) to deal effectively with the "designer drug" problem. However, Section 201(g) of the UCSA (1990) goes part of the way toward resolving this problem by authorizing state scheduling agencies to do "emergency scheduling" of substances on an expedited and temporary basis based upon a need to avoid an imminent hazard to the public safety. This provision shrinks (but does not eliminate) the window of opportunity that these substances are unscheduled and thus legal. Sections 101(3) and 214 of the UCSA (1990) defines and prohibits creating and distributing "designer drugs" thereby closing the loophole without impeding legitimate scientific research or the use of analogs for purposes other than human consumption. Moreover, these provisions insure that the final determination of whether an analog should be treated as a controlled substance will be made by the state scheduling agency.

ENDNOTES

1. Congressional Findings, Anti-Drug Abuse Act of 1988, Pub. L No. 100-690, Sections 4102 and 5251, 102 Stat. 4264 and 4309 (1988).

2. Id.

3. The White House Conference for a Drug Free America, Final Report 60 (June, 1988).

4. "The white-powderbar is gone, crime doesn't pay much anymore", *Palm Beach Review* 13 (October 15, 1990).

5. Id. at 4.

6. Id. at 13.

7. Id.

8. The U.S. Attorneys and Attorney General of the United States, Drug Trafficking: A Report to the President of the United States 18 (August 3, 1989).

9. *The Arizona Republic* (July 21, 1988).

10. *The Arizona Republic.*

11. *The Arizona Republic* (July 22, 1988).

12. U.S. Attorneys and Attorney General, supra note 6, at 46-51.

13. "California agencies receive millions in forfeitures", *Money Laundering Alert* 6 (September, 1990).

14. Drug Enforcement Administration, Office of Chief Counsel, October 1, 1990.

15. "GAO probe finds extensive business laundering", *Money Laundering Alert* 1,4 (October, 1990).

16. "G-7 Workpapers detail laundering methods, laws", *Money Laundering Alert*, supra note 13, at 7.

17. "Uniform money laundering law proposed to states", *Money Laundering Alert*, supra note 15, at 6.

18. United States v. Benevento, 836 F. 2d 129 (2nd. Cir. 1988).

19. Pub. L. 98-473.

20. Pub. L. 99-570.

21. Pub. L. 100-690.

22. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 563 (1974).

23. United States v. Eight Thousand Eight Hundred Fifty Dollars ($8,850.00) in United States Currency, 461 U.S. 555 (1983); United States v. $18,505.10, 739 F.2d 354 (8th Cir. 1984) (25-month delay reasonable).

24. Office of National Drug Control Policy, State Drug Control Status Summary, State Drug Control Status Report (November, 1990); National Criminal Justice Association, A Guide to State Controlled Substances Acts (1991).

25. National Criminal Justice Association, supra note 24.

26. Fullilove, M., Fullilove, III, R., "Intersecting epidemics: Black teen crack use and sexually transmitted disease", Journal of the American Medical Womens Association, Vol. 44, No.5 152 (September/October 1989).

27. *Washington Post*, (June 8, 1989).

28. *Newsweek*, (May 29, 1988).

29. National Institute of Justice, Characteristics of Different Types of Drug Involved Offenders 11 (February, 1988).

30. The White House Conference for a Drug Free America, supra note 3.

31. National Institute of Justice, Characteristics of Different Types of Drug-Involved Offenders (February, 1988).

32. Bureau of Justice Statistics, Drug Use and Crime, State Prison Inmate Survey, 1986, at 7 (July, 1988).

33. Id. at 1.

34. National Institute of Justice, Drug Use Forecasting Annual Report, 1989 (June), 1990).

35. Robert Stutman, Special Agent in Charge, Drug Enforcement Administration, New York City, United States Attorneys Drug Demand Reduction Conference, San Antonio, Texas (September 25-29, 1989).

36. National Committee for the Prevention of Child Abuse, Current Trends in Child Abuse Reporting and Fatalities: The Results of the 1989 Annual Fifty State Survey, 2-3 (March 1990).

37. Id.

38. Id. at 11.

39. Bureau of Justice Statistics, The Redesigned National Crime Survey: Selected New Data 2 (January, 1989).

40. Bureau of Justice Statistics, Drug Use and Crime, supra note 32, at 3.

41. Bureau of Justice Statistics, Report to the Nation on Crime and Justice, Second Edition 50 (March, 1988).

42. Id.

43. Id.

44. Kleiman, M., Holland, W., Hayes, C.; John F. Kennedy School of Government, Harvard University, Report to the District Attorney for Essex County: Evaluation of the Lynn Drug Task Force 4 (October 24, 1984).

45. Frank M., Leadership Approaches to Drug Prosecution – The Santa Cruz Strategy, *The Mainline* Special Issue: Leadership Approach No.1

46. U.S. Department of Health and Human Services, Children Today 3 (July–August, 1990).

47. Id. at 4.

48. Rosenstein, B., Wheeler, Jean, and Heid, P., "Fetal Protection: Drugs and Pregnancy", Maryland Bar Journal 24 (May/June 1990).

49. U. S. House Select Committee on Children, Youth and Families, Hearing Summary: "Born Hooked: Confronting the Impact of Perinatal Substance Abuse" 1–2 (April 27, 1989).

50. Id. at 2.

51. U.S. Department of Health and Human Services, supra note 46, at 5.

52. Id.

53. Rosenstein, B., Wheeler, Jean, and Heid, P., supra note 48, at 26.

54. U. S. Department of Health and Human Services, 1990 National Household Survey on Drug Abuse, News Release 4 (December 19, 1990).

55. U.S. Chamber of Commerce, Statement on The Impact of the Drug Problem on American Business before The House Select Committee on Narcotics Abuse and Control 2 (October 3, 1990).

56. U. S. Chamber of Commerce, Drug Abuse in the Workplace: An Employer's Guide for Prevention 11 (1987).

57. U.S. Chamber of Commerce, Statement on The Impact of the Drug Problem on American Businesses supra note 55.

58. Id. at 4.

59. Id.

60. Id. at 2.

61. Id. at 4.

62. Office of National Drug Control Policy, Leading Drug Indicators 11–15 (September, 1990).

63. U. S. House Select Committee on Narcotics Abuse and Control, New Release (March 12, 1990).

64. U. S. Department of Health and Human Services, Remarks by Secretary Louis W. Sullivan 4 (December 19, 1990).

65. Office of National Drug Control Policy, Leading Drug Indicators, supra note 62, at 21.

66. National Commission on Drug-Free Schools, Final Report, Toward a Drug-Free Generations: A Nation's Responsibility 4 (September 1990).

67. U.S. Senate Judiciary Committee, Drug Use in America: Is the Epidemic Really over?, Summary Findings, Majority Staff Study, 10-11 (December 19, 1990).

68. U.S. Department of Health and Human Services, Remarks, supra note 64, at 4.

69. U.S. Chamber of Commerce, Drug Abuse in the Workplace, supra note 56, at 13.

70. The U.S. Attorneys and Attorney General, supra note 8, at 19.

71. Id. at 20.

72. *Washington Post* (February 6, 1991).

73. The White House, National Drug Control Strategy 8 (February, 1991).

74. Reuter, P., MacCoun, R., Murphy, P., Rand Corporation, Money From Crime: A Study of the Economics of Drug Dealing in Washington, D.C. 108 (June, 1990).

75. Id.

76. Office of National Drug Control Policy, State Drug Control Status Report, supra note 24.

77. National Criminal Justice Association, supra note 24.

78. The White House Conference, supra note 3, at 62-63.

79. The White House, supra note 73, Appendix D 156.

80. Bureau of Justice Statistics, supra note 41, at 103.

81. Wexler, H., Lipton, D., Johnson, B., National Institute of Justice, A Criminal Justice System Strategy for Treating Cocaine - Heroin Abusing Offenders in Custody 5 (March, 1988).

82. National Council of Juvenile and Family Court Judges, Drugs - The American Family in Crisis: A Judicial Response - 39 Recommendations 29 (1988).

83. *Washington Post* (June 3, 1990).

84. Wexler, H, Lipton, D., Johnson, B., National Institute of Justice, supra note 81, at 6.

85. Id.

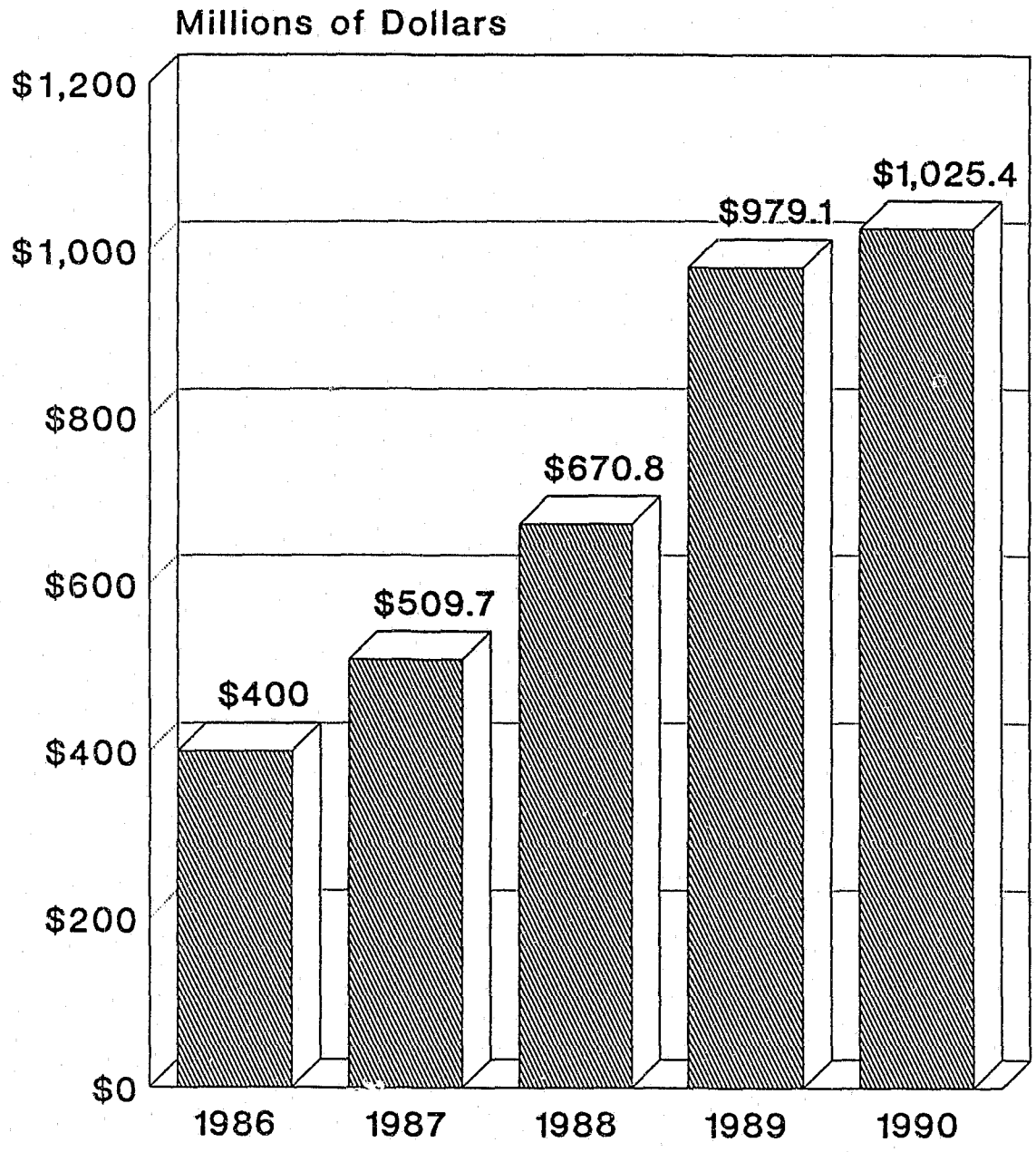
86. Id. at 5.

87. National Commission on Drug Free Schools, supra note 66, at iv.

88. National Commission on Drug-Free Schools, supra note 66, at 56; The White House, supra note 73, at 63.

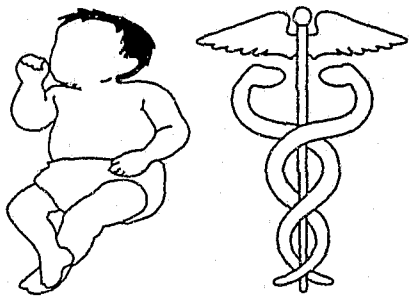
89. *Washington Post*, (February 4, 1991).

DEA ASSET SEIZURES AND FORFEITURES
Total Dollar Values Per Year



(*) Drug Enforcement Administration
(**)Totals represent Fiscal Years

HIV-INFECTED INFANTS



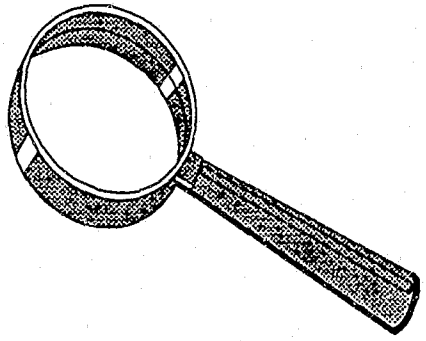
73% of perinatally-infected HIV infants have mothers who are IV drug users or the sexual partners of IV-drug users.

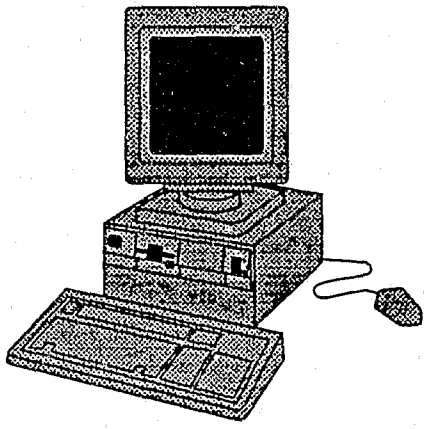
AIDS is 9th leading killer among children ages 1 to 4 years old, and 7th among adolescents 15 to 24 years old.

Average yearly cost of caring for AIDS-infected child = $35,000

Average yearly cost of caring for AIDS-infected born drug addicted = $44,000

Average treatment and support services for perinatally infected HIV infants will cost MEDICARE $18,000 to $42,000 per year.

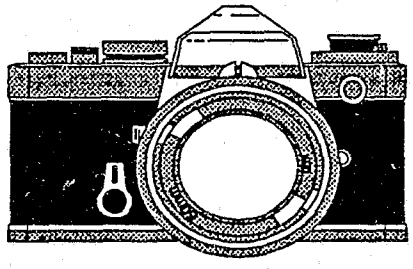




INVESTIGATIVE EXPENDITURES

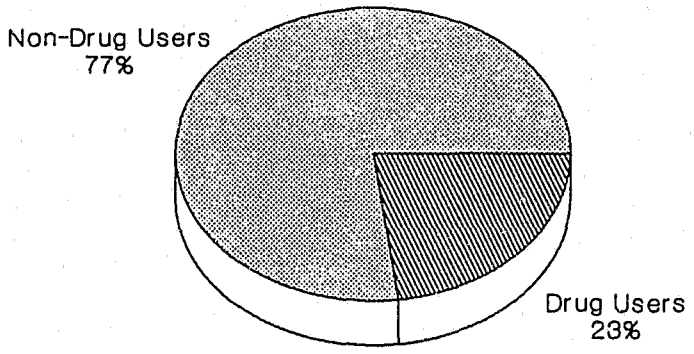
Federal 1990: $760.8 million

State/local 1990: $5 billion



(*) U.S. Department of Justice

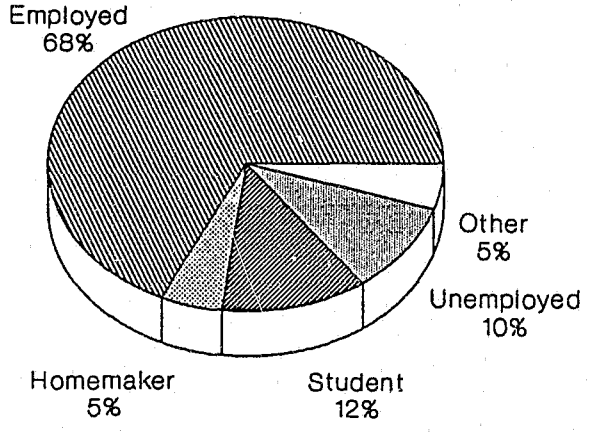
EMPLOYEE DRUG USE PATTERNS IN THE UNITED STATES



Percent of Workforce Using Drugs

(•) BJA NCTAP Newsletter

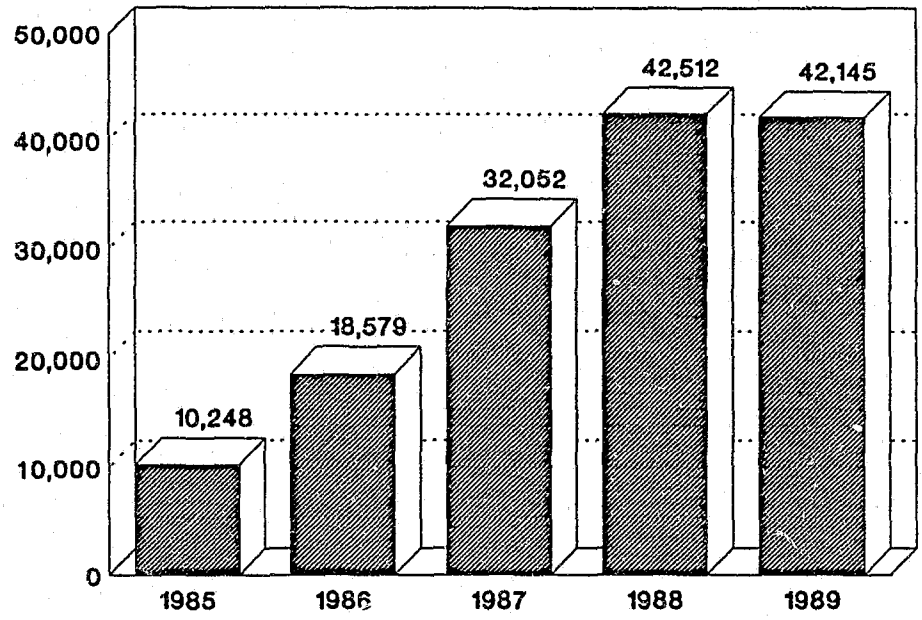
EMPLOYMENT STATUS OF DRUG USERS IN THE UNITED STATES



Percent of Drug Users by Occupation

(•) NIDA Household Survey

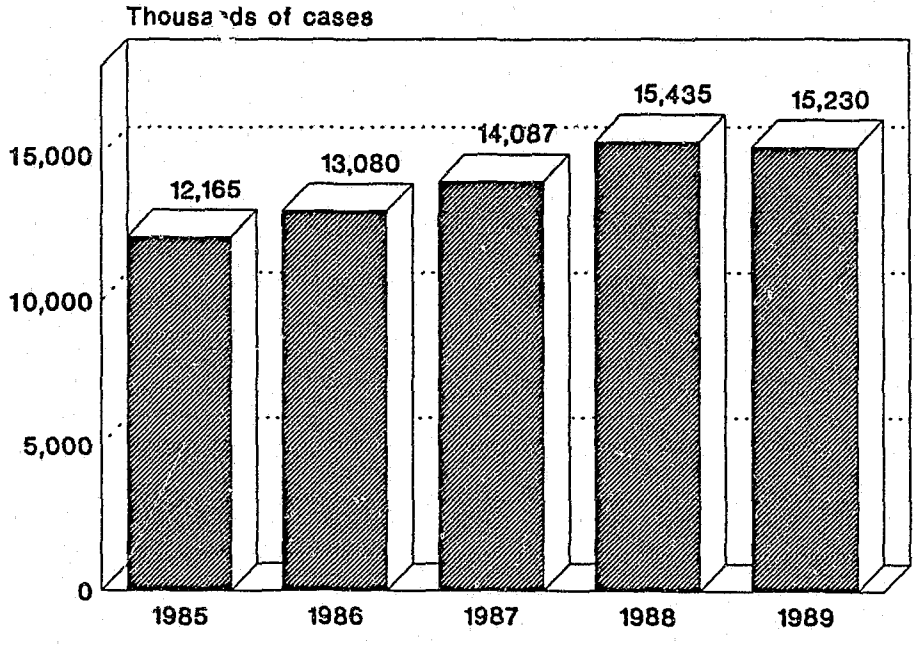
COCAINE-RELATED EMERGENCY ROOM TRENDS
Yearly Totals (1985-1989)



(•) DAWN data from 14 metropolitan areas

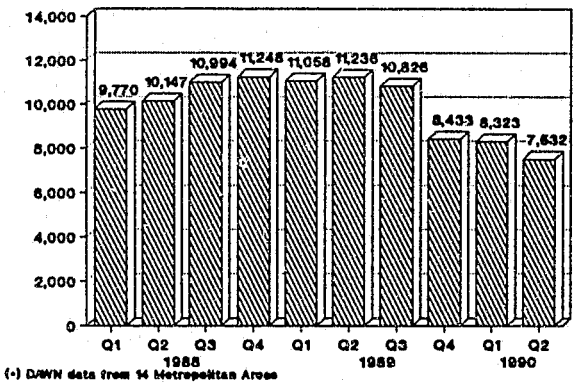
The impact of drug use on hospital emergency rooms throughout the United States poses a serious problem.

HEROIN-RELATED EMERGENCY ROOM TRENDS
Yearly Totals (1985-1989)



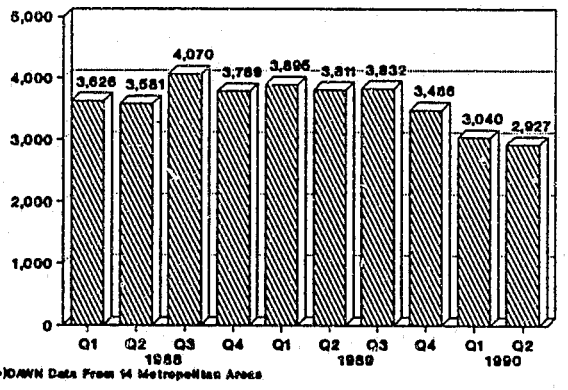
(•) DAWN data from 14 metropolitan areas

COCAINE-RELATED EMERGENCY ROOM CASES
Quarterly Trends (1988-1990)



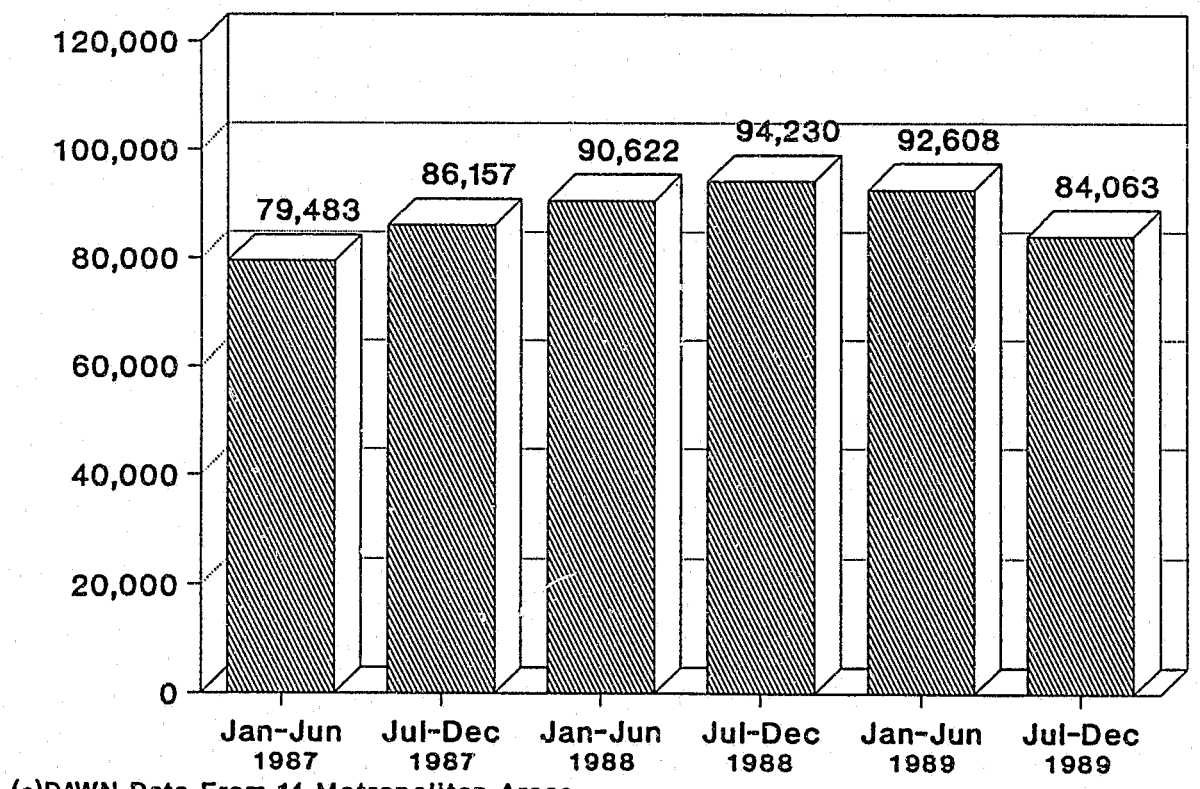
(*) DAWN data from 14 Metropolitan Areas

HEROIN-RELATED EMERGENCY ROOM CASES
Quarterly Trends (1988-1990)



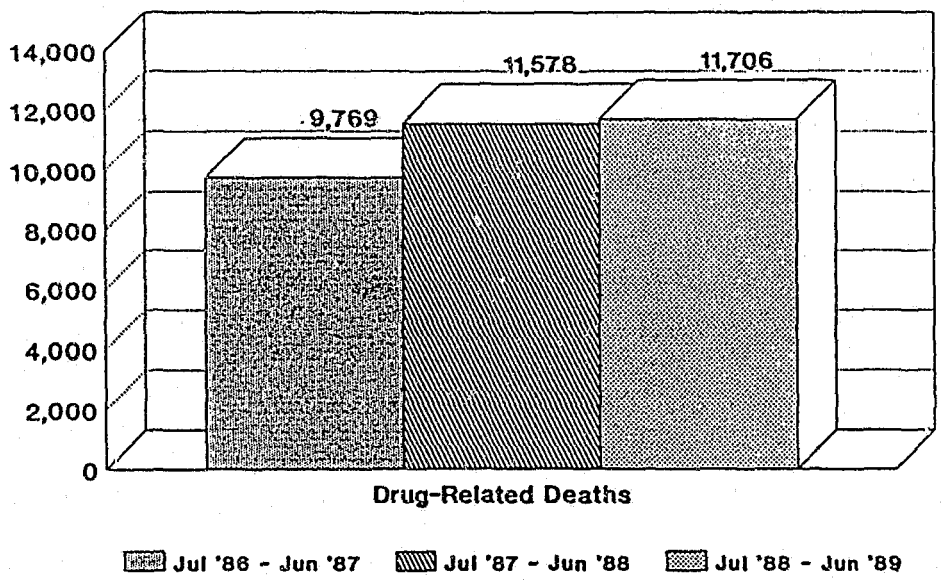
(*)DAWN Data From 14 Metropolitan Areas

DRUG-RELATED EMERGENCY ROOM CASES
Semi-Annual Trends (1987-1989)



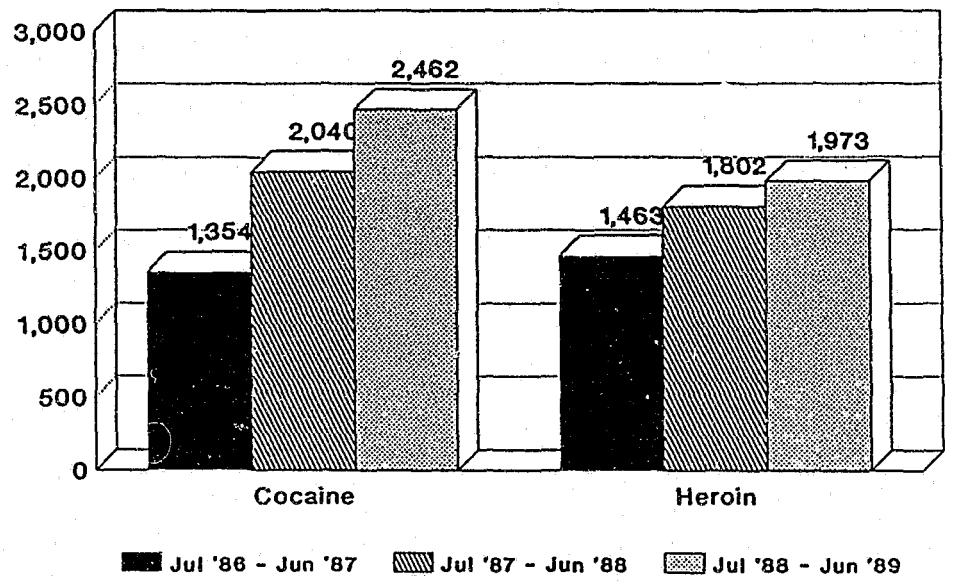
(*)DAWN Data From 14 Metropolitan Areas

TRENDS IN DRUG ABUSE-RELATED DEATHS
Emergency Room Deaths for All Drugs



(•) DAWN Data for 14 metropolitan areas

TRENDS IN DRUG ABUSE-RELATED DEATHS
Estimated Number by Drug Type



(•) DAWN Data for 14 metropolitan areas

UNIFORM CONTROLLED SUBSTANCES ACT (UCSA) (1990)

IN THIS SECTION: PAGE

INTRODUCTION
TO THE
UNIFORM CONTROLLED SUBSTANCES ACT (UCSA) (1990)

One need only glance at the front page of any daily newspaper to see that the drug epidemic is ravaging our society. Americans are demanding tough laws with effective penalties for those who use and deal drugs. A 1989 Gallup poll found that 77 percent of the respondents wanted tougher laws for drug users while 92 percent wanted tougher laws for drug dealers. Polls conducted by the *Washington Post, New York Times,* and the *Wall Street Journal* echoed these findings.

In response to the growing consensus, the federal government has implemented strong new laws in a number of areas. Many states have followed the federal lead by enacting drug-free school zone statutes, trafficking laws, asset forfeiture provisions, and other legislation designed to target dealers and hold users accountable.

This analysis and policy overview of the UCSA (1990) have been prepared to help state and local policymakers achieve a better understanding of the drug problem and the legislative tools which provide effective responses.

Since 1988, the National District Attorneys Association (NDAA), National Association of Attorneys General (NAAG), and the U.S. Department of Justice (DOJ), through the Task Force on the UCSA established by the American Prosecutors Research Institute, have worked with the National Conference of Commissioners on Uniform State Laws (NCCUSL) to develop a revised UCSA which effectively addresses the current drug epidemic. Extraordinary hard work and a spirit of cooperation between the UCSA Drafting Committee and the Task Force have culminated in the UCSA (1990): a package of uniform legislation desperately needed by the states.

Recognizing the states' critical need for strong drug legislation, the President's National Drug Control Strategy encourages states to adopt many provisions recommended by the Task Force and included in the UCSA (1990). The Strategy urges states to enact laws which (1) prohibit the knowing receipt or transfer of drug proceeds; (2) impose mandatory manimum sentences for serious drug crimes; and (3) criminalize attempts and solicitations to sell or buy drugs. *[National Drug Control Strategy, February, 1991, pp. 153-157.]*

Similarly, the Office of National Drug Control Policy and Attorney General Thornburgh strongly urged NCCUSL to pass Task Force recommendations on other drug control legislation. In brief, the UCSA (1990) provides a number of basic tools to fight the war on drugs fairly and effectively.

At the core, the UCSA (1990) is designed to target kingpins and drug traffickers; to prevent the laundering of drug proceeds; to help stop the flow of designer drugs into the market; to protect children; to promote user accountability; to provide alternatives to incarceration for first time offenders; and to provide adequate funding for education and treatment services.

The UCSA (1990) will help codify the American people's desire to provide fair and effective tools with which to wage this war. While many state legislatures have forged ahead to adopt powerful new provisions based on federal law, the need is still great for strong uniform provisions. NCCUSL rose to meet the challenge and has given state legislatures across America a uniform act needed to defend our hopes for today and our dreams for tomorrow.

Over the years the growing sophistication of drug offenders has rendered statutory tools adopted two decades ago obsolete . . .
Illicit drug enterprises look to expand in places where legal conditions are favorable. As some states have cracked down through more stringent statutes and tougher enforcement, drug traffickers have relocated to other states not yet prepared with laws as sophisticated as the criminals.

George Bush
President
Letter to National Conference of Commissioners on Uniform State Laws Regarding the Uniform Controlled Substances Act (UCSA)
July 12, 1990

HIGHLIGHTS OF THE UNIFORM CONTROLLED SUBSTANCES ACT (UCSA) (1990)

DESIGNER DRUGS

- Allows prosecution of controlled substance analog cases under limited circumstances and emergency scheduling of the substance while rulemaking proceedings commence. (§ 101 (3) 201 (g) and 214)). (See pp. 58–59, 69–70, 101).

TARGETING SERIOUS DRUG OFFENDERS

- Imposes enhanced and mandatory minimum sentences on traffickers who deal in large quantities of herion, cocaine, crack, PCP, LSD, methamphetamines, and marijuana. (§ 401 (g), (i)). (See pp. 127–133).

- Imposes enhanced and mandatory minimum sentences on individuals who distribute drugs to minors, or within 1,000 feet of a school or public playground, or employ minors in drug operations. (§ 409 and 410). (See pp. 169–173).

- Imposes enhanced and mandatory minimum sentences against persons who engage in a Continuing Criminal Enterprise by (1) committing a felony which is part of a continuing series of two or more violations on separate occasions; (2) supervising five or more persons with respect to the violations; and (3) obtaining substantial income or resources. (§ 411). (See pp. 181–183).

- Authorizes Continuing Criminal Enterprise civil cause of action against kingpins for treble damages based on gross proceeds of the entire enterprise. (§ 604). (See p. 112).

- Prohibits money laundering activities, including knowing or intentional (1) receipt or accquisition of; (2) participation in the transportation or transfer of; or (3) concealment of the ownership of, proceeds known to be derived from a violation of the Act. (§ 412). (See pp. 189–190).

- Prohibits knowing or intentional solicitation or attempt to deliver, distribute or possess with intent to distribute drugs in violation of the Act. (§ 408). (See p. 166).

USER ACCOUNTABILITY

- Prohibits knowing or intentional solicitation or attempt to possess drugs in violation of the Act. (§ 408). (See p. 166).

- Prohibits knowing or intentional maintenance, control, or lease of buildings known to be used for illegal distribution activities. (§ 402 (f)). (See p. 150).

- Imposes assessments on convicted drug offenders which are used for drug abuse education and treatment services. (§ 416). (See pp. 203–204).

- Prohibits knowing or intentional possession of drugs except as authorized under the Act. (§ 406). (See pp. 161–162).

- Provides an alternative to conviction for individuals charged with first–time drug offenses which requires successful completion of an education or treatment and rehabilitation program. (§ 414). (See pp. 195–196).

- Authorizes court to place any convicted offender on probation which includes participation in a treatment program. (§ 415). (See pp. 198–199).

DETAILED SUMMARY
OF THE
UNIFORM CONTROLLED SUBSTANCES ACT (UCSA)(1990)

ARTICLE I

DEFINITIONS

Section 101. Definitions (See pp. 58–66).

(1) Administer – unless otherwise provided, means to apply a substance directly to a patient or research subject by:
(i) a practitioner; or
(ii) the patient or research subject at the direction and in the presence of the practitioner.

(2) Controlled substance – a drug, substance, or precursor included in Schedules I through V.

definition of controlled substance analog (See also 201(g) and 214)

(3) (i) Controlled substance analog – a substance which has a substantially similar chemical structure to a Schedule I or II substance and:
(A) has a substantially similar effect on the central nervous system of a Schedule I or II substance; or
(B) with respect to a particular individual, which the individual represents or intends to have a substantially similar effect on the central nervous system of a Schedule I or II substance;
(ii) the term excludes:
(A) a controlled substance;
(B) a substance for which there is an approved new drug application;
(C) a substance for which there is an investigational use exemption; or
(D) a substance to the extent not intended for human consumption.

(4) Deliver – unless otherwise provided, the actual or constructive transfer of a substance.

(5) Dispense – to lawfully deliver a controlled substance to an ultimate user, patient or research subject.

(6) Dispenser – practitioner who dispenses.

(7) Distribute – to deliver other than by administering or dispensing.

(8) Distributor – person who distributes.

(9) Drug –

(i) a substance in the United States Pharmacopoeia, National Formulary, or the official Homeopathic Pharmacopoeia of the United States, or a supplement;
(ii) a substance intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease;
(iii) a substance intended to affect the structure or function of the body; and
(iv) a substance intended for use as a component of an article specified in paragraph (9). Devices or their components, parts, or accessories are excluded.

(10) Drug Enforcement Administration – the United States Drug Enforcement Administration.

(11) Immediate precursor –

(i) the principal compound used, or produced primarily for use, in the manufacture of a controlled substance;
(ii) that is an immediate chemical intermediary used or likely to be used in the manufacture of the controlled substance; and
(iii) the control of which is necessary to prevent or limit the manufacture of the controlled substance.

(12) Isomer – an optical isomer except in designated sections where it includes a geometric or positional isomer.

(13) Manufacture – the processing of a controlled substance directly or indirectly or by extraction from substances of natural origin or by synthesis, including packaging and labelling:

(i) by a practitioner in the course of the practitioner's professional practice; or
(ii) by a practitioner, or an authorized agent as part of research, teaching, or chemical analysis and not for sale.

(14) Marijuana – all parts of the plant cannabis, the seeds, the resin, and every compound or derivative of the plant, seeds, or resin. Excludes the mature stalks or preparation or mixture thereof; fiber from the stalks or any preparation or mixture thereof; oil or cake from the seeds or any preparation or mixture thereof; or the sterilized seed.

(15) Narcotic drug –

(i) opium and its derivatives;
(ii) synthetic opiate and its derivatives;
(iii) poppy straw and its concentrate;
(iv) coca leaves, with specified exceptions;
(v) cocaine;

(vi) cocaine base;
(vii) ecgonine;
(viii) any compound, mixture, or preparation of (i) through (vii).

(16) Opiate – a substance having an addiction forming or addiction – sustaining liability or being capable of conversion into such a drug, with specified exceptions.

(17) Opium poppy – plant of the species Papaver somniferum, except the seeds.

(18) Person – individual, estate, trust, association, corporation, business, legal, or commercial entity, or governmental agency or subdivision.

(19) Poppy straw – all parts, except the seeds, of the opium poppy.

(20) Practitioner – a person permitted by the state to distribute, dispense, research, administer, or use in teaching or chemical analysis a controlled substance in the course of professional practice or research.

(21) Production – unless otherwise provided, the manufacturing of a controlled substance and the planting, cultivating, growing, or harvesting of a plant from which the substance is derived.

(22) State – a state, the District of Columbia, Puerto Rico, or a territory or possession of the United States.

(23) Ultimate user – an individual who lawfully possesses a controlled substance for personal use, use of a member of the household, or for administering to animals owned by the individual or the household.

ARTICLE II

STANDARDS AND SCHEDULES

Section 201. Authority to Control (See pp. 67–73).

(a) The [appropriate person or agency] shall administer the Act and schedule substances pursuant to the [state administrative procedures].

(b) In making a scheduling determination, the [appropriate person or agency] shall consider:

(1) the actual or relative potential for abuse;
(2) the scientific evidence of its pharmacological effect;

(3) the state of correct scientific knowledge regarding the substance;
(4) the history and current pattern of abuse;
(5) the scope, duration, and significance of abuse;
(6) the risk of public health;
(7) the potential of the substance to produce psychic or physiological dependence liability; and
(8) whether the substance is an immediate precursor of a controlled substance.

(c) Findings by the Food and Drug Administration (FDA) or Drug Enforcement Administration (DEA) regarding the factors in (b) may be considered prima facie evidence.

(d) The [appropriate person or agency] shall make findings and publish a rule controlling a substance with a potential for abuse.

(e) The [appropriate person or agency] may place an immediate precursor on a schedule, including the schedule of the substance for which it is an immediate precursor. Substances are not subject to control solely because they are precursors of the controlled precursor.

(f) After 30 days from the date of a final federal order designating, rescheduling, or deleting a substance, or from the date of a temporary scheduling order under the federal diversion control act, the [appropriate person or agency] shall similarly control the substance unless an objection is made to the action.

If an objection is made, the [appropriate person or agency] shall shall publish notice of the objection and make a scheduling determination pursuant to subsection (a)–(d). If no objection is made, the [appropriate person or agency] shall publish a final rule without making the findings required in (a)–(d).

emergency scheduling of controlled substance analogs (See also 101 (3) and 214)

(g) The [appropriate person or agency] may schedule a substance on an emergency basis if it is necessary to avoid an imminent hazard to the public safety. Upon notice under Section 214, the [appropriate person or agency] shall initiate scheduling of an analog on an emergency basis. The scheduling expires one year after adoption of the rule.

In determining an imminent hazard, the [appropriate person or agency] shall consider:
1) whether the substance has been temporarily scheduled under federal law;
2) factors in (b)(4),(5); and may consider
(1) clandestine importation, manufacture, or distribution; and
(2) information concerning other factors in (a)(i).

An emergency rule may not be adopted until a general rule making proceeding commences. The rule lapses upon conclusion of the proceeding.

(f) Authority to control does not extend to tobacco or alcoholic beverages.

Section 202. Nomenclature (See p. 73).

The scheduled substances are listed or added by any official, common usual, chemical or trade names used.

Section 203. Schedule I Tests (See pp. 73–74).

(a) The [appropriate person or agency] shall add a substance to Schedule I, if the substance:

(1) has high potential for abuse;
(2) has no currently accepted medical use in the United States; and
(3) lacks accepted safety for use under medical supervision.

(b) The [appropriate person or agency] may add a substance to Schedule I without making findings required by (a) if a federal agency has controlled the substance.

Section 204. Schedule I (See pp. 35–42, 74–81).

Schedule I – heroin, MDMA, LSD, marijuana

A list of Schedule I substances including heroin, MDMA, LSD, and marijuana.

Section 205. Schedule II Tests (See p. 82).

(a) The [appropriate person or agency] shall add a substance to Schedule II if:

(1) the substance has high potential for abuse;
(2) the substance has currently accepted medical use in the U.S. or accepted medical use with severe restrictions; and
(3) the abuse of the substance may lead to severe psychological or physical dependence.

(b) The [appropriate person or agency] may add a substance to Schedule II without making the findings required by (a) if a federal agency has controlled the substance.

Section 206. Schedule II (See pp. 42–47, 82–87).

Schedule II – methamphetamine cocaine, PCP

A list of Schedule II substances, including methamphetamine, cocaine, and phencyclidine.

Section 207. Schedule III Tests (See pp. 88–88).

(a) The [appropriate person or agency] shall add a substance to Schedule III if:

(1) the substance has a potential for abuse less than Schedules I and II substances;
(2) the substance has correctly accepted medical use in the U.S.; and
(3) abuse of the substance may lead to moderate or low physical dependence or high psychological dependence.

(b) The [appropriate person or agency] may add a substance to Schedule III without making findings required by (a) if a federal agency has controlled the substance.

Section 208. Schedule III (See pp. 88–93).

A list of Schedule III substances.

Section 209. Schedule IV Tests (See pp. 93–94).

(a) The [appropriate person or agency] shall add a substance to Schedule IV if:

(1) the substance has a low potential for abuse relative to Schedule III substances;
(2) the substance has currently accepted medical use in the U.S; and
(3) abuse of the substance may lead to limited physical dependence or psychological dependence relative to a Schedule III substance.

(b) The [appropriate person or agency] may add a substance to Schedule IV without making the findings required by (a) if a federal agency has controlled the substance.

Section 210. Schedule IV (See pp. 47–51, 94–98).

A list of Schedule IV substances.

Section 211. Schedule V Tests (See p. 98).

(a) The [appropriate person or agency] shall add a substance to Schedule V if:

(1) the substance has a low potential for abuse relative to Schedule IV substances;

(2) the substance has currently accepted medical use in the U.S.; and

(3) abuse of the substance may lead to limited physical dependence relative to the Schedule IV substances;

(b) The [appropriate person or agency] may add a substance to Schedule V without making findings required by (a) if a federal agency has controlled the substance.

Section 212. Schedule V (See pp. 99–100).

A list of Schedule V substances.

Section 213. Publishing of Schedules (See pp. 100–101).

The [appropriate person or agency] shall annually publish updated schedules. Failure to publish is no defense to an administrative or judicial proceeding under this Act.

Section 214. Controlled Substance Analog Treated As Schedule I Substance (See p. 101).

controlled substance analog treated as Schedule I substance if intended for human consumption (See also 101(3) and 201(g))

An analog, to the extent intended for human consumption, must be treated as a Schedule I substance.

Within [ ] days after initiation of a prosecution of an analog case, the [prosecuting attorney] shall notify the [appropriate person or agency] of information relevant to emergency scheduling under Section 201(g).

After final determination that an analog should not be scheduled, no related prosecution may be commenced or continued.

ARTICLE III

REGULATION OF MANUFACTURE, DISTRIBUTION, AND DISPENSING OF CONTROLLED SUBSTANCES

Section 301. Rules (See p. 109).

The [appropriate person or agency] may adopt rules and charge reasonable fees relating to regulation and control of controlled substances.

Section 302. Registration Requirements (See pp. 109–111).

(a) A person who manufactures, distributes, or dispenses controlled substances or proposes to do so shall register annually.

(b) A registrant may possess, manufacture, distribute, dispense, or conduct research with controlled substances only as authorized by the registration.

(c) The following persons are exempt from registration requirements:

(1) an agent or employee of a registrant who is acting in the usual course of business;

(2) a common or contract carrier or warehouseman or employee thereof who is acting in the usual course of business; and

(3) an ultimate user or possessor pursuant to a lawful practitioner's order or in lawful possession of a Schedule V substance.

(d) The [appropriate person or agency] may waive the registration requirements if it is consistent with public health and safety.

(e) A separate registration is required for each principal place of business or professional practice.

(f) The [appropriate person or agency] may inspect the establishment of a registrant or an applicant for registration.

Section 303. Registration (See pp. 111–114).

(a) The [appropriate person or agency] shall register an applicant to manufacture or distribute substances unless it would be inconsistent with the public interest. In determining the public interest, the [appropriate person or agency] shall consider:

(1) maintenance of effective controls against illegal diversion of substances;

(2) compliance with laws;

(3) promotion of technical advances in manufacturing or developing substances;
(4) drug convictions;
(5) past experience in manufacturing or distributing and presence of effective controls against illegal diversion;
(6) furnishing of false or fraudulent material in an application;
(7) suspension or revocation of a federal registration; and
(8) other public health and safety factors.

(b) A registrant may manufacture or distribute Schedule I or II substances only as specified in the registration.

(c) A practitioner authorized to dispense controlled substances or conduct research must register. Separate registrations for research with non-narcotic substances is unnecessary. Federal registrants who conduct research may conduct research in the state upon furnishing evidence of the federal registration.

(d) A federal registrant may submit a copy of the federal registration as an application for registration under this Section. The [appropriate person or agency] may require additional information.

Section 304. Suspension or Revocation of Registration **(See pp. 114–118).**

(a) The [appropriate person or agency] may suspend or revoke a registration under Section 303 if the registrant:
(1) has furnished false or fraudulent information in an application;
(2) has been convicted of a federal or state drug felony;
(3) had a federal registration suspended or revoked; or
(4) committed an act inconsistent with the public interest.

(b) The [appropriate person or agency] may limit revocation or suspension to a particular controlled substance.

(c) Upon suspension or revocation, all controlled substances of the registrant may be placed under seal. No disposition may be made until all appeals have been concluded or time for taking on appeal has lapsed, unless the court orders a sale. Upon a revocation order becoming final, all substances may be forfeited to the state.

(d) The [appropriate person or agency] may seize or place under seal substances of a registrant whose registration expired or who ceased to do business or practice as contemplated by the registration. Substances are to be held for the benefit of the registrant or a successor in interest who receives notice of procedures for return of the substances.

Disposition may occur only after 180 days from the date of the seizure or seal. Sale proceeds remaining after payment of costs are delivered to the registrant or successor in interest.

(e) The [appropriate person or agency] shall notify the Drug Enforcement Administration (DEA) of orders and forfeitures under this section.

Section 305. Order to Show Cause (See pp. 118–119).

(a) The [appropriate person or agency] shall issue an order to show cause why the registration should not be denied, revoked, suspended, or why the renewal should not be refused. The order, issued prior to taking action regarding the registration, shall:

(1) state its grounds; and

(2) direct the applicant or registrant to appear before the [appropriate person or agency] at a specified time and date not less than 30 days after date of service of the order. However, in the case of denial or renewal the order may not be served later than 30 days before the registration expires.

Proceedings are independent of other proceedings and a registration remains effective pending the hearing's outcome.

(b) The [appropriate person or agency] may suspend a registration without an order to show cause if there is imminent danger to public health and safety. The suspension must occur simultaneously with the commencement of proceedings under Section 304. The suspension remains effective until the conclusion of proceedings unless withdrawn by the [appropriate person or agency] or dissolved by a court.

Section 306. Records of Registrants (See p. 120).

Registrants shall keep records and maintain inventories.

Section 307. Order Forms (See p. 120).

A registrant may distribute a Schedule I or II substance only pursuant to an order form.

Section 308. Prescriptions (See pp. 121–122).

(a) As used in this section, medical treatment includes dispensing or administering a narcotic drug for pain, including intractable pain.

(b) A person may dispense a controlled substance only as provided in this section.

(c) A Schedule II substance may only be dispensed with a practitioner's written prescription except:

(1) when the practitioner dispenses directly to a user; or

(2) a pharmacy dispenses the substance.

(d) In an emergency, a practitioner may orally prescribe a Schedule II substance. The prescription must promptly be reduced to writing, signed, and filed by the pharmacy. A prescription for a Schedule II substance may not be refilled.

(e) A Schedule III or IV substance may only be dispensed with a practitioner's written or oral prescription except:

(1) when the practitioner dispenses directly to a user; or

(2) a pharmacy dispenses the substance.

The prescription must not be filled or refilled more than six months after its date or more than five times, unless renewed by the practitioner.

(f) A Schedule V substance shall be distributed or dispensed only for medical purposes including medical treatment or authorized research.

(g) A practitioner may dispense or deliver a controlled substance only in the ordinary course of that practitioner's profession.

(h) A pharmacist who reasonably believes a prescription was issued in the usual course of professional treatment or authorized research is immune from liability.

(i) A practitioner may only self-prescribe Schedule II – IV substances in medical emergencies.

Section 309. Diversion Prevention and Control
(See pp. 123–124).

(a) Diversion means transfer of a controlled substance from legal to illegal uses or distribution.

(b) The [appropriate person or agency] shall regularly prepare and provide a report on the patterns and trends of distribution, diversion, and abuse of substances.

(c) The [appropriate person or agency] shall enter into agreements with other agencies to improve enforcement of the Act and identification of diversion sources. The agreement must specify roles and responsibilities of each agency. The [appropriate person or agency] shall:

(1) convene periodic meetings to coordinate a state diversion control program; and

(2) arrange cooperation and information exchanges among agencies, states, and the federal government.

(d) The [appropriate person or agency] shall report [annually] to the governor and appropriate legislative officers on the distribution, diversion and abuse of controlled substances.

ARTICLE IV

OFFENSES AND PENALTIES

Section 401. Prohibited Acts A; Penalties (See pp. 125–134).

Section 401 permits flexibility in punishment ranges based on dangerousness of the drug and quantity involved

(a) Except as authorized, a person may not knowingly, or intentionally manufacture, distribute, or deliver a controlled substance, or possess a controlled substance with intent to manufacture, distribute, or deliver, a controlled substance. Authorizes imposition of a sentence, fine, or both.

(b) Penalty option for mixture or substance containing:
(1) heroin;
(2)(i)–(iv) cocoa leaves; cocaine; ecgonine or compound, mixture, or preparation containing any quantity of the substances;
(3) cocaine base;
(4) phencyclidine;
(5) lysergic acid diethylamide;
(6) methamphetamine; or
(7) marijuana. [29 grams or more]

(c) Penalty option for violation involving Schedule I or II substance.

(d) Penalty option for violation involving Schedule III substance.

(e) Penalty option for violation involving Schedule IV or V substance.

(f) Penalty option for violation involving marijuana.

trafficking in the 7 most commonly abused drugs: heroin, cocaine,

[(g) Notwithstanding any other provision, a person may not knowingly or intentionally distribute, purchase, manufacture, bring into the state, or possess specific controlled substances. Imposes minimum term of imprisonment and fines.

cocaine base (crack), PCP, LSD, methamphetamine or marijuana

imposes minimum terms of imprisonment and fines (See also (i), (j)), but leaves quantities and length of terms bracketed so states can set levels consistent with their drug markets and prison capacity

mixture or substance: considers only gross weight in determining penalties to reflect realties of how drugs are commonly marketed

(1) [28] grams or more of any mixture or substance containing heroin.

(i) Penalty option for violation involving [28] grams or more, but less than [100] grams.
(ii) Penalty option for violation involving [100] grams or more, but less than [500] grams.
(iii) Penalty option for violation involving [500] grams or more.

(2) [56] grams or more of any mixture or substance containing cocaine or its related substances.

(i) Penalty option for violating involving [56] grams or more, but less than [450] grams.
(ii) Penalty option for violation involving [450] grams or more, but less than [1] kilogram.
(iii) Penalty option for violation involving [1] kilogram or more.

(3) [5] grams or more of any mixture or substance containing cocaine base.

(i) Penalty option for violation involving [5] grams.
(ii) Penalty option for violation involving [25] grams or more, but less than [50] grams.
(iii) Penalty option for violation involving [50] grams grams or more.

(4) [10] grams or more of any mixture or substance containing phencyclidine.

(i) Penalty options for violation involving [10] grams or more, but less than [50] grams.
(ii) Penalty option for violation involving [50] grams or more, but less than [100] grams.
(iii) Penalty option for violation involving [100] grams or more.

(5) [500] milligrams or more of any mixture or substance containing lysergic acid diethylamide.

(i) Penalty option for violation involving [500] milligrams or more, but less than [1] gram.
(ii) Penalty option for violation involving [1] gram or more, but less than [5] grams.
(iii) Penalty option for violation involving [5] grams or more.

(6) [56] grams or more of any mixture or substance containing methamphetamine or any of its salts, isomers, or salts of isomers.

(i) Penalty option for violation involving [56] grams or more, but less than [450] grams.
(ii) Penalty option for violation involving [450]

grams or more, but less than [1] kilogram.
(iii) Penalty option for violation involving [1] kilogram or more.

(7) [10] kilograms or more of marijuana.
(i) Penalty option for violation involving [10] kilograms or more, but less than [50] kilograms.
(ii) Penalty option for violation involving [50] kilograms or more, but less than [100] kilograms.
(iii) Penalty option for violation involving [100] kilograms or more.]

(h) Except as authorized, a person may not knowingly or intentionally possess piperidine **(1)** with intent to manufacture a controlled substance; or **(2)** knowing, or having reasonable cause to believe, that piperidine will be used to manufacture a controlled substance. Authorizes imposition of a sentence, fine, or both.

mandatory minimum penalties for drug trafficking; recommended by White House Conference for a a Drug-Free America

[(i)] Except as provided in subsection (j), a sentence for violation of (g) may not be suspended, deferred, or withheld. No release on parole prior to serving mandatory term of imprisonment.]
[(j)] Upon motion by the defendant or state, the court may reduce or suspend the sentence of a convicted offender who substantially assists the enforcement of the Act. The arresting agency must be heard concerning the request.

Section 402. Prohibited Acts B; Penalties (See pp. 149–152).

(a) A person may not distribute or dispense a controlled substance in violation of § 308.

(b) A person may not manufacture, distribute, or dispense a controlled substance as a registrant except as authorized by his or her registration.

(c) A person may not refuse or fail to make, keep, or furnish records or documents.

(d) A person may not refuse entry for inspection purposes.

(e) A manufacturer, distributor, agent or employee who has reasonable cause to believe a violation will occur may not deliver a controlled substance.

punishes profiteers who allow drugs to be dealt in the relative security of houses, motel

(f) A person may not knowingly or intentionally maintain, control, lease, or make available for use a building, vehicle, room or other structure which the person knows is used for illegal distribution activities.

rooms and other buildings (See also (h))

(g) A person may not:
(1) knowingly or intentionally maintain a place which the person knows is used for illegal manufacturing activities;
(2) manage or control a building, room, or enclosure and knowingly or intentionally lease or make available for use the property which the person knows is used for unlawful manufacturing activities.

(h) No violation of (f) occurs if:
(1) the person lacked knowledge of the unlawful presence of the violator; or
(2) the person notified a law enforcement agency of the illegal conduct.

(i) Violation of (g) is punishable by a sentence, fine, or both.

(j) Other violations are punishable by a sentence, fine, or both.

Section 403. Prohibited Acts C; Penalties (See pp. 155–156).

(a) A person may not knowingly or intentionally:
(1) distribute, as a registrant, a Schedule I or II substance except pursuant to an order form;
(2) use a false, revoked, or suspended registration number to obtain, manufacture, distribute, or dispense a controlled substance;
(3) acquire a controlled substance by fraud, misrepresentation, deception, or subterfuge.
(4) include false or fraudulent material information in, or omit material information from an application, report, or document.
(5) possess a false or fraudulent prescription with intent to obtain a controlled substance.

(b) Violation is punishable by a sentence, fine, or both.

Section 404. Counterfeit Substances Prohibited; Penalty (See pp. 156–157).

a) A person may not knowingly or intentionally manufacture, or deliver,or possess with intent to manufacture or deliver a controlled substance, container or label which bears the name or number of another manufacturer, distributor, or dispenser.

(b) A person may not knowingly or intentionally distribute, possess, or make, without authorization, a thing designed to print or reproduce the name or mark of another person.

(c) Violation is punishable by a sentence, fine, or both.

Section 405. Imitation Controlled Substances Prohibited; Penalty (See pp. 157–158).

(a) A person may not knowingly or intentionally deliver or possess with intent to deliver a controlled substance representing it to be a controlled substance.

(b) A person may not knowingly or intentionally deliver, or possess with intent to deliver, a non–controlled substance:

(1) intending it to be used or distributed as a controlled substance; or

(2) under circumstances in which the person has reasonable cause to believe the non–controlled substance will be used or distributed as a controlled substance.

(c) It is no defense to believe the non–controlled substance is a controlled substance.

(d) Violation is punishable by a sentence, fine, or both.

Section 406. Possession as Prohibited Act; Penalties (See pp. 161–162).

(a) An individual may not knowingly or intentionally possess a controlled substance except pursuant to a valid prescription or order.

(b) Possession of [29] grams or more of a Schedule II substance is a [felony] and punishable by a sentence, fine, or both.

(c) Possession of a Schedule III, IV, or V, substance is a [felony] [misdemeanor] and punishable by a sentence, fine, or both.

(d) Possession of less than [29] grams of marijuana is a [misdemeanor] and punishable by a sentence, fine, or both.

Section 407. Conspiracy; Penalty (See pp. 165–166).

provides same penalty for conspiracy as for underlying offense

A person may not conspire to violate the Act. Violation is punishable by the same penalty provided for the offense that was the object of the conspiracy.

Section 408. Solicitation; [Attempt;] Penalty (See p. 166).

punishing solicitations and attempts allows proactive

(a) A person may not knowingly or intentionally, solicit, induce, or intimidate an individual to violate the Act.

(b) A person may not attempt to violate the Act.]

undercover enforcement strategies, such as reverse stings

(c) Violation is punishable by the same penalty as provided for the offense that was the object of the solicitation [or attempt].

Section 409. Distribution to Individual Under Age 18; Distribution Near Schools or Colleges; Penalties
(See pp. 169–171).

enhanced punishment for selling to children

(a) It is unlawful for an individual 18 years or older to distribute a controlled substance to an individual:
(1) under 18 years; and
(2) at least two years younger than the distributor.
(3) Violation is punishable by imprisonment and a fine not exceeding [two times] that otherwise provided.

drug free school zones

(b) An individual may not violate Section 401 in, on, or within [1,000 feet] of a school or public playground.

enhanced punishment helps shield children from the evils of the drug trade, including the "easy money" and "free life-style" that comes with selling drugs

Violation is punishable by imprisonment and a fine not exceeding [two times] that otherwise provided.

(c) Repeat violations of (B) are punishable by a term of imprisonment not exceeding [three times] that otherwise authorized.

(d) It is no defense to (a) that the accused did not know the individual's age.

(e) It is no defense to (b) or (c) that the accused did not know the distance involved.

mandatory minimums; recommended by White House Conference

[(f) (1) Sentence may not be suspended, deferred, or withheld;
(2) Minimum term of imprisonment required;
(3) No release on parole prior to serving mandatory term of imprisonment.]

Section 410. Employment or Use of Individual Under 18 Years of Age in Drug Operations; Penalties
(See pp. 171–173).

(a) An individual 18 years or older may not knowingly or intentionally employ, use, persuade or otherwise entice an individual under 18 years to violate the Act or assist in avoiding detection or apprehension for a violation.

enhanced punishment for using children

(b) Violation is punishable by imprisonment and a fine not exceeding [two times] that otherwise authorized.

as look-outs or steerers who direct people to the drug activity

(c) Repeat violations are punishable by a term of imprisonment not exceeding [three times] that otherwise authorized.

helps deter use of juveniles who face little or no hard-time and are unlikely to cooperate with authority

(d) Violation including individual under 15 years is punishable by an additional term of imprisonment and fine.

(e) It is no defense that the accused did not know the protected individual's age.

mandatory minimum penalties; recommended by White House Conference

[(f) (1) Sentence may not be suspended, deferred, or withheld;
(2) Minimum term of imprisonment required; and
(3) No release on parole prior to serving mandatory term of imprisonment.]

Section 411. Continuing Criminal Enterprise; Penalty (See pp. 181–183).

enhanced punishment for engaging in a Continuing Criminal Enterprise

(a) Violation is punishable by imprisonment and a fine not exceeding [two times] that provided for the underlying offense.

Person is engaged in a Continuing Criminal Enterprise if:
(1) the person commits a felony;
(2) the felony is part of a continuing series of two or more violations on separate occasions:
(1) the person supervises five or more other individuals regarding the violations; and
(2) the person receives substantial income or resources from the violations.

(b) Repeat violations are punishable by a term of imprisonment not exceeding [three times] that otherwise authorized.

mandatory minimum penalties

[(c) (1) Sentence may not be suspended, deferred or withheld;
(2) Minimum term of imprisonment required; and
(3) No release on parole prior to serving mandatory term of imprisonment.

Section 412. Money Laundering and Illegal Investment; Penalty (See pp. 189–190).

designed to drive the distributors of goods and services away

(a) A person may not knowingly or intentionally receive, acquire, or engage in transactions involving proceeds known to be derived from a violation.

Excludes transactions necessary to preserve a constitutional right to

from the drug trafficking industry

representation [but allows forfeiture of proceeds.]

(b) A person may not knowingly or intentionally sell, transfer or make available anything of value to violate or further a violation of the Act.

helps cut off the drug industry's economic support

(c) A person may not knowingly or intentionally plan, organize, finance, or facilitate the transportation or transfer of proceeds the person knows are derived from a violation.

(d) A person may not knowingly or intentionally conduct a financial transaction designed:

(1) to conceal the ownership or control of proceeds the person knows are derived from a violation; or
(2) to avoid a reporting requirement.

(e) Violation is punishable by imprisonment, a fine, or both.

Section 413. Second or Subsequent Offenses; Penalties **(See p. 195).**

(a) Repeat violations of the Act are punishable by a term of imprisonment not exceeding two times that otherwise authorized and a fine not exceeding two times that otherwise authorized.

(b) A repeat violation occurs if the offender has a prior final conviction for violation of a federal or state drug law.

(c) Section inapplicable to Sections 406, 409(b), 410 (a), or 411.

Section 414. Conditional Discharge for Possession as First Offense **(See pp. 195–198).**

allows probation for first time possessors which includes completion of an education or treatment and rehabilitation program

(a) A court may place an individual on probation requiring successful completion of an education or treatment and rehabilitation program if the individual:

(1) is found guilty of a possession offense under § 406; or
(2) tenders a plea of guilty, no contest, or similar plea to to the offense; and
(3) has not been convicted of a state or federal drug offense within the past ten years.

(b) Upon violation of probation, the court enters a conviction. Upon successful completion of the terms, the court dismisses the proceedings. Non public record of dismissal retained to determine individual's qualifications for this section at a later time.

provides opportunity for rehabilitation

(c) Dismissal is a conviction only for purposes of setting bail or imposing additional penalties for second or subsequent convictions. Individual may not be held liable for perjury or

but permits use of prior record if the individual commits future crimes

giving a false statement for the failure to admit the arrest, indictment, information or trial. Dismissal may occur only once with respect to an individual.

[Section 415. Treatment Option for Violation of Act (See pp. 198–199).

authorizes probation for any convicted drug offender which includes participation in a treatment program

With the consent of the convicted drug offender and the appropriate treatment facility, the court may place the offender on probation which includes participation in a treatment program.

(1) Treatment must be for the period the facility considers necessary.

(2) Treatment or a combination of a sentence and probation including treatment may not exceed the maximum allowable sentence unless the offender consents.

(3) Upon completion of treatment and other conditions, the court will terminate the probation.

(4) Upon violation of the conditions, the court will revoke the probation.]

Section 416. Assessment for Education and Treatment; Appropriation of Moneys (See pp. 203–204).

based on New Jersey law, N.J. Stat. Ann. 2C: 35–15

(a) Convicted drug offenders and probationers under § 414 are assessed a fee for each offense in addition to other fines or assessments. Suggested range is [$500.00] to [$3,000.00].

National Commission on Drug-Free Schools recommends that states establish assessment funds for education and treatment services

(b) Assessments are to be collected in the same manner as [other fines, restitution] and forwarded to the [appropriate agency].

(c) Moneys collected are deposited into the drug abuse education and treatment fund. Fund moneys are appropriated on a continuing basis and are not subject to [state fiscal and appropriations restraints].

user fees provide a more reliable funding base than forfeiture because every jurisdiction convicts drug offenders

(d) Administering agency shall expend moneys only for education, prevention, and treatment services. Fund moneys may not supplant other funds.

Section 417. Penalties Under Other Laws (See p. 207).

Penalties and civil remedies under this Act are in addition to other penalties, remedies or sanctions authorized by law.

Section 418. Bar to Prosecution (See pp. 207–208).

A conviction or acquittal under federal or another state's law for the same act is a bar to prosecution under this Act.

ARTICLE V

ENFORCEMENT AND ADMINISTRATIVE PROVISIONS

[Section 501. Powers of Enforcement Personnel (See pp. 209–210).

A designated officer or employee may:

(1) carry firearms to perform official duties;
(2) execute and serve warrants, subpoenas, and summonses;
(3) make warrantless arrests for offenses committed in the officer or employee's presence or if there is probable cause that a felony has been committed or is being committed;
(4) seize property; and
(5) perform other designated law enforcement duties.]

Section 502. Administrative Inspection and Warrants (See pp. 210–216).

(a) Controlled premises means places where registrants or persons exempted from registration requirements are:

(1) required to keep records; or
(2) permitted to hold, manufacture, process, sell, or otherwise dispose of controlled substances.

(b) Issuance and execution of administrative inspection warrants.

(1) Upon a showing of probable cause, a judge may issue a warrant authorizing administrative inspections of controlled premises and seizures of property. Probable cause exists if there is a valid public interest in enforcement of the Act or related rules.
(2) A warrant may issue only upon an affidavit:
1) of a designated officer or employee having knowledge of the alleged facts;
2) sworn to before the [judge or magistrate]; and
3) which establishes probable cause.

The warrant shall specify the areas and type of property to be inspected and the purpose of the inspection. It must:
1) state the grounds for its issuance and identify individuals who gave supporting affidavits;
2) direct an authorized individual to execute it;

3) command the individual to inspect designated areas and seize specified property; and
4) require it to be served during normal business hours and designate to whom it must be returned.

(3) A warrant must be executed and returned within ten days of its date, unless the court orders otherwise.

A copy of the warrant and a receipt must be given to the person from whom the property is taken.

Written inventory must be taken upon prompt return of the property.

1) Inventory must be taken in the presence of the individual executing the warrant and either the person from whom the property was taken or at least one other credible individual.
2) Copy of the warrant is provided to the applicant for the warrant and the person from whom the property was taken.

(4) A copy of the return and related papers shall be filed with the appropriate clerk of the court.

(c) Administrative inspections of controlled premises.

(1) If authorized by a warrant, a designated officer or employee may conduct an administrative inspection.
(2) If authorized by a warrant, a designated officer or employee may:

(i) inspect and copy records;
(ii) reasonably inspect the controlled premises and equipment, materials, and except as provided by paragraph (4), all other things therein which bear on a violation of the Act; and
(iii) inventory controlled substances and obtain samples.

(3) Inspections of books and records without a warrant and pursuant to an administrative subpoena are allowed. Also allowed are entries and administrative inspections without a warrant:

(i) if the person in charge of the controlled premises consents;
(ii) if there is imminent danger to health or safety;
(iii) if there is reason to believe the mobility of a conveyance makes it impracticable to obtain a warrant;
(iv) in other exceptional or emergency circumstances;
(v) in other situations where a warrant is not constitutionally required.

(4) An inspection does not extend to financial, pricing or sales data, other than shipment information, unless the person in charge of the premises consents in writing.

Section 503. Injunctions (See p. 216).

(a) [Trial courts] may restrain or enjoin violations.
(b) Defendant may demand a jury trial for a violation of an order under (a).

Section 504. Cooperative Arrangements and Confidentiality (See pp. 216–218).

(a) The [appropriate person or agency] shall cooperate with federal and other state agencies in discharging responsibilities relating to controlled substances including:

(1) exchanging information;
(2) coordinating and cooperating in training programs;
(3) cooperating with the Drug Enforcement Administration (DEA); and
(4) conducting eradication programs.

(b) Results, information, and evidence received by the DEA may be relied and acted upon in the exercise of regulatory responsibilities.

(c) A practitioner is not required to reveal the name of a patient or research subject to the [appropriate person or agency] or in any proceeding.

Section 505. Burden of Producing Evidence; Liabilities (See pp. 218–219).

(a) The state does not have to negate any exemption or exception in any pleading or proceeding under this Act.

(b) No person is presumed to be the holder of an appropriate registration or order form issued under this Act.

(c) Authorized government officials lawfully administering or enforcing this Act are immune from civil or criminal liability.

Section 506. Judicial Review (See p. 219).

Final decisions are subject to review pursuant to [State Administrative Procedure Act].

Section 507. Education and Research (See pp. 219–223).

(a) The [appropriate person or agency] shall implement drug education programs and may:

(1) promote better community recognition of drug abuse problems;

(2) assist groups and organizations in helping reduce drug abuse;

(3) aid them in solving administrative and organizational problems;

(4) evaluate drug education programs;

(5) disseminate research results; and

(6) help train law enforcement officials about abuse.

(b) The [appropriate person or agency] shall encourage drug abuse research and may:

(1) establish methods to assess effects of substances and their potential for abuse;

(2) make studies and undertake programs to:

(i) develop or modify approaches to strengthen enforcement of the Act;

(ii) determine patterns of misuse and abuse; and

(iii) improve methods for dealing with the misuse and abuse; and

(3) enter into contracts to conduct drug abuse and misuse research or demonstrations, or special projects.

(c) The [appropriate person or agency] may enter into contracts for educational and research activities without performance bonds.

(d) The [appropriate person or agency] may authorize persons to withhold the names and identifying characteristics of research subjects. A person with authorization is not required to reveal the specified information in any proceeding.

(e) The [appropriate person or agency] may authorize persons doing research to possess and distribute controlled substances. A person with authorization is not subject to prosecution for the specified acts.

ARTICLE VI

MISCELLANEOUS

Section 601. Prospective Application. (See p. 225).

This Act applies to violations of law, seizures and forfeitures, proceedings and investigations occuring after its effective date.

Section 602. Pending Proceedings (See pp. 225–226).

(a) The Act is inapplicable to prosecutions occurring before its effective date except Article IV penalties do apply if they are less than those under prior law.

(b) The Act is inapplicable to civil seizures or forfeitures and injunctive proceedings commenced before its effective date.

(c) All pending administrative proceedings will be brought to a final determination in accordance with superseded laws. Substances controlled under superseded law but not scheduled under this Act are automatically controlled and must be included in the appropriate schedule.

(d) The [appropriate person or agency] shall initially permit registrants under superseded laws to register under this Act.

(e) This Act applies to actions and proceedings which occur following its effective date.

Section 603. Continuation of Rules; Application to Existing Relationships (See p. 226).

Orders and rules remain effective until modified, superseded, or repealed. Section 608 is inapplicable to rights and duties that matured, penalties that were incurred, and proceedings that were begun before the effective date of this Act.

Section 604. Continuing Criminal Enterprise; Civil Action (See p. 227).

civil action for treble damages against drug kingpins designed to dismantle the drug enterprise

(a) The [appropriate authority] may sue a person who violates Section 411 for three times the person's directly or indirectly acquired gross income and assets; and investigation and prosecution costs.

(b) Standard of proof is preponderance of the evidence.

[Section 605. Statute of Limitations (See p. 231).

[Seven] years after the claim became known or should have become known. Statute tolled when:

1) a party is out of state;
2) a party is in confinement; or
3) during criminal proceedings.]

Section 606. Uniformity of Application and Construction (See p. 232).

This Act shall be construed to promote uniformity.

Section 607. Short Title (See p. 232).

This Act may be cited as the Uniform Controlled Substances Act (1990).

Section 608. Severability Clause (See p. 232).

The invalidity of one provision does not affect other provisions.

Section 609. Repeal (See p. 232).

Section 610. Effective Date (See p. 232).

TABLE OF CONTENTS
FOR THE

UNIFORM CONTROLLED SUBSTANCES ACT (UCSA) (1990)

AMENDMENTS TO

UNIFORM CONTROLLED SUBSTANCES ACT (1990)

As Approved by the Executive Committee of the
National Conference of Commissioners
on Uniform State Laws

February 9, 1991

AMENDMENT 1

Section 204 of the Act is amended to read:

SECTION 204. SCHEDULE I. Unless specifically excepted by state or federal law or state or federal regulation or more specifically included in another schedule, the following controlled substances are listed in Schedule I:

(1) any of the following synthetic opiates, including any isomers, esters, ethers, salts, and salts of isomers, esters, and ethers of them that are theoretically possible within the specific chemical designation:

(i) acetyl-alpha-methylfentanyl (N-[1-(1-methyl-2-phenethyl)-4-piperidinyl]-N-phenylacetamide);

(ii) acetylmethadol;

(iii) allylprodine;

(iv) alphacetylmethadol;

(v) alphameprodine;

(vi) alphamethadol;

(vii) alpha-methylfentanyl (N-[1-(alpha-methyl-beta-phenyl)ethyl-4-piperidyl] propionanilide; 1-(1-methyl-2-phenylethyl)-4-(N-propanilido) piperidine);

(viii) alpha-methylthiofentanyl (N-[1-methyl-2-(2-thienyl)ethyl-4-piperidinyl]-N-phenylpropanamide);

(ix) benzethidine;

(x) betacetylmethadol;

(xi) beta-hydroxyfentanyl (N-[1-(2-hydroxy-2-phenethyl)-4-piperidinyl]-N-phenylpropanamide);

(xii) beta-hydroxy-3-methylfentanyl (other name: N-[1-(2-hydroxy-2-phenethyl)-3-methyl-4-piperidinyl]-N-phenylpropanamide);

(xiii) betameprodine;

(xiv) betamethadol;

(xv) betaprodine;

(xvi) clonitazene;

(xvii) dextromoramide;

(xviii) diampromide;

(xix) diethylthiambutene;

(xx) difenoxin;

(xxi) dimenoxadol;

(xxii) dimepheptanol;

(xxiii) dimethylthiambutene;

(xxiv) dioxaphetyl butyrate;

(xxv) dipipanone;

(xxvi) ethylmethylthiambutene;

(xxvii) etonitazene;

(xxviii) etoxeridine;

(xxix) furethidine;

(xxx) hydroxypethidine;

(xxxi) ketobemidone;

(xxxii) levomoramide;

(xxxiii) levophenacylmorphan;

(xxxiv) 3-methylfentanyl (N-[3-methyl-1-(2-phenylethyl)-4-piperidyl]-N-phenylpropanamide);

(xxxv) 3-methylthiofentanyl (N-[3-methyl-1-(2-thienyl)ethyl-4-piperidinyl]-N-phenylpropanamide);

(xxxvi) morpheridine;

(xxxvii) MPPP (1-methyl-4-phenyl-4-propionoxypiperidine);

(xxxviii) noracymethadol;

(xxxix) norlevorphanol;

(xl) normethadone;

(xli) norpipanone;

(xlii) para-fluorofentanyl (N-(4-fluorophenyl)-N-[1-(2-phenethyl)-4-piperidinyl]-propanamide);

(xliii) PEPAP(1-(-2-phenethyl)-4-phenyl-4-acetoxypiperidine);

(xliv) phenadoxone;

(xlv) phenampromide;

(xlvi) phenomorphan;

(xlvii) phenoperidine;

(xlviii) piritramide;

(xlix) proheptazine;

(l) properidine;

(li) propiram;

(lii) racemoramide;

(liii) thiofentanyl (N-phenyl-N-[1-(2-thienyl)ethyl-4-piperidinyl]-propanamide);

(liv) tilidine; and

(lv) trimeperidine.

(2) any of the following opium derivatives, including any salts, isomers, and salts of isomers of them that are theoretically possible within the specific chemical designation:

(i) acetorphine;

(ii) acetyldihydrocodeine;

(iii) benzylmorphine;

(iv) codeine methylbromide;

(v) codeine-N-Oxide;

(vi) cyprenorphine;

(vii) desomorphine;

(viii) dihydromorphine;

(ix) drotebanol;

(x) etorphine, except hydrochloride salt;

(xi) heroin;

(xii) hydromorphinol;

(xiii) methyldesorphine;

(xiv) methyldihydromorphine;

(xv) morphine methylbromide;

(xvi) morphine methylsulfonate;

(xvii) morphine-N-oxide;

(xviii) myrophine;

(xix) nicocodeine;

(xx) nicomorphine;

(xxi) normorphine;

(xxii) pholcodine; and

(xxiii) thebacon.

(3) material, compound, mixture, or preparation containing any quantity of the following hallucinogenic substances, including any salts, isomers, and salts of isomers of them that are theoretically possible within the specific chemical designation:

(i) 4-bromo-2,5-dimethoxy-amphetamine (other names: 4-bromo-2,5-dimethoxy-alpha-methylphenethylamine; 4-bromo-2,5-DMA);

(ii) 2,5-dimethoxyamphetamine (other names: 2,5-dimethoxy-alpha-methylphenethylamine; 2,5-DMA);

(iii) 4-methoxyamphetamine (other names: 4-methoxy-alpha-methylphenethylamine; paramethoxyamphetamine, PMA);

(iv) 5-methoxy-3,4-methylenedioxy amphetamine;

(v) 4-methyl-2,5-dimethoxy-amphetamine (other names: 4-methyl-2,5-dimethoxy-alpha-methylphenethylamine; DOM; and STP);

(vi) 3,4-methylenedioxy amphetamine;

(vii) 3,4-methylenedioxymethamphetamine (MDMA);

(viii) 3,4,5-trimethoxy amphetamine;

(ix) bufotenine (other names: 3-(beta-Dimethylaminoethyl)-5-hydroxyindole; 3-(2-dimethylaminoethyl)-5-indolol; N, N-dimethylserotonin; 5-hydroxy-N,N-dimethyltryptamine; mappine);

(x) diethyltryptamine (other names: N,N-Diethyltryptamine; DET);

(xi) dimethyltryptamine (other names: DMT);

(xii) ibogaine (other names: (7-Ethyl-6,6B,7,8,9,10,12,13-octahydro-2-methoxy-6,9-methano-5H-pyrido [1', 2':1,2] azepine [5,4-b] indole; tabernanthe iboga);

(xiii) lysergic acid diethylamide;

(xiv) marijuana;

(xv) mescaline;

(xvi) parahexyl (other names: 3-Hexyl-1-hydroxy-7,8,9,10-tetrahydro-6,6,9-trimethyl-6H-dibenzo[b,d]pyran; synhexyl);

(xvii) peyote (all parts of the plant classified botanically as Lophophora williamsii Lemaire, whether growing or not, its seeds, any extract from any

part of the plant, and every compound, salts, derivative, mixture, or preparation of the plant, or its seeds or extracts);

(xviii) N-ethyl MDA;

~~(xviii)~~ (xix) N-ethyl-3-piperidyl benzilate;

(xx) N-hydrpxy MDA;

~~(xix)~~ (xxi) N-methyl-3-piperidyl benzilate;

~~(xx)~~ (xxii) psilocybin;

~~(xxi)~~ (xxiii) psilocyn;

~~(xxii)~~ (xxiv) tetrahydrocannabinols;

~~(xxiii)~~ (xxv) ethylamine analog of phencyclidine (other names: N-ethyl-1-phenylcyclohexylamine; (1-phenylcyclohexyl)ethylamine, N-(1-phenylcyclohexl)ethylamine; cyclohexamine; PCE);

~~(xxiv)~~ (xxvi) pyrrolidine analog of phencyclidine (other names: 1-(1-phenylcyclohexyl)-pyrrolidine; PCPy; PHP); ~~and~~

~~(xxv)~~ (xxvii) thiophene analog of phencyclidine (other names: 1-[1-(2-thienyl)-cyclohexyl]-piperidine, 2-thienylanalog of phencyclidine; TPCP; TCP)~~.~~ ; and

(xxviii) TCPy.

(4) material, compound, mixture, or preparation containing any quantity of the following substances having a depressant effect on the central nervous system, including any salts, isomers, and salts of

isomers of them that are theoretically possible within the specific chemical designation:

(i) mecloqualone; and

(ii) methaqualone.

(5) material, compound, mixture, or preparation containing any quantity of the following substances having a stimulant effect on the central nervous system, including their salts, isomers, and salts of isomers:

(i) fenethylline; ~~and~~

(ii) N-ethylamphetamine~~.~~ ;

(iii) (±) Cis-4-methylaminorex; and

(iv) N,N-dimethylamphetamine.

AMENDMENT 2

Section 206 of the Act is amended to read:

SECTION 206. SCHEDULE II. Unless specifically excepted by state or federal law or state or federal regulation or more specifically included in another schedule, the following controlled substances are listed in Schedule II:

(1) any of the following substances, however manufactured:

(i) Opium and opium derivative, and any salt, compound, derivative, or preparation of opium or opium derivative, excluding apomorphine, dextrorphan,

nalbuphine, butorphanol, nalmefene, naloxone, and naltrexone, but including:

(A) raw opium;

(B) opium extracts;

(C) opium fluid;

(D) powdered opium;

(E) granulated opium;

(F) tincture of opium;

(G) codeine;

(H) ethylmorphine;

(I) etorphine hydrochloride;

(J) hydrocodone;

(K) hydromorphone;

(L) metopon;

(M) morphine;

(N) oxycodone;

(O) oxymorphone; and

(P) thebaine;

(ii) A salt, compound, derivative, or preparation that is chemically equivalent or identical with any of the substances listed in subparagraph (i), but not isoquinoline alkaloids of opium;

(iii) Opium poppy and poppy straw;

(iv) Coca leaves and any salt, compound, derivative, or preparation of coca leaves, including cocaine and ecgonine and their salts, isomers,

derivatives, and salts of isomers and derivatives, and any salt, compound, derivative, or preparation that is chemically equivalent or identical with any of the substances listed in this subparagraph, but not including decocainized coca leaves or extractions of coca leaves which do not contain cocaine or ecgonine; and

(v) Concentrate of poppy straw (the crude extract of poppy straw in either liquid, solid, or powder form which contains the phenanthrene alkaloids of the opium poppy);

(2) any of the following synthetic opiates, including any isomers, esters, ethers, salts, and salts of isomers, esters, and ethers of them that are theoretically possible within the specific chemical designation:

(i) alfentanil;

(ii) alphaprodine;

(iii) anileridine;

(iv) bezitramide;

(v) carfentanal;

(vi) dextropropoxyphene (non-dosage forms);

~~(v)~~ (vii) dihydrocodeine;

~~(vi)~~ (viii) diphenoxylate;

~~(vii)~~ (ix) fentanyl;

~~(viii)~~ (x) isomethadone;

~~(ix)~~ (xi) levomethorphan;

~~(x)~~ (xii) levorphanol;

~~(xi)~~ (xiii) metazocine;

~~(xii)~~ (xiv) methadone;

~~(xiii)~~ (xv) methadone - Intermediate, 4-cyano-2-dimethylamino-4,4-diphenyl butane;

~~(xiv)~~ (xvi) moramide - Intermediate, 2-methyl-3-morpholino-1,1-diphenylpropane-carboxylic acid;

~~(xv)~~ (xvii) pethidine (meperidine);

~~(xvi)~~ (xviii) pethidine - Intermediate-A, 4-cyano-1-methyl-4-phenylpiperidine;

~~(xvii)~~ (xix) pethidine - Intermediate-B, ethyl-4-phenylpiperidine-4-carboxylate;

~~(xviii)~~ (xx) pethidine - Intermediate-C, 1-methyl-4-phenylpiperidine-4-carboxylic acid;

~~(xix)~~ (xxi) phenazocine;

~~(xx)~~ (xxii) piminodine;

~~(xxi)~~ (xxiii) racemethorphan;

~~(xxii)~~ (xxiv) racemorphan; and

~~(xxiii)~~ (xxv) sufentanil;

(3) material, compound, mixture, or preparation containing any quantity of the following substances, their salts, isomers, or salts of isomers, having a stimulant effect on the central nervous system:

(i) amphetamine;

(ii) methamphetamine;

(iii) phenmetrazine; and

(iv) methylphenidate;

(4) material, compound, mixture, or preparation containing any quantity of the following substances having a depressant effect on the central nervous system, including any salts, isomers, and salts of isomers of them that are theoretically possible within the specific chemical designation:

(i) amobarbital;

(ii) pentobarbital;

(iii) phencyclidine; and

(iv) secobarbital;

(5) (i) dronabinol (synthetic) in sesame oil and encapsulated in a soft gelatin capsule in a federal Food and Drug Administration approved drug product ((other names for dronabinol: (6aR-trans)-6a,7,8,10a-tetrahydro-6,6,9-trimethyl-3-pentyl-6H-dibenzo [b,d]pyran-1-ol; (-)-delta-9-(trans)-tetrahydrocannabinol));

(6) nabilone ((another name for nabilone: (±)-trans-3-(1,1-dimethylheptyl)-6,6a,7,8,10,10a-hexahydro-1-hydroxy-6,6-dimethyl-9Hdibenzo[b,d]pyran-9-one)); and

(7) material, compound, mixture, or preparation containing any quantity of the following substances:

(i) Immediate precursor to amphetamine and methamphetamine: phenylacetone (other names: phenyl-w-

propanone; P2P; benzyl methyl ketone; methyl benzyl ketone);

(ii) Immediate precursors to phencyclidine:

(A) 1-phenylcyclohexylamine; and

(B) 1-piperidinocyclohexanecarbonitrile (PCC).

AMENDMENT 3

Section 210 of the Act is amended to read:

SECTION 210. SCHEDULE IV.

(a) Unless specifically excepted by state or federal law or state or federal regulation or more specifically included in another schedule, the following controlled substances are listed in Schedule IV:

(1) a material, compound, mixture, or preparation containing any of the following narcotic drugs, or their salts calculated as the free anhydrous base or alkaloid, in limited quantities as set forth below:

(i) not more than 1 milligram of difenoxin and not less than 25 micrograms of atropine sulfate per dosage unit;

(ii) dextropropoxyphene (dosage forms); and

~~(ii)~~ (iii) dextropropoxyphene (alpha-(+)-4-dimethylamino-1,2-diphenyl-3-methyl-2-propionoxybutane);

(2) a material, compound, mixture, or preparation containing any quantity of the following substances having a depressant effect on the central nervous system, including any salts, isomers, and salts of isomers of them that are theoretically possible within the specific chemical designation:

(i) alprazolam;

(ii) barbital;

(iii) bromazepam;

(iv) camazepam;

(v) chloral betaine;

(vi) chloral hydrate;

(vii) chlordiazepoxide;

(viii) clobazam;

(ix) clonazepam;

(x) clorazepate;

(xi) clotiazepam;

(xii) cloxazolam;

(xiii) delorazepam;

(xiv) diazepam;

(xv) estazolam;

(xvi) ethchlorvynol;

(xvii) ethinamate;

(xviii) ethyl loflazepate;

(xix) fludiazepam;

(xx) flunitrazepam;

(xxi) flurazepam;

(xxii) halazepam;

(xxiii) haloxazolam;

(xxiv) ketazolam;

(xxv) loprazolam;

(xxvi) lorazepam;

(xxvii) lormetazepam;

(xxviii) mebutamate;

(xxix) medazepam;

(xxx) meprobamate;

(xxxi) methohexital;

(xxxii) methylphenobarbital (mephobarbital);

(xxxiii) midazolam;

(xxxiv) nimetazepam;

(xxxv) nitrazepam;

(xxxvi) nordiazepam;

(xxxvii) oxazepam;

(xxxviii) oxazolam;

(xxxix) paraldehyde;

(xl) petrichloral;

(xli) phenobarbital;

(xlii) pinazepam;

(xliii) prazepam;

(xliv) quazepam;

(xlv) temazepam;

(xlvi) tetrazepam; and

(xlvii) triazolam;

(3) a material, compound, mixture, or preparation containing any quantity of the following substance, including any salts, isomers, and salts of isomers of it that are theoretically possible: fenfluramine;

(4) a material, compound, mixture, or preparation containing any quantity of the following substances having a stimulant effect on the central nervous system, including their salts, isomers, and salts of isomers:

(i) cathine;

~~(i)~~ (ii) diethylpropion;

(iii) fencamfamin;

(iv) fenproporex;

~~(ii)~~ (v) mazindol;

~~(iii)~~ (vi) pemoline (including organometallic complexes and chelates thereof);

~~(iv)~~ (vii) phentermine;

~~(v)~~ (viii) pipradrol; and

~~(vi)~~ (ix) SPA ((-)-1-dimethylamino-1,2-diphenylethane);

(5) a material, compound, mixture, or preparation containing any quantity of the following substance, including its salts: pentazocine.

(b) The [appropriate person or agency] may exempt by rule any compound, mixture, or preparation containing a depressant substance listed in subsection (a)(2) from the application of all or part of this [Act], if the compound, mixture, or preparation contains one or more active medicinal ingredients not having a depressant effect on the central nervous system and the admixtures are in combinations, quantity, proportion, or concentration that vitiate the potential for abuse of the substances having a depressant effect on the central nervous system.

UNIFORM CONTROLLED SUBSTANCES ACT (1990)

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS NINETY-NINTH YEAR
IN MILWAUKEE, WISCONSIN
JULY 13 - 20, 1990

WITH PREFATORY NOTE AND COMMENTS

2/21/91

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Criminal Justice Policy Foundation
National Association of Attorneys General
National Association of Criminal Defense Lawyers
National District Attorneys Association

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ON UNIFORM STATE LAWS
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UNIFORM CONTROLLED SUBSTANCES ACT (1990)

PREFATORY NOTE

The Uniform Controlled Substances Act (1990) is designed to supplant the Uniform Controlled Substances Act adopted by the National Conference of Commissioners on Uniform State Laws in 1970. The 1970 Uniform Act was designed to complement the federal Controlled Substances Act, which was enacted in 1970. Since 1970, several changes have been made to the federal act, particularly in 1984, 1986, and 1988.

This Uniform Act was drafted to maintain uniformity between the laws of the several states and those of the federal government. It has been designed to complement the federal law and provide an interlocking trellis of federal and state law to enable government at all levels to control more effectively the drug abuse problem.

The drug abuse problem has reached epidemic proportions. It encompasses almost every nationality, race, and economic level. It has moved from urban areas into suburban and rural communities, and has manifested itself in every state in the Union.

Much of this major increase in drug use and abuse is attributable to the increased mobility of our citizens and their affluence. Drugs clandestinely manufactured or illegally diverted from legitimate channels in one part of a state are easily transported for sale to another part of that state or even to another state. Nowhere is this mobility manifested with greater impact than in the legitimate pharmaceutical industry. The lines of distribution of the products of this major national industry cross in and out of a state innumerable times during the manufacturing or distribution processes. To assure the continued free movement of controlled substances between states, while at the same time securing such states against drug diversion from legitimate sources, it becomes critical to approach not only the control of illicit and legitimate traffic in these substances at the national and international levels, but also to approach this problem at the state and local level on a uniform basis.

A main objective of this Uniform Act is to continue a coordinated and codified system of drug control initiated with the federal act and the 1970 Uniform Act.

The Act sets out the prohibited activities in detail, but does not prescribe specific fines or sentences, this being left to the discretion of the individual states. It further provides law enforcement tools to improve investigative efforts and provides for education and training programs relating to the drug abuse problem.

The Uniform Act updates and improves existing state laws and ensures legislative and administrative flexibility to enable the states to cope with both present and future drug problems. Because of the emphasis on controlling drug use, members of the medical profession may hesitate to prescribe narcotic drugs where use of such drugs is warranted. This Act addresses this concern. Legitimate use of controlled substances is essential for public health and safety, and the availability of these substances must be assured. At the same time, the illegitimate manufacture, distribution, and possession of controlled substances must be curtailed and eliminated. It is recognized that law enforcement may not be the ultimate solution to the drug abuse problem. It is hoped that present research efforts will be continued and vigorously expanded, particularly as they relate to the development of rehabilitation, treatment, and educational programs for addicts, drug dependent persons, and potential drug abusers.

ARTICLE I

DEFINITIONS

SECTION 101. DEFINITIONS. As used in this [Act]:

(1) "Administer," unless the context otherwise requires, means to apply a controlled substance, whether by injection, inhalation, ingestion, or any other means, directly to the body of a patient or research subject by:

(i) a practitioner or, in the practitioner's presence, by the practitioner's authorized agent; or

(ii) the patient or research subject at the direction and in the presence of the practitioner.

(2) "Controlled substance" means a drug, substance, or immediate precursor included in Schedules I through V of Article II.

(3) (i) "Controlled substance analog" means a substance the chemical structure of which is substantially similar to the chemical structure of a controlled substance listed in or added to Schedule I or II and:

(A) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or

hallucinogenic effect on the central nervous system of a controlled substance included in Schedule I or II; or

(B) with respect to a particular individual, which the individual represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance included in Schedule I or II; but

(ii) the term does not include:

(A) a controlled substance;

(B) a substance for which there is an approved new drug application;

(C) a substance with respect to which an exemption is in effect for investigational use by a particular person under Section 505 of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 355] to the extent conduct with respect to the substance is permitted by the exemption; or

(D) any substance to the extent not intended for human consumption before an exemption takes effect with respect to the substance.

(4) "Deliver," unless the context otherwise requires, means to transfer a substance, actually or constructively, from one person to another, whether or not there is an agency relationship.

(5) "Dispense" means to deliver a controlled substance to an ultimate user, patient, or research subject by or pursuant to the lawful order of a practitioner, including the prescribing, administering, packaging, labeling, or compounding necessary to prepare the substance for that delivery.

(6) "Dispenser" means a practitioner who dispenses.

(7) "Distribute" means to deliver other than by administering or dispensing a controlled substance.

(8) "Distributor" means a person who distributes.

(9) "Drug" means (i) a substance recognized as a drug in the official United States Pharmacopoeia, National Formulary, or the official Homeopathic Pharmacopoeia of the United States, or a supplement to any of them; (ii) a substance intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in individuals or animals; (iii) a substance, other than food, intended to affect the structure or a function of the body of individuals or animals; and (iv) a substance intended for use as a component of an article specified in this paragraph. The term does not include a device or its components, parts, or accessories.

(10) "Drug Enforcement Administration" means the Drug Enforcement Administration of the United States Department of Justice, or its successor agency.

(11) "Immediate precursor" means a substance:

(i) that the [appropriate person or agency] has found to be and by rule has designated to be the principal compound used, or produced primarily for use, in the manufacture of a controlled substance;

(ii) that is an immediate chemical intermediary used or likely to be used in the manufacture of the controlled substance; and

(iii) the control of which is necessary to prevent, curtail, or limit the manufacture of the controlled substance.

(12) "Isomer" means an optical isomer, but in Sections 101(15)(v), 204(1)(xii) and (xxxiv), 206(1)(iv), and 401(b)(2)(ii) the term includes a geometric isomer; in Sections 204(i)(viii) and (xlii), and 210(a)(3) the term includes a positional isomer; and in Sections 204(1)(xxxv) and (3), and 208(a)(1) the term includes a positional or geometric isomer.

(13) "Manufacture" means to produce, prepare, propagate, compound, convert, or process a controlled substance, directly or indirectly, by extraction from substances of natural origin, chemical synthesis, or a combination of extraction and chemical synthesis, and

includes packaging or repackaging of the substance or labeling or relabeling of its container. The term does not include the preparation, compounding, packaging, repackaging, labeling, or relabeling of a controlled substance:

(i) by a practitioner as an incident to the practitioner's administering or dispensing of a controlled substance in the course of the practitioner's professional practice; or

(ii) by a practitioner, or by the practitioner's authorized agent under the practitioner's supervision, for the purpose of, or as an incident to, research, teaching, or chemical analysis and not for sale.

(14) "Marijuana" means all parts of the plant **Cannabis**, whether growing or not; its seeds; the resin extracted from any part of the plant; and every compound, salt, derivative, mixture, or preparation of the plant, or its seeds or resin. The term does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, salt, derivative, mixture, or preparation of the mature stalks, except resin extracted therefrom; fiber, oil, or cake; or the sterilized seed of the plant which is incapable of germination.

(15) "Narcotic drug" means any of the following, however manufactured:

(i) opium, opium derivative, and any derivative of either, including any salts, isomers, and salts of isomers of them that are theoretically possible within the specific chemical designation, but not isoquinoline alkaloids of opium;

(ii) synthetic opiate and any derivative of synthetic opiate, including any isomers, esters, ethers, salts, and salts of isomers, esters, and ethers of them that are theoretically possible within the specific chemical designation;

(iii) poppy straw and concentrate of poppy straw;

(iv) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(v) cocaine, or any salt, isomer, or salt of isomer of cocaine;

(vi) cocaine base;

(vii) ecgonine, or any derivative, salt, isomer, or salt of isomer of ecgonine; and

(viii) compound, mixture, or preparation containing any quantity of a substance listed in this paragraph.

(16) "Opiate" means a substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having addiction-forming or addiction-sustaining liability. The term includes opium, opium derivatives, and synthetic opiates. The term does not include, unless specifically scheduled as a controlled substance pursuant to Section 201, the dextrorotatory isomer of 3-methoxy-n-methylmorphinan and its salts (dextromethorphan). The term includes the racemic and levorotatory forms of dextromethorphan.

(17) "Opium poppy" means the plant of the species **Papaver somniferum L.**, except its seeds.

(18) "Person" means an individual, corporation, business trust, estate, trust, partnership, association, joint venture, government or governmental subdivision or agency, or any other legal or commercial entity.

(19) "Poppy straw" means all parts, except the seeds, of the opium poppy, after mowing.

(20) "Practitioner" means a physician, dentist, veterinarian, scientific investigator, pharmacist, pharmacy, hospital, or other person licensed, registered, or otherwise permitted, by this State, to distribute, dispense, conduct research with respect to, administer, or use in teaching or chemical analysis, a

controlled substance in the course of professional practice or research.

(21) "Production," unless the context otherwise requires, includes the manufacturing of a controlled substance and the planting, cultivating, growing, or harvesting of a plant from which a controlled substance is derived.

(22) "State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or insular possession subject to the jurisdiction of the United States.

(23) "Ultimate user" means an individual who lawfully possesses a controlled substance for the individual's own use or for the use of a member of the individual's household or for administering to an animal owned by the individual or by a member of the individual's household.

COMMENT

Several provisions of the Uniform Controlled Substances Act (1990) are derived from the wording of the federal Controlled Substances Act. In most instances, deviations from the wording of the federal act are intended to improve readability, with no change in substance. This Act does not include a definition for such terms as "addict," "drug dependent person," or "habitual user." If a state chooses to use such a definition, the state should assure that the definition cannot be construed to include a patient using a controlled substance pursuant to the lawful order of a practitioner. In paragraph (2) "included" is used to refer to substances controlled on adoption of the Act (those substances "listed" in Sections 204, 206, 208, 210, and 212) and to substances controlled under Section 501 and administrative action. The definition of

"controlled substance analog" is derived from the definition contained in the federal act, as added by the Anti-Drug Abuse Act of 1986, §§ 1201-1204 (the "Controlled Substance Analogue Enforcement Act of 1986"). "Deliver" and "delivery" apply to any substance so as to include imitation controlled substances. The definition of "drug" is derived from the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 321(g)(1). The definition of "isomer" is taken from the federal Controlled Substances Act, 21 U.S.C. 802(14). "Isomer" was added to the federal act in 1984, and amended in 1986 and is further revised to reflect the use of the term in Sections 101(15)(v), 204(a)(1)(xxxiv), 208(a)(1), 210(a)(3), and 401(a)(1)(ii)(B). The definition of marijuana applies to all subtypes or species of **Cannabis**, regardless of the gross botanical characteristics of individual species, e.g., **Cannabis sativa L.**, **Cannabis americanus**, **Cannabis indica**, and **Cannabis ruderalis**.

ARTICLE II

STANDARDS AND SCHEDULES

SECTION 201. AUTHORITY TO CONTROL.

(a) The [appropriate person or agency] shall administer this [Act] and may add substances to or delete or reschedule substances listed in Section 204, 206, 208, 210, or 212 pursuant to the [insert appropriate state administrative procedures code section].

(b) In making a determination regarding a substance, the [appropriate person or agency] shall consider the following:

(1) the actual or relative potential for abuse;

(2) the scientific evidence of its pharmacological effect, if known;

(3) the state of current scientific knowledge regarding the substance;

(4) the history and current pattern of abuse;

(5) the scope, duration, and significance of abuse;

(6) the risk to the public health;

(7) the potential of the substance to produce psychic or physiological dependence liability; and

(8) whether the substance is an immediate precursor of a controlled substance.

(c) The [appropriate person or agency] may consider findings of the federal Food and Drug Administration or the Drug Enforcement Administration as prima facie evidence relating to one or more of the determinative factors.

(d) After considering the factors enumerated in subsection (b), the [appropriate person or agency] shall make findings with respect to them and adopt and publish a rule controlling the substance upon finding the substance has a potential for abuse.

(e) The [appropriate person or agency], without regard to the findings required by subsection (d) or Sections 203, 205, 207, 209, and 211 or the procedures prescribed by subsections (a) through (d), may add an immediate precursor to the same schedule in which the controlled substance of which it is an immediate precursor is placed or to any other schedule. If the [appropriate person or agency] designates a substance as an immediate precursor, substances that are precursors of the controlled precursor are not subject to control solely because they are precursors of the controlled precursor.

(f) If a substance is designated, rescheduled, or deleted as a controlled substance under federal law, the [appropriate person or agency] shall similarly treat the substance under this [Act] after the expiration of 30

days from the date of publication in the Federal Register of a final order designating the substance as a controlled substance or rescheduling or deleting the substance or from the date of issuance of an order of temporary scheduling under Section 508 of the federal Dangerous Drug Diversion Control Act of 1984 [21 U.S.C. 811(h)], unless within the 30-day period, the [appropriate person or agency] or an interested party objects to the treatment of the substance. If no objection is made, the [appropriate person or agency] shall adopt and publish, without making the determinations or findings required by subsections (a) through (d) or Section 203, 205, 207, 209, or 211, a final rule treating the substance. If an objection is made, the [appropriate person or agency] shall make a determination with respect to the treatment of the substance as provided by subsections (a) through (d). Upon receipt of an objection to the treatment by the [appropriate person or agency], the [appropriate person or agency] shall publish notice of the receipt of the objection, and action by the [appropriate person or agency] under this [Act] is stayed until the [appropriate person or agency] adopts a rule as provided by subsection (d).

(g) The [appropriate person or agency], by rule and without regard to the requirements of subsections

(a) through (c), may schedule a substance in Schedule I, whether or not the substance is substantially similar to a controlled substance included in Schedule I or II, if the [appropriate person or agency] finds that scheduling of the substance on an emergency basis is necessary to avoid an imminent hazard to the public safety and the substance is not in any other schedule or no exemption or approval is in effect for the substance under Section 505 of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 355]. Upon receipt of notice under Section 214, the [appropriate person or agency] shall initiate scheduling of the controlled substance analog on an emergency basis pursuant to this subsection. The scheduling of a substance under this subsection expires one year after the adoption of the scheduling rule. With respect to the finding of an imminent hazard to the public safety, the [appropriate person or agency] shall consider whether the substance has been scheduled on a temporary basis under federal law or factors set forth in subsections (b)(4), (5), and (6), and may also consider clandestine importation, manufacture, or distribution, and, if available, information concerning the other factors set forth in subsection (b). A rule may not be adopted under this subsection until the [appropriate person or agency] initiates a rulemaking proceeding under subsections (a) through (d) with

respect to the substance. A rule adopted under this subsection lapses upon the conclusion of the rulemaking proceeding initiated under subsections (a) through (d) with respect to the substance.

(h) Authority of the [appropriate person or agency] to control under this section does not extend to distilled spirits, wine, malt beverages, or tobacco.

COMMENT

The Act vests the authority to administer its provisions in the appropriate person or agency within the state. The "appropriate" person or agency should have expertise in law enforcement, pharmacology, and chemistry. The appropriate person or agency may be one or more persons, or one or more agencies, or a combination. The enacting state should designate that person or agency that has the means to implement, enforce, and regulate the provisions of the Act. For example, authority could be vested in the Office of the Attorney General, a Department of Health, a Division of Public Safety, or such other agency within the state responsible for regulating and enforcing the drug laws. An alternative might be a division of authority whereby one agency might be responsible for controlling drugs under this Article, another agency might be designated to regulate the legitimate industry under Article III, and still another agency might be charged with enforcement. In any event, the ultimate authority for determining the appropriate person or agency is vested in the enacting state.

This section sets out the factors to be considered for the control and classification of drugs into five schedules. This classification achieves one of the main objectives of the Act, which is to create a coordinated, codified system of drug control and regulation. The Act follows the federal Controlled Substances Act and lists all of the controlled substances in five schedules that are identical with the federal law. Throughout the Act "listed" is used to refer to the controlled substances listed in the Act, while "included" is used to refer to substances controlled under authority of the Act but not necessarily "listed" in the Act. The Act is not intended to prevent a state from adding or removing substances from the schedules, or from reclassifying

substances from one schedule to another, provided the procedures specified in this section are followed.

The overall intent of this section is to create reasonable flexibility within the Act so that, as new substances are discovered or found to have an abuse potential, they can speedily be brought under control without constant resort to the legislature. This flexibility allows the laws to keep in step with new trends in drug abuse and new scientific information. States should consider establishing a Scientific Advisory Committee consisting of leading medical and pharmaceutical professionals to advise the appropriate person or agency on control of substances.

Subsection (a) allows federal findings with respect to the substance to be the evidence of consideration of the relevant factors enumerated in subsection (a).

Subsection (d) provides a process of action without resorting to normal administrative procedure. The subsection provides that a rule is required to be adopted and published to similarly control a substance without objection and that the decision of the administering agency is final with respect to administrative action but is subject to judicial review as provided by Section 506. The procedure also applies to federal, temporary scheduling of a controlled substance. States that would have a delegation of legislative authority problem may want to replace subsection (d) with a sentence to this effect: "If a substance is designated, rescheduled, or deleted as a controlled substance under federal law and notice thereof is given to the [appropriate person or agency], the [appropriate person or agency] shall initiate proceedings to control the substance under this [Act] pursuant to the procedures of [insert appropriate state administrative procedures code section]." Changes to the schedules should be published so as to afford notice, and this is encouraged by the requirement in subsections (b) and (d) that the agency is to cause the rules to be published.

Subsection (e) is intended to allow emergency scheduling and is based on similar temporary scheduling authority in the federal act, added in 1984 and contained in 21 U.S.C. 811(h). The reference to the scheduling on a temporary basis under federal law is intended to allow use of scheduling under the equivalent federal provision, 21 U.S.C. 811(h), as a factor in lieu of the three referenced factors in subsection (a).

Although the emergency rulemaking procedure may be initiated without regard to a regular rulemaking proceeding, the initiation of a regular rulemaking proceeding is a condition precedent to the adoption of an emergency rule. States may want to consider whether to allow a hearing under subsection (e) upon the request of an interested party, similar to that provided by subsection (d).

SECTION 202. NOMENCLATURE. The controlled substances listed in or added to the schedules in Sections 204, 206, 208, 210, and 212 are listed or added by any official, common, usual, chemical, or trade name used.

SECTION 203. SCHEDULE I TESTS.

(a) The [appropriate person or agency] shall add a substance to Schedule I upon finding that the substance:

(1) has high potential for abuse;

(2) has no currently accepted medical use in treatment in the United States; and

(3) lacks accepted safety for use under medical supervision.

(b) The [appropriate person or agency] may add a substance to Schedule I without making the findings required by subsection (a) if the substance is controlled under Schedule I of the federal Controlled Substances Act by a federal agency as the result of an international treaty, convention, or protocol.

COMMENT

With extreme reluctance the requirements for placing substances in the various schedules are being retained in substantially the form contained in the 1970 Uniform Act and the federal Controlled Substances Act. The primary reason for the retention is that requirements for scheduling particular substances should parallel one another at the state and federal levels. The primary reason for the reluctance to retain the requirements is the fact that substances have been placed on schedules without complying fully with the criteria ordinarily governing scheduling decisions. See Grinspoon v. Drug Enforcement Administration, 828 F.2d 881 (1st Cir. 1987); and National Organization for the Reform of Marijuana Laws (NORML) v. Drug Enforcement Administration, 559 F.2d 735 (D.C. Cir. 1977). Subsection (b) allows placement of a substance on the schedule without the necessity of the findings required by subsection (a), if it is placed by a federal agency on the corresponding federal schedule pursuant to an international agreement. See 21 U.S.C. 811(d). As enacted in 1970 the federal act contained such a provision, 21 U.S.C. 811(d)(1), which was expanded in 1978 with respect to application of the Convention on Psychotropic Substances, 21 U.S.C. 811(d)(2).

SECTION 204. SCHEDULE I. Unless specifically excepted by state or federal law or state or federal regulation or more specifically included in another schedule, the following controlled substances are listed in Schedule I:

(1) any of the following synthetic opiates, including any isomers, esters, ethers, salts, and salts of isomers, esters, and ethers of them that are theoretically possible within the specific chemical designation:

(i) acetyl-alpha-methylfentanyl (N-[1-(1-methyl-2-phenethyl)-4-piperidinyl]-N-phenylacetamide);

(ii) acetylmethadol;

(iii) allylprodine;

(iv) alphacetylmethadol;

(v) alphameprodine;

(vi) alphamethadol;

(vii) alpha-methylfentanyl (N-[1-(alpha-methyl-beta-phenyl)ethyl-4-piperidyl] propionanilide; 1-(1-methyl-2-phenylethyl)-4-(N-propanilido) piperidine);

(viii) alpha-methylthiofentanyl (N-[1-methyl-2-(2-thienyl)ethyl-4-piperidinyl]-N-phenylpropanamide);

(ix) benzethidine;

(x) betacetylmethadol;

(xi) beta-hydroxyfentanyl (N-[1-(2-hydroxy-2-phenethyl)-4-piperidinyl]-N-phenylpropanamide);

(xii) beta-hydroxy-3-methylfentanyl (other name: N-[1-(2-hydroxy-2-phenethyl)-3-methyl-4-piperidinyl]-N-phenylpropanamide);

(xiii) betameprodine;

(xiv) betamethadol;

(xv) betaprodine;

(xvi) clonitazene;

(xvii) dextromoramide;

(xviii) diampromide;

(xix) diethylthiambutene;

(xx) difenoxin;

(xxi) dimenoxadol;

(xxii) dimepheptanol;

(xxiii) dimethylthiambutene;

(xxiv) dioxaphetyl butyrate;

(xxv) dipipanone;

(xxvi) ethylmethylthiambutene;

(xxvii) etonitazene;

(xxviii) etoxeridine;

(xxix) furethidine;

(xxx) hydroxypethidine;

(xxxi) ketobemidone;

(xxxii) levomoramide;

(xxxiii) levophenacylmorphan;

(xxxiv) 3-methylfentanyl (N-[3-methyl-1-(2-phenylethyl)-4-piperidyl]-N-phenylpropanamide);

(xxxv) 3-methylthiofentanyl (N-[3-methyl-1-(2-thienyl)ethyl-4-piperidinyl]-N-phenylpropanamide);

(xxxvi) morpheridine;

(xxxvii) MPPP (1-methyl-4-phenyl-4-propionoxypiperidine);

(xxxviii) noracymethadol;

(xxxix) norlevorphanol;

(xl) normethadone;

(xli) norpipanone;

(xlii) para-fluorofentanyl (N-(4-fluorophenyl)-N-[1-(2-phenethyl)-4-piperidinyl]-propanamide);

(xliii) PEPAP(1-(-2-phenethyl)-4-phenyl-4-acetoxypiperidine);

(xliv) phenadoxone;

(xlv) phenampromide;

(xlvi) phenomorphan;

(xlvii) phenoperidine;

(xlviii) piritramide;

(xlix) proheptazine;

(l) properidine;

(li) propiram;

(lii) racemoramide;

(liii) thiofentanyl (N-phenyl-N-[1-(2-thienyl)ethyl-4-piperidinyl]-propanamide);

(liv) tilidine; and

(lv) trimeperidine.

(2) any of the following opium derivatives, including any salts, isomers, and salts of isomers of them that are theoretically possible within the specific chemical designation:

(i) acetorphine;

(ii) acetyldihydrocodeine;

(iii) benzylmorphine;

(iv) codeine methylbromide;

(v) codeine-N-Oxide;

(vi) cyprenorphine;

(vii) desomorphine;

(viii) dihydromorphine;

(ix) drotebanol;

(x) etorphine, except hydrochloride salt;

(xi) heroin;

(xii) hydromorphinol;

(xiii) methyldesorphine;

(xiv) methyldihydromorphine;

(xv) morphine methylbromide;

(xvi) morphine methylsulfonate;

(xvii) morphine-N-oxide;

(xviii) myrophine;

(xix) nicocodeine;

(xx) nicomorphine;

(xxi) normorphine;

(xxii) pholcodine; and

(xxiii) thebacon.

(3) material, compound, mixture, or preparation containing any quantity of the following hallucinogenic substances, including any salts, isomers, and salts of isomers of them that are theoretically possible within the specific chemical designation:

(i) 4-bromo-2,5-dimethoxy-amphetamine (other names: 4-bromo-2,5-dimethoxy-alpha-methylphenethylamine; 4-bromo-2,5-DMA);

(ii) 2,5-dimethoxyamphetamine (other names: 2,5-dimethoxy-alpha-methylphenethylamine; 2,5-DMA);

(iii) 4-methoxyamphetamine (other names: 4-methoxy-alpha-methylphenethylamine; paramethoxyamphetamine, PMA);

(iv) 5-methoxy-3,4-methylenedioxy amphetamine;

(v) 4-methyl-2,5-dimethoxy-amphetamine (other names: 4-methyl-2,5-dimethoxy-alpha-methylphenethylamine; DOM; and STP);

(vi) 3,4-methylenedioxy amphetamine;

(vii) 3,4-methylenedioxymethamphetamine (MDMA);

(viii) 3,4,5-trimethoxy amphetamine;

(ix) bufotenine (other names: 3-(beta-Dimethylaminoethyl)-5-hydroxyindole; 3-(2-dimethylaminoethyl)-5-indolol; N, N-dimethylserotonin; 5-hydroxy-N,N-dimethyltryptamine; mappine);

(x) diethyltryptamine (other names: N,N-Diethyltryptamine; DET);

(xi) dimethyltryptamine (other names: DMT);

(xii) ibogaine (other names: (7-Ethyl-6,6B,7,8,9,10,12,13-octahydro-2-methoxy-6,9-methano-5H-pyrido [1', 2':1,2] azepine [5,4-b] indole; tabernanthe iboga);

(xiii) lysergic acid diethylamide;

(xiv) marijuana;

(xv) mescaline;

(xvi) parahexyl (other names: 3-Hexyl-1-hydroxy-7,8,9,10-tetrahydro-6,6,9-trimethyl-6H-dibenzo[b,d]pyran; synhexyl);

(xvii) peyote (all parts of the plant classified botanically as Lophophora williamsii Lemaire, whether growing or not, its seeds, any extract from any part of the plant, and every compound, salts, derivative, mixture, or preparation of the plant, or its seeds or extracts);

(xviii) N-ethyl-3-piperidyl benzilate;

(xix) N-methyl-3-piperidyl benzilate;

(xx) psilocybin;

(xxi) psilocyn;

(xxii) tetrahydrocannabinols;

(xxiii) ethylamine analog of phencyclidine (other names: N-ethyl-1-phenylcyclohexylamine; (1-phenylcyclohexyl)ethylamine, N-(1-phenylcyclohexl)ethylamine; cyclohexamine; PCE);

(xxiv) pyrrolidine analog of phencyclidine (other names: 1-(1-phenylcyclohexyl)-pyrrolidine; PCPy; PHP); and

(xxv) thiophene analog of phencyclidine (other names: 1-[1-(2-thienyl)-cyclohexyl]-piperidine, 2-thienylanaloq of phencyclidine; TPCP; TCP).

(4) material, compound, mixture, or preparation containing any quantity of the following substances

having a depressant effect on the central nervous system, including any salts, isomers, and salts of isomers of them that are theoretically possible within the specific chemical designation:

(i) mecloqualone; and

(ii) methaqualone.

(5) material, compound, mixture, or preparation containing any quantity of the following substances having a stimulant effect on the central nervous system, including their salts, isomers, and salts of isomers:

(i) fenethylline; and

(ii) N-ethylamphetamine.

COMMENT

Schedule I reflects the substances controlled under Schedule I of the federal act, as published in 21 CFR 1308.11 (April 1, 1987), and updated through the February 22, 1988, issue of the Federal Register. States that would not have a delegation of legislative authority problem may want to replace the specific listing of substances with an adoption of the federal schedules by reference, with any deletions or additions determined appropriate by the state administrator, or to delete this section and rely on the state administrator to schedule a substance.

Although peyote is listed as a Schedule I controlled substance in this Act and under Schedule I of the federal act, a separate federal regulation (21 CFR 1307.31 (April 1, 1989)) exempts the nondrug use of peyote in bona fide religious ceremonies of the Native American Church. In light of Employment Division v. Smith, 494 U.S. ____, 108 L.Ed. 2d 876, 110 S.Ct. 1595 (1990), states should consider including in Schedule I an exception similar to that found in 21 CFR 1307.31.

SECTION 205. SCHEDULE II TESTS.

(a) The [appropriate person or agency] shall add a substance to Schedule II upon finding that:

(1) the substance has high potential for abuse;

(2) the substance has currently accepted medical use in treatment in the United States, or currently accepted medical use with severe restrictions; and

(3) the abuse of the substance may lead to severe psychological or physical dependence.

(b) The [appropriate person or agency] may add a substance to Schedule II without making the findings required by subsection (a) if the substance is controlled under Schedule II of the federal Controlled Substances Act by a federal agency as the result of an international treaty, convention, or protocol.

COMMENT

Subsection (b) allows placement of a substance on the schedule without the necessity of the findings required by subsection (a), if it is placed by a federal agency on the corresponding federal schedule pursuant to an international agreement. See 21 U.S.C. 811(d). As enacted in 1970 the federal act contained such a provision, 21 U.S.C. 811(d)(1), which was expanded in 1978 with respect to application to the Convention on Psychotropic Substances, 21 U.S.C. 811(d)(2).

SECTION 206. SCHEDULE II. Unless specifically excepted by state or federal law or state or federal regulation or more specifically included in another

schedule, the following controlled substances are listed in Schedule II:

(1) any of the following substances, however manufactured:

(i) Opium and opium derivative, and any salt, compound, derivative, or preparation of opium or opium derivative, excluding apomorphine, dextrorphan, nalbuphine, butorphanol, nalmefene, naloxone, and naltrexone, but including:

(A) raw opium;

(B) opium extracts;

(C) opium fluid;

(D) powdered opium;

(E) granulated opium;

(F) tincture of opium;

(G) codeine;

(H) ethylmorphine;

(I) etorphine hydrochloride;

(J) hydrocodone;

(K) hydromorphone;

(L) metopon;

(M) morphine;

(N) oxycodone;

(O) oxymorphone; and

(P) thebaine;

(ii) A salt, compound, derivative, or preparation that is chemically equivalent or identical with any of the substances listed in subparagraph (i), but not isoquinoline alkaloids of opium;

(iii) Opium poppy and poppy straw;

(iv) Coca leaves and any salt, compound, derivative, or preparation of coca leaves, including cocaine and ecgonine and their salts, isomers, derivatives, and salts of isomers and derivatives, and any salt, compound, derivative, or preparation that is chemically equivalent or identical with any of the substances listed in this subparagraph, but not including decocainized coca leaves or extractions of coca leaves which do not contain cocaine or ecgonine; and

(v) Concentrate of poppy straw (the crude extract of poppy straw in either liquid, solid, or powder form which contains the phenanthrene alkaloids of the opium poppy);

(2) any of the following synthetic opiates, including any isomers, esters, ethers, salts, and salts of isomers, esters, and ethers of them that are theoretically possible within the specific chemical designation:

(i) alfentanil;

(ii) alphaprodine;

(iii) anileridine;

(iv) bezitramide;

(v) dihydrocodeine;

(vi) diphenoxylate;

(vii) fentanyl;

(viii) isomethadone;

(ix) levomethorphan;

(x) levorphanol;

(xi) metazocine;

(xii) methadone;

(xiii) methadone - Intermediate, 4-cyano-2-dimethylamino-4,4-diphenyl butane;

(xiv) moramide - Intermediate, 2-methyl-3-morpholino-1,1-diphenylpropane-carboxylic acid;

(xv) pethidine (meperidine);

(xvi) pethidine - Intermediate-A, 4-cyano-1-methyl-4-phenylpiperidine;

(xvii) pethidine - Intermediate-B, ethyl-4-phenylpiperidine-4-carboxylate;

(xviii) pethidine - Intermediate-C, 1-methyl-4-phenylpiperidine-4-carboxylic acid;

(xix) phenazocine;

(xx) piminodine;

(xxi) racemethorphan;

(xxii) racemorphan; and

(xxiii) sufentanil;

(3) material, compound, mixture, or preparation containing any quantity of the following substances, their salts, isomers, or salts of isomers, having a stimulant effect on the central nervous system:

(i) amphetamine;

(ii) methamphetamine;

(iii) phenmetrazine; and

(iv) methylphenidate;

(4) material, compound, mixture, or preparation containing any quantity of the following substances having a depressant effect on the central nervous system, including any salts, isomers, and salts of isomers of them that are theoretically possible within the specific chemical designation:

(i) amobarbital;

(ii) pentobarbital;

(iii) phencyclidine; and

(iv) secobarbital;

(5) (i) dronabinol (synthetic) in sesame oil and encapsulated in a soft gelatin capsule in a federal Food and Drug Administration approved drug product ((other names for dronabinol: (6aR-trans)-6a,7,8,10a-tetrahydro-6,6,9-trimethyl-3-pentyl-6H-dibenzo [b,d]pyran-1-o1; (-)-delta-9-(trans)-tetrahydrocannabinol));

(6) nabilone ((another name for nabilone: (±)-trans-3-(1,1-dimethylheptyl)-6,6a,7,8,10,10a-hexahydro-1-hydroxy-6,6-dimethyl-9Hdibenzo[b,d]pyran-9-one)); and

(7) material, compound, mixture, or preparation containing any quantity of the following substances:

(i) Immediate precursor to amphetamine and methamphetamine: phenylacetone (other names: phenyl-w-propanone; P2P; benzyl methyl ketone; methyl benzyl ketone);

(ii) Immediate precursors to phencyclidine:

(A) 1-phenylcyclohexylamine; and

(B) 1-piperidinocyclohexanecarbonitrile (PCC).

COMMENT

Schedule II reflects the substances controlled under Schedule II of the federal act, as published in 21 CFR 1308.12 (April 1, 1987), and updated through the April 15, 1987, issue of the Federal Register. States that would not have a delegation of legislative authority problem may want to replace the specific listing of substances with an adoption of the federal schedules by reference, with any deletions or additions determined appropriate by the state administrator, or to delete this section and rely on the state administrator to schedule a substance.

SECTION 207. SCHEDULE III TESTS.

(a) The [appropriate person or agency] shall add a substance to Schedule III upon finding that:

(1) the substance has a potential for abuse less than the substances included in Schedules I and II;

(2) the substance has currently accepted medical use in treatment in the United States; and

(3) abuse of the substance may lead to moderate or low physical dependence or high psychological dependence.

(b) The [appropriate person or agency] may add a substance to Schedule III without making the findings required by subsection (a) if the substance is controlled under Schedule III of the federal Controlled Substances Act by a federal agency as the result of an international treaty, convention, or protocol.

COMMENT

Subsection (b) allows placement of a substance on the schedule without the necessity of the findings required by subsection (a), if it is placed by a federal agency on the corresponding federal schedule pursuant to an international agreement. See 21 U.S.C. 811(d). As enacted in 1970 the federal act contained such a provision, 21 U.S.C. 811(d)(1), which was expanded in 1978 with respect to application to the Convention on Psychotropic Substances, 21 U.S.C. 811(d)(2).

SECTION 208. SCHEDULE III.

(a) Unless specifically excepted by state or federal law or regulation or more specifically included in another schedule, the following controlled substances are listed in Schedule III:

(1) a material, compound, mixture, or preparation containing any quantity of the following substances having a stimulant effect on the central nervous system,

including any salts, isomers, and salts of isomers of them that are theoretically possible within the specific chemical designation:

(i) a compound, mixture, or preparation in dosage unit form containing any stimulant substance included in Schedule II and which was listed as an excepted compound on August 25, 1971, pursuant to the federal Controlled Substances Act, and any other drug of the quantitative composition shown in that list for those drugs or which is the same except for containing a lesser quantity of controlled substances;

(ii) benzphetamine;

(iii) chlorphentermine;

(iv) clortermine; and

(v) phendimetrazine;

(2) a material, compound, mixture, or preparation containing any quantity of the following substances having a depressant effect on the central nervous system:

(i) a compound, mixture, or preparation containing any of the following drugs or their salts and one or more other active medicinal ingredients not included in any schedule:

(A) amobarbital;

(B) secobarbital; and

(C) pentobarbital;

(ii) any of the following drugs, or their salts, in suppository dosage form, approved by the federal Food and Drug Administration for marketing only as a suppository:

(A) amobarbital;

(B) secobarbital; and

(C) pentobarbital;

(iii) a substance containing any quantity of a derivative of barbituric acid or any salt of a derivative of barbituric acid;

(iv) chlorhexadol;

(v) glutethimide;

(vi) lysergic acid;

(vii) lysergic acid amide;

(viii) methyprylon;

(ix) sulfondiethylmethane;

(x) sulfonethylmethane;

(xi) sulfonmethane; and

(xii) tiletamine and zolazepam or any of their salts (other names for a tiletamine-zolazepam combination product: Telazol; other names for tiletamine: 2-(ethylamino)-2-(2-thienyl)-cyclohexanone; other names for zolazepam: 4-(2-fluorophenyl)-6,8-dihydro-1,3,8-trimethylpyrazolo-[3,4-e][1,4]-diazepin-7(1H)-one; flupyrazapon);

(3) nalorphine; and

(4) a material, compound, mixture, or preparation containing any of the following narcotic drugs, or their salts calculated as the free anhydrous base or alkaloid, in limited quantities as set forth below:

(i) not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with an equal or greater quantity of an isoquinoline alkaloid of opium;

(ii) not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(iii) not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with a fourfold or greater quantity of an isoquinoline alkaloid of opium;

(iv) not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(v) not more than 1.8 grams of dihydrocodeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(vi) not more than 300 milligrams of ethylmorphine per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(vii) not more than 500 milligrams of opium per 100 milliliters or per 100 grams, or not more than 25 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts; and

(viii) not more than 50 milligrams of morphine per 100 milliliters or per 100 grams with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(b) The [appropriate person or agency] may exempt by rule a compound, mixture, or preparation containing a stimulant or depressant substance listed in subsections (a)(1) and (2) from the application of all or part of this [Act], if the compound, mixture, or preparation contains one or more active medicinal ingredients not having a stimulant or depressant effect on the central nervous system and the admixtures are in combinations, quantity, proportion, or concentration that vitiate the potential for abuse of the substances having a stimulant or depressant effect on the central nervous system.

COMMENT

Schedule III reflects the substances controlled under Schedule III of the federal act, as published in 21 CFR 1308.13 (April 1, 1987). States that would not have a delegation of legislative authority problem may want to replace the specific listing of substances with an adoption of the federal schedules by reference, with any deletions or additions determined appropriate by the state administrator, or to delete this section and rely on the state administrator to schedule a substance.

SECTION 209. SCHEDULE IV TESTS.

(a) The [appropriate person or agency] shall add a substance to Schedule IV upon finding that:

(1) the substance has a low potential for abuse relative to substances included in Schedule III;

(2) the substance has currently accepted medical use in treatment in the United States; and

(3) abuse of the substance may lead to limited physical dependence or psychological dependence relative to substances included in Schedule III.

(b) The [appropriate person or agency] may add a substance to Schedule IV without making the findings required by subsection (a) if the substance is controlled under Schedule IV of the federal Controlled Substances Act by a federal agency as the result of an international treaty, convention, or protocol.

COMMENT

Subsection (b) allows placement of a substance on the schedule without the necessity of the findings required by subsection (a), if it is placed by a federal agency on the corresponding federal schedule pursuant to an international agreement. See 21 U.S.C. 811(d). As

enacted in 1970, the federal act contained such a provision, 21 U.S.C. 811(d)(1), which was expanded in 1978 with respect to application to the Convention on Psychotropic Substances, 21 U.S.C. 811(d)(2).

SECTION 210. SCHEDULE IV.

(a) Unless specifically excepted by state or federal law or state or federal regulation or more specifically included in another schedule, the following controlled substances are listed in Schedule IV:

(1) a material, compound, mixture, or preparation containing any of the following narcotic drugs, or their salts calculated as the free anhydrous base or alkaloid, in limited quantities as set forth below:

(i) not more than 1 milligram of difenoxin and not less than 25 micrograms of atropine sulfate per dosage unit;

(ii) dextropropoxyphene (alpha-(+)-4-dimethylamino-1,2-diphenyl-3-methyl-2-propionoxybutane);

(2) a material, compound, mixture, or preparation containing any quantity of the following substances having a depressant effect on the central nervous system, including any salts, isomers, and salts of isomers of them that are theoretically possible within the specific chemical designation:

(i) alprazolam;

(ii) barbital;

(iii) bromazepam;

(iv) camazepam;

(v) chloral betaine;

(vi) chloral hydrate;

(vii) chlordiazepoxide;

(viii) clobazam;

(ix) clonazepam;

(x) clorazepate;

(xi) clotiazepam;

(xii) cloxazolam;

(xiii) delorazepam;

(xiv) diazepam;

(xv) estazolam;

(xvi) ethchlorvynol;

(xvii) ethinamate;

(xviii) ethyl loflazepate;

(xix) fludiazepam;

(xx) flunitrazepam;

(xxi) flurazepam;

(xxii) halazepam;

(xxiii) haloxazolam;

(xxiv) ketazolam;

(xxv) loprazolam;

(xxvi) lorazepam;

(xxvii) lormetazepam;

(xxviii) mebutamate;

(xxix) medazepam;

(xxx) meprobamate;

(xxxi) methohexital;

(xxxii) methylphenobarbital (mephobarbital);

(xxxiii) midazolam;

(xxxiv) nimetazepam;

(xxxv) nitrazepam;

(xxxvi) nordiazepam;

(xxxvii) oxazepam;

(xxxviii) oxazolam;

(xxxix) paraldehyde;

(xl) petrichloral;

(xli) phenobarbital;

(xlii) pinazepam;

(xliii) prazepam;

(xliv) quazepam;

(xlv) temazepam;

(xlvi) tetrazepam; and

(xlvii) triazolam;

(3) a material, compound, mixture, or preparation containing any quantity of the following substance, including any salts, isomers, and salts of isomers of it that are theoretically possible: fenfluramine;

(4) a material, compound, mixture, or preparation containing any quantity of the following

substances having a stimulant effect on the central nervous system, including their salts, isomers, and salts of isomers:

(i) diethylpropion;

(ii) mazindol;

(iii) pemoline (including organometallic complexes and chelates thereof);

(iv) phentermine;

(v) pipradrol; and

(vi) SPA ((-)-1-dimethylamino-1,2-diphenylethane);

(5) a material, compound, mixture, or preparation containing any quantity of the following substance, including its salts: pentazocine.

(b) The [appropriate person or agency] may exempt by rule any compound, mixture, or preparation containing a depressant substance listed in subsection (a)(2) from the application of all or part of this [Act], if the compound, mixture, or preparation contains one or more active medicinal ingredients not having a depressant effect on the central nervous system and the admixtures are in combinations, quantity, proportion, or concentration that vitiate the potential for abuse of the substances having a depressant effect on the central nervous system.

COMMENT

Schedule IV reflects the substances controlled under Schedule IV of the federal act, as published in 21 CFR 1308.14 (April 1, 1987). States that would not have a delegation of legislative authority problem may want to replace the specific listing of substances with an adoption of the federal schedules by reference, with any deletions or additions determined appropriate by the state administrator, or to delete this section and rely on the state administrator to schedule a substance.

SECTION 211. SCHEDULE V TESTS.

(a) The [appropriate person or agency] shall add a substance to Schedule V upon finding that:

(1) the substance has a low potential for abuse relative to substances included in Schedule IV;

(2) the substance has currently accepted medical use in treatment in the United States; and

(3) abuse of the substance may lead to limited physical dependence or psychological dependence relative to the substances included in Schedule IV.

(b) The [appropriate person or agency] may add a substance to Schedule V without being required to make the findings required by subsection (a) if the substance is controlled under Schedule V of the federal Controlled Substances Act by a federal agency as the result of an international treaty, convention, or protocol.

COMMENT

Subsection (b) allows placement of a substance on the schedule without the necessity of the findings required by subsection (a), if it is placed by a federal agency on the corresponding federal schedule pursuant to an international agreement. See 21 U.S.C. 811(d). As

enacted in 1970 the federal act contained such a provision, 21 U.S.C. 811(d)(1), which was expanded in 1978 with respect to application to the Convention on Psychotropic Substances, 21 U.S.C. 811(d)(2).

SECTION 212. SCHEDULE V. Unless specifically excepted by state or federal law or state or federal regulation or more specifically included in another schedule, the following controlled substances are listed in Schedule V:

(1) a material, compound, mixture, or preparation containing any of the following narcotic drug and its salts: buprenorphine;

(2) a compound, mixture, or preparation containing any of the following narcotic drugs, or their salts calculated as the free anhydrous base or alkaloid, in limited quantities as set forth below, which also contains one or more nonnarcotic active medicinal ingredients in sufficient proportion to confer upon the compound, mixture, or preparation, valuable medicinal qualities other than those possessed by the narcotic drug alone:

(i) not more than 200 milligrams of codeine per 100 milliliters or per 100 grams;

(ii) not more than 100 milligrams of dihydrocodeine per 100 milliliters or per 100 grams;

(iii) not more than 100 milligrams of ethylmorphine per 100 milliliters or per 100 grams;

(iv) not more than 2.5 milligrams of diphenoxylate and not less than 25 micrograms of atropine sulfate per dosage unit;

(v) not more than 100 milligrams of opium per 100 milliliters or per 100 grams; and

(vi) not more than 0.5 milligram of difenoxin and not less than 25 micrograms of atropine sulfate per dosage unit; and

(3) a material, compound, mixture, or preparation containing any quantity of the following substances having a stimulant effect on the central nervous system, including their salts, isomers, and salts of isomers:

(i) propylhexedrine; and

(ii) pyrovalerone.

COMMENT

Schedule V reflects the substances controlled under Schedule V of the federal act, as published in 21 CFR 1308.15 (April 1, 1987) and updated through the April 4, 1988, issue of the Federal Register. States that would not have a delegation of legislative authority problem may want to replace the specific listing of substances with an adoption of the federal schedules by reference, with any deletions or additions determined appropriate by the state administrator, or to delete this section and rely on the state administrator to schedule a substance.

SECTION 213. PUBLISHING OF SCHEDULES. The [appropriate person or agency] shall publish updated schedules annually. Failure to publish updated

schedules is not a defense in any administrative or judicial proceeding under this [Act].

COMMENT

The administrative agency should distribute updated schedules to all registrants under the Act.

SECTION 214. CONTROLLED SUBSTANCE ANALOG TREATED AS SCHEDULE I SUBSTANCE. A controlled substance analog, to the extent intended for human consumption, must be treated, for the purposes of this [Act], as a substance included in Schedule I. Within [ ] days after the initiation of prosecution with respect to a controlled substance analog by indictment or information, the [prosecuting attorney] shall notify the [appropriate person or agency] of information relevant to emergency scheduling as provided for in Section 201(g). After final determination that the controlled substance analog should not be scheduled, no prosecution relating to that substance as a controlled substance analog may be commenced or continued.

COMMENT

This section is based on Section 203 of the federal Controlled Substances Act, 21 U.S.C. 813, as added by the Anti-Drug Abuse Act of 1986, §§ 1201-1204 (the "Controlled Substance Analogue Enforcement Act of 1986"). Because a controlled substance analog, as defined by Section 101, is an unscheduled substance, the section provides for procedures to be initiated to schedule the analog as well as to prevent further prosecution if the analog is found to be not appropriate for scheduling as a controlled substance.

ANALYSIS

SECTION 101. DEFINITIONS.

SECTION 201. AUTHORITY TO CONTROL. SUBSECTION (g)

SECTION 214. CONTROLLED SUBSTANCE ANALOG TREATED AS SCHEDULE I

Hypothetical

Joe Cooker is a former college student with a rudimentary knowledge of chemistry and a keen interest in illegal drugs both from the standpoint of abuse and economic profit. One day Joe learns through friends that by making a simple alteration in the chemical structure of the controlled substance ABC, he can produce a legal substance that, because it is not listed on any "schedule" is non-controlled and legal. The new drug has the same or greater hallucinogenic effect on the central nervous system as the outlawed ABC. Joe and his friends invest in some laboratory equipment, set up a primitive lab in a garage, and begin manufacturing the new substance ABCX or "Utopia" in bulk quantities. No scientific studies of the physical or psychological effects of ABCX on humans have ever been conducted. Indeed, no animal studies of any kind have taken place. ABCX has not been subjected to any of the controls by the FDA to protect the public, but Joe and his friends continue to manufacture and distribute ABCX in an indiscriminate manner. Soon public health officials are receiving reports of ABCX abusers needing medical and psychological treatment. Law enforcement officials are helpless to stop this activity because ABCX can't become a controlled substance until the lengthy process for scheduling has been completed.

The State of Justice where Joe resides, adopts an emergency scheduling provision similar to Section 201(g) of the UCSA (1990). The state scheduling agency initiates an "emergency scheduling" proceeding with respect to ABCX by publishing a public notice. Joe and his cohorts catch wind of this proceeding and simply begin to produce a new and even more dangerous analog of the controlled substance ABC which they dub ABCZ or "Eros." Six months later, when the state completes the emergency scheduling of ABCX, there is none being produced or sold on the street. Nearly a year later, law enforcement personnel have identified the new substance as ABCX and, once again, the state initiates "emergency scheduling" proceedings. Joe and his cohorts merely create another variation on the chemical structure of ABC and remain in business fully oblivious to the public health consequences of their activities.

Analysis

Unless the State of Justice enacts an "analog" statute similar to Section 101(3) and Section 214 of the UCSA (1990), this scenario may be played out indefinitely. Indeed, such scenarios were common prior to the 1986 enactment of the federal "analog" statutes. As set forth below, the UCSA (1990) provisions are narrower than the federal provisions, provide full protection for legitimate scientific research and for use of analogs for purposes other than human consumption. They also provide safeguards against improper prosecution for mere accidental production of a controlled substance analog and they

insure that the final determination of whether an analog is to be treated as a controlled substance is made by the appropriate state scheduling agency.

In 1986, congress reported that "fentanyl" analogs: had resulted in over 100 drug overdoses because they were more than 3,000 times more potent than the heroin molecule on which they were based. Moreover, one designer drug -- MPPP, an analog of Demerol (meperidine) had been marketed with processing impurities (MPTP) which caused almost total paralysis in dozens of users because of a suspected link between MPTP and Parkinson's disease. At least 400 additional persons had been identified as being at serious risk of developing Parkinson's disease because of their exposure to these impurities. There was, at the time, no provision under the UCSA (1970) or under federal law for prosecuting those responsible for the manufacture and sale of such uncontrolled substances.

Makers of "designer drugs," operating out of illicit laboratories, chemically alter a controlled substance by making a very slight alteration in the chemical structure of the controlled substances in order to produce a new, uncontrolled -- and therefore "legal" -- substance which produces an effect on the central nervous system nearly identical to that produced by the controlled substance on which it is based. Such "designer drugs" were originally produced in a successful effort to evade the drug laws. The new substances were produced more quickly than the Drug Enforcement Administration (DEA) could add them to the schedules of controlled substances; thus, the manufacture, distribution, and use of these "designer drugs" were not illegal under either federal or state drug laws. Moreover, each time DEA completed scheduling proceedings, the illicit chemists merely made another variation in the chemical structure and invented a new, uncontrolled designer drug.

There was nothing in the UCSA (1970) which would allow states to deal effectively with the "designer drug" problem in an expedited manner. Indeed all a state scheduling agency could do was to initiate formal scheduling proceedings with respect to the substances which might consume months or even years during which the traffickers of designer drugs could ply their trade at will without any concern for the public health effects of their products. Section 201(g) of the USCA (1990) seeks to rectify this situation by vesting state agencies with "emergency scheduling authority" which allows for the temporary placement of a substance in Schedule I based upon an expedited determination that such action is necessary to "avoid an imminent hazard to the public health." This "temporary scheduling" would expire at the end of one year. Moreover, a "temporary scheduling" order may not be made unless the state agency also initiates formal scheduling proceedings under Section 201(a) with respect to the substance.

Section 201(g) of the USCA (1990) is similar to the "emergency scheduling" provision under federal law, which is codified as 21 U.S.C. 811(h). This provision was enacted in 1984 as part of the initial federal response to the "designer drug" problem. It authorized the Attorney General to place a substance in Schedule I on a temporary basis in order to avoid an "imminent hazard to the public safety," after a 30-day public notice period. This "emergency scheduling" order would expire at the end of one year unless extended for a six-month period during the pendency of formal scheduling proceedings. The legislative history of this provision made clear that its purpose was "to protect the public from drugs of abuse that appear in the illicit drug traffic too rapidly to be effectively handled under the lengthy routine scheduling procedures." S. Rep. No. 225, 98th Cong., 2d Sess., at 264, *reprinted in* [1984] U.S. Code Cong. & Ad. News 3182, 3446. However, even this "emergency scheduling" authority proved ineffective in stemming the tide of "designer drugs."

Indeed, a congressional report noted in 1986 that:

> DEA in the course of its investigation has found a very small number of illicit chemists have been very carefully developing new drugs to stay ahead of DEA's scheduling actions. As a consequence, even with the emergency scheduling authority [of 21 U.S.C. 811 (h)(1)], the public remains at risk, and dangerous chemists are able to escape prosecution due to the following factors. First, there is an enormous number of drugs which can yet be developed. Second, there is an unavoidable delay in discovering that such drugs are being distributed. Third, there is the unavoidable obstacle of establishing that these drugs are being abused and pose an imminent threat to the public health. Finally, there is the [lapse] of time needed to undertake and complete action to control the drugs. The only way to effectively protect the public is to investigate and prosecute these chemists... prior to formal control of the drugs.

H.R. Rep. No. 848, 99th Cong., 2d Sess., at 5 (1986) (*emphasis added*).

Section 101(3)(i) and Section 214 of the UCSA (1990) represent a reasonable and measured response to the problems noted by Congress in the foregoing passage. They would allow for prosecution of "designer drug" cases, in limited circumstances, prior to the completion of any "emergency" or routine scheduling proceeding. First, Section 101(3)(i) limits the definition of "controlled substance analog" to substances which:

> (1) are substantially similar to the chemical structure of a controlled substance in Schedule I or II; and
>
> (A) which have a stimulant, depressant or hallucinogenic effect on the central nervous system that is substantially similar to the effect of a controlled substance in Schedule I or II; or
>
> (B) with respect to a particular individual, which the individual represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to that of a controlled substance in Schedule I or II.

The definition specifically excludes any substance (1) which is already a controlled substance; (2) which is subject to an approved new drug application; (3) which is subject to an exemption for investigational use by a particular person to the extent of conduct that is pursuant to that exemption; and (4) which is not intended for human consumption before such an exemption takes effect with respect to the substance. Moreover, Section 214 specifically provides that a controlled substance analog may only be treated as a substance included in Schedule I "to the extent [it is] intended for human consumption."

It is important to note, first of all, that the exceptions specified in Section 101(3)(i) insure that no prosecution is brought because of use of controlled substance analogs for legitimate scientific research or for purposes other than human consumption. This is as it should be since the motivating concerns behind these provisions are to protect the public health and safety and to allow for prosecution only of those unauthorized "chemists" and their "clients" who intentionally produce, distribute, and use "designer drugs" for purposes of human consumption. Likewise, this provision would not allow prosecution for the production of a controlled substance analog which was produced accidentally during the course of chemical research because such an "accidental analog" would not be produced

for purpose of human consumption. (Such a prosecution would also be barred by the requirements in the controlled substance offense provisions that an offense be committed "knowingly or intentionally.") Equally important is the fact that this provision would apply only to substances which are structurally similar to a controlled substance in Schedule I or II and which are either substantially similar in their pharmacological effect or which are intended or have been represented by the defendant to have such a substantially similar effect.

Moreover, the USCA (1990) contains safeguards against unfair prosecution and conviction even in the limited class of cases which falls within the scope of the statutes. Section 214 requires a prosecutor to notify the state scheduling agency of information relevant to "emergency scheduling" of a controlled substance analog within a certain number of days after initiating a prosecution with respect to that analog. Section 201(g) specifies that the state agency must initiate an "emergency scheduling" proceeding upon receipt of such notice. More importantly, Section 214 specifically provides that no prosecution relating to an analog may continue or take place following a final determination by the state agency that the substance should not be scheduled. Thus, the statutes insure that the final determination of what should be treated as a controlled substance will be made by the agency possessing the expertise to make such determinations scientifically and objectively.

It is also very important to note that the UCSA (1990) is much narrower than the comparable provisions of the Federal Controlled Substance Analogue Enforcement Act of 1986, which Congress enacted as Subtitle E of the Anti Drug Abuse Act of 1986. The federal provisions, which are codified as 21 U.S.C. 802(32) and 813, resemble the UCSA (1990) in that they limit prosecutions only to cases involving analogs intended for human consumption and contain definitional exceptions which safeguard legitimate scientific research and production or use of analogs for purposes other than human consumption. However, where the USCA (1990) allows only two alternative theories of prosecution (i.e., the state must show in all cases that the analog has a chemical structure that is substantially similar to a controlled substance in Schedule I or II and must also show either that the analog, in fact, has a pharmacological effect that is substantially similar to that of a controlled substance in Schedule I or II or that the analog was represented or intended to have such a substantially similar effect by the particular defendant), the federal provisions allow three alternative and greatly simplified theories of prosecution.

Thus, a person may be convicted of an analog offense under the federal provisions if the government establishes either (1) that the alleged "analog" is substantially similar in structure to a controlled substance in Schedule I or II; (2) that the "analog" has a substantially similar pharmacological effect on the central nervous system as a controlled substance in Schedule I or II; or (3) that the "analog" has been represented or intended to have such a substantially similar effect by the particular defendant in a case. *See* 21 U.S.C. 802(32)(a).

Thus there is no requirement under the federal provisions, as there is under the UCSA (1990), that an analog be shown to be substantially similar in chemical structure to a controlled substance in Schedule I or II in every case. Moreover, the federal statute does not require a prosecutor to notify the DEA of information relevant to "emergency scheduling" proceedings with respect to a particular substance after an analog prosecution is initiated based upon that substance, and does not provide that an analog prosecution shall not commence or continue if DEA makes a final determination not to schedule a

controlled substance.

It should be noted that the federal analog provisions are being used extensively -- and with considerable success -- by federal prosecutors. A unanimous panel of the United States Court of Appeals for the Fifth Circuit upheld the federal statute against a vagueness challenge in a prosecution involving MDMA. See *United States* v. *Desurra*, 865 F.2d 651 (5th Cir. 1989).

Finally, it is simply specious to claim, as some have, that enactment of either the analog provisions or the emergency scheduling statute would violate the *ex post facto* clause. None of the sections would authorize prosecution for activities involving analog substances which occur prior to their enactment by the states. Once the analog provisions are adopted, it would thereafter be illegal to manufacture, distribute or possess "controlled substance analogs" for purposes of human consumption with the exception of legitimate scientific research. Similarly, once a substance is added to Schedule I on an "emergency basis" it will thereafter be illegal to manufacture, distribute or possess the substance at least during the term of the emergency scheduling order. Furthermore, once the USCA (1990) is enacted, persons will be on fair notice of what the law requires for the reasons previously stated.

To summarize, there is no provision in the UCSA (1970) to deal with the "designer drug" problem. Thus, state law enforcement officials are powerless in combatting the manufacture and abuse of such "uncontrolled" substances. Section 201(g) of the UCSA (1990) would go part of the way toward resolving this problem by giving state scheduling agencies authority to do "emergency scheduling" of substances on a temporary basis to avoid "an imminent hazard to the public safety." Section 101(3) and Section 214 of the UCSA (1990) would give state and local law enforcement personnel the power to bring "analog" prosecutions in limited numbers of cases while at the same time, protecting legitimate scientific research and use of analogs for purpose other than human consumption. Finally, these provisions would provide adequate safeguards against criminal prosecution for the accidental production of a controlled substance analog and would insure that the final determination of whether an analog should be treated as a controlled substance be made by the state scheduling agency.

ARTICLE III

REGULATION OF MANUFACTURE, DISTRIBUTION, AND DISPENSING OF CONTROLLED SUBSTANCES

SECTION 301. RULES. The [appropriate person or agency] may adopt rules and charge reasonable fees relating to the registration and control of the manufacture, distribution, and dispensing of controlled substances in this State.

COMMENT

This section permits a state to cover the costs of actual registration and control by charging reasonable fees. However, the section does not permit a state to charge exorbitant fees as a means of fully implementing the regulatory provisions of the Act and thereby avoiding the need for additional state appropriations.

SECTION 302. REGISTRATION REQUIREMENTS.

(a) A person who manufactures, distributes, or dispenses a controlled substance within this State or who proposes to engage in the manufacture, distribution, or dispensing of a controlled substance within this State, shall obtain annually a registration issued by the [appropriate person or agency] in accordance with rules adopted by the [appropriate person or agency].

(b) A person registered by the [appropriate person or agency] under this [Act] to manufacture, distribute, dispense, or conduct research with controlled substances may possess, manufacture,

distribute, dispense, or conduct research with those substances to the extent authorized by the registration and in conformity with this Article.

(c) The following persons need not register and may lawfully possess controlled substances under this [Act]:

(1) an agent or employee of a registered manufacturer, distributor, or dispenser of a controlled substance if the agent or employee is acting in the usual course of business or employment;

(2) a common or contract carrier or warehouseman, or an employee thereof, whose possession of any controlled substance is in the usual course of business or employment; and

(3) an ultimate user or a person in possession of a controlled substance pursuant to a lawful order of a practitioner or in lawful possession of a substance included in Schedule V.

(d) The [appropriate person or agency] by rule may waive the requirement for registration of certain manufacturers, distributors, or dispensers upon finding it consistent with the public health and safety.

(e) A separate registration is required for each principal place of business or professional practice where the applicant manufactures, distributes, or dispenses controlled substances.

(f) The [appropriate person or agency] may inspect the establishment of a registrant or applicant for registration in accordance with rules adopted by the [appropriate person or agency].

COMMENT

This section requires any person who engages in, or intends to engage in, manufacturing, distributing, or dispensing of controlled substances to be registered by the state. Practitioners who administer, as that term is defined in Section 101(1), or who prescribe, will be required to register; however, under subsequent sections they may be exempt from the record-keeping requirements. By registering every individual dealing with controlled substances, the state will know who is responsible for a substance and who is dealing in these substances. The registration requirements imposed by this section are designed to eliminate many sources of diversion, both actual and potential.

Common and contract carriers, warehousemen, ultimate users, and agents of registrants are specifically exempted from the registration requirements since to require otherwise would be extremely burdensome and afford little increase in protection against diversion.

Annual registration is called for so that a licensee can be screened and the registration lists purified should the need arise. In addition, the annual registration requirement will be a form of check on persons authorized to deal in controlled substances.

SECTION 303. REGISTRATION.

(a) The [appropriate person or agency] shall register an applicant to manufacture or distribute substances included in Schedules I through V unless the [appropriate person or agency] determines that the issuance of the registration would be inconsistent with the public interest. In determining the public

interest, the [appropriate person or agency] shall consider the following factors:

(1) maintenance of effective controls against diversion of controlled substances into other than legitimate medical, scientific, research, or industrial channels;

(2) compliance with state and local law;

(3) promotion of technical advances in the art of manufacturing controlled substances and the development of new substances;

(4) convictions of the applicant under laws of another country or federal or state laws relating to a controlled substance;

(5) past experience of the applicant in the manufacture or distribution of controlled substances, and the existence in the applicant's establishment of effective controls against diversion of controlled substances into other than legitimate medical, scientific, research, or industrial channels;

(6) furnishing by the applicant of false or fraudulent material in an application filed under this [Act];

(7) suspension or revocation of the applicant's federal registration or the applicant's registration of another state to manufacture, distribute, or dispense controlled substances as authorized by federal law; and

(8) any other factors relevant to and consistent with the public health and safety.

(b) Registration under subsection (a) entitles a registrant to manufacture or distribute a substance included in Schedule I or II only if it is specified in the registration.

(c) A practitioner must be registered with the [appropriate person or agency] before dispensing a controlled substance or conducting research with respect to a controlled substance included in Schedules II through V. The [appropriate person or agency] need not require separate registration under this Article for a practitioner engaging in research with nonnarcotic substances included in Schedules II through V if the registrant is already registered under this Article in another capacity. A practitioner registered under federal law to conduct research with a substance included in Schedule I may conduct research with the substance in this State upon furnishing the [appropriate person or agency] evidence of the federal registration.

(d) A manufacturer or distributor registered under the federal Controlled Substances Act [21 U.S.C. 801 et seq.] may submit a copy of the federal application as an application for registration as a manufacturer or distributor under this section. The [appropriate person or agency] may require a

manufacturer or distributor to submit information in addition to the application for registration under the federal act.

COMMENT

This section sets out the factors under which a state authority registers persons to engage in the various activities concerning controlled substances. These factors are similar to those which must be considered in registering an applicant under the federal act.

Practitioners are to be registered to dispense substances in Schedules II through V, comprising all substances with recognized medical uses, if they are authorized to dispense under the laws of the state. If those practitioners wish to conduct research in nonnarcotic substances in Schedules II through V, the state authority may require, or not require, a separate registration. This permissive language will be beneficial to those states that wish to keep close tabs on all those individuals who conduct research within their borders. Practitioners who are registered under federal law to conduct research with respect to Schedule I substances are permitted to conduct that research in a state solely upon notification to the appropriate state authority of a valid federal registration.

Under subsection (d), a manufacturer or distributor registered under federal law may be registered under this Act, upon submitting the information contained in the application for federal registration and any additional information required by the state. The applicant would still be subject to the determination under subsection (a).

SECTION 304. SUSPENSION OR REVOCATION OF REGISTRATION.

(a) The [appropriate person or agency] may suspend or revoke a registration under Section 303 to manufacture, distribute, or dispense a controlled substance upon finding that the registrant has:

(1) furnished false or fraudulent material information in an application filed under this [Act];

(2) been convicted of a felony under a state or federal law relating to a controlled substance;

(3) had the registrant's federal registration suspended or revoked and is no longer authorized by federal law to manufacture, distribute, or dispense controlled substances; or

(4) committed an act that would render registration under Section 303 inconsistent with the public interest as determined under that section.

(b) The [appropriate person or agency] may limit revocation or suspension of a registration to the particular controlled substance with respect to which grounds for revocation or suspension exist.

(c) If a registration is suspended or revoked, the [appropriate person or agency] may place under seal all controlled substances owned or possessed by the registrant at the time of suspension or the effective date of the revocation order. No disposition may be made of substances under seal until the time for taking an appeal has elapsed or until all appeals have been concluded unless a court, upon application, orders the sale of perishable substances and the deposit of the proceeds of the sale with the court. When a revocation

order becomes final, the court may order the controlled substances forfeited to the state.

(d) The [appropriate person or agency] may seize or place under seal any controlled substance owned or possessed by a registrant whose registration has expired or who has ceased to practice or do business in the manner permitted by the registration. The controlled substance must be held for the benefit of the registrant or the registrant's successor in interest. The [appropriate person or agency] shall notify a registrant, or the registrant's successor in interest, whose controlled substance is seized or placed under seal, of the procedures to be followed to secure the return of the controlled substance and the conditions under which it will be returned. The [appropriate person or agency] may not dispose of a controlled substance seized or placed under seal under this subsection until the expiration of 180 days after the controlled substance was seized or placed under seal. Costs incurred by the [appropriate person or agency] in seizing, placing under seal, maintaining custody, and disposing of any controlled substance under this subsection may be recovered from the registrant, any proceeds obtained from the disposition of the controlled substance, or from both. The [appropriate person or agency] shall pay to the registrant or the registrant's

successor in interest any balance of the proceeds of any disposition remaining after the costs have been recovered.

(e) The [appropriate person or agency] shall promptly notify the Drug Enforcement Administration of all orders restricting, suspending, or revoking registration and of all forfeitures of controlled substances.

COMMENT

Subsection (a) sets out the criteria upon which a registration can be revoked or suspended during the year in which that particular registration is in force. In denial of registration renewal situations for manufactures or distributors, the criteria in this subsection should not be used. Instead, the state authority should apply the broader criteria set out in Section 303(a) relating to initial registration.

Subsection (b) allows the state authority to limit the revocation or suspension of a registration to a particular substance rather than revoking or suspending the whole registration. This will be especially effective where a manufacturer committed a criminal violation, but certain mitigating circumstances militate against removing full registration. Instead, the right to manufacture a particular substance could be suspended or revoked. This would put the manufacturer out of the business of manufacturing the substance but would not totally remove the manufacturer's livelihood.

Subsection (c) relates to forfeitures of controlled substances where the registrant's registration has been revoked. This subsection is permissive rather than mandatory. Thus, if the registration of a sole medical practitioner or a community pharmacy in a small town were revoked, the state authority could allow the former registrant to sell those substances to a new owner-registrant so that the inhabitants of the particular town would not have to go without needed pharmaceutical supplies.

Subsection (d) authorizes seizure or placement under seal of controlled substances owned or possessed

by a registrant whose registration has expired or who has otherwise ceased to practice or do business. This authorization is based on the similar authorization granted in 1984 to the United States Attorney General under 21 U.S.C. 824(g).

Subsection (e) is necessary because suspension or revocation of a state registration is grounds for denial, suspension, or revocation of a Federal registration.

SECTION 305. ORDER TO SHOW CAUSE.

(a) Before denying, suspending, revoking, or refusing to renew a registration, the [appropriate person or agency] shall serve upon the applicant or registrant an order to show cause why registration should not be denied, suspended, or revoked, or the renewal refused. The order must state its grounds and direct the applicant or registrant to appear before the [appropriate person or agency] at a specified time and place not less than 30 days after the date of service of the order. In case of a refusal to renew a registration, the order must be served not later than 30 days before expiration of the registration. The proceedings must be conducted in accordance with [insert appropriate administrative procedures]. The proceedings do not preclude any criminal prosecution or other proceeding. A proceeding to refuse to renew a registration does not affect the existing registration, which remains in effect until completion of the proceeding.

(b) The [appropriate person or agency] may suspend, without an order to show cause, a registration simultaneously with the institution of proceedings under Section 304, or if renewal of registration is refused, upon finding that there is an imminent danger to the public health or safety which warrants the action. The suspension continues in effect until the conclusion of the proceedings, including judicial review, unless earlier withdrawn by the [appropriate person or agency] or dissolved by a court of competent jurisdiction.

COMMENT

This section requires the state authority to serve upon a registrant an order to show cause why the registrant's registration should not be revoked or suspended or renewal refused prior to taking such action. The order should contain enough information to fully apprise the registrant of the charges. If, during the pendency of an administrative hearing to deny a renewal registration, the registration runs out, this section keeps the old registration in force until the administrative hearing is completed.

Subsection (b) allows the state authority, in cases of imminent danger to the public health or safety, to suspend the registration simultaneously with the institution of proceedings to revoke, suspend, or refuse a renewal. Such an emergency situation can occur when a practitioner, knowing that action is being taken to revoke the practitioner's registration, begins to buy and divert large quantities of controlled substances. Rather than having to wait until all administrative proceedings have been completed and allow substantial diversion of these substances, the state authority may act immediately to suspend the registration. It may then place all controlled substances under seal until the administrative hearing is completed.

SECTION 306. RECORDS OF REGISTRANTS. A person registered to manufacture, distribute, or dispense controlled substances under this [Act] shall keep records and maintain inventories in compliance with the federal law and rules adopted by the [appropriate person or agency].

COMMENT

This section ties into the federal system. By tying the state and federal systems together, different and duplicative "paper" requirements are avoided. However, if a state sees a need for any additional recordkeeping or inventory requirements, the appropriate state agency may impose those requirements by rule.

This section is also intended to exempt those individuals exempted by Federal law from recordkeeping and inventory requirements.

SECTION 307. ORDER FORMS. A registrant may distribute a substance included in Schedule I or II to another registrant only by means of an order form. Compliance with federal law respecting order forms constitutes compliance with this section.

COMMENT

This section requires order forms for the distribution of any Schedule I or II substances. It, too, is tied into the federal system and compliance with the federal order form requirements should be sufficient to fulfill any state order form requirements.

SECTION 308. PRESCRIPTIONS.

(a) As used in this section, "medical treatment" includes dispensing or administering a narcotic drug for pain, including intractable pain.

(b) A person may dispense a controlled substance only as provided in this section.

(c) Except when dispensed directly by a practitioner, other than a pharmacy, to an ultimate user, a substance included in Schedule II may not be dispensed without the written prescription of a practitioner.

(d) In an emergency, as defined by rule of the [appropriate person or agency], a substance included in Schedule II may be dispensed upon oral prescription of a practitioner, reduced promptly to writing, signed by the practitioner, and filed by the pharmacy. The pharmacy shall keep prescriptions in conformity with Section 306. A prescription for a substance included in Schedule II may not be refilled.

(e) Except when dispensed directly by a practitioner, other than a pharmacy, to an ultimate user, a substance included in Schedule III or IV, which is a prescription drug as determined under [appropriate state or federal statute], may not be dispensed without a written or oral prescription of a practitioner. The prescription must not be filled or refilled more than

six months after its date or be refilled more than five times, unless renewed by the practitioner.

(f) A substance included in Schedule V may be distributed or dispensed only for a medical purpose, including medical treatment or authorized research.

(g) A practitioner may dispense or deliver a controlled substance to or for an individual or animal only for medical treatment or authorized research in the ordinary course of that practitioner's profession.

(h) No civil or criminal liability or administrative sanction may be imposed on a pharmacist for action taken in reliance on a reasonable belief that an order purporting to be a prescription was issued by a practitioner in the usual course of professional treatment or in authorized research.

(i) An individual practitioner may not dispense a substance included in Schedule II, III, or IV for that individual practitioner's personal use except in a medical emergency.

COMMENT

This section is not intended to impose any limitation on a physician or authorized hospital staff to administer or dispense controlled substances to persons with intractable pain for which no relief or cure is possible or none has been found after reasonable efforts. See 21 CFR 1306.07(c). Subsections (a), (f), and (g) are derived from the California Health and Safety Code §§ 11152, 11153(a), and 11156. "Dispense" is defined in Section 101(5) to include prescribe, administer, package, label, and compound. In subsection (c) the requirement for the practitioner's signature is added due to a similar requirement in 21 CFR 1306.05

(July 1, 1987). Under that regulation, the responsibility for proper dispensing of controlled substances is upon the prescribing practitioner and a corresponding responsibility rests with a pharmacist who fills a prescription. In subsection (f) medical treatment is specifically described as including use of narcotic drugs for painkilling purposes to make it clear to practitioners that such use is not prohibited by this Act. In subsection (g) a reasonable belief exception is added for filling what appears to be a valid prescription.

SECTION 309. DIVERSION PREVENTION AND CONTROL.

(a) In this section, "diversion" means the transfer of a controlled substance from a lawful to an unlawful channel of distribution or use.

(b) The [appropriate person or agency] shall regularly prepare and make available to other state regulatory, licensing, and law enforcement agencies a report on the patterns and trends of distribution, diversion, and abuse of controlled substances.

(c) The [appropriate person or agency] shall enter into written agreements with local, state, and federal agencies to improve identification of sources of diversion and to improve enforcement of and compliance with this [Act] and other laws and regulations pertaining to unlawful conduct involving controlled substances. An agreement must specify the roles and responsibilities of each agency that has information or authority to identify, prevent, or control drug diversion and drug abuse. The [appropriate person or

agency] shall convene periodic meetings to coordinate a state diversion prevention and control program. The [appropriate person or agency] shall arrange for cooperation and exchange of information among agencies and with other states and the federal government.

(d) The [appropriate person or agency] shall report [annually] to the governor and to the presiding officer [of each house] of the [legislative assembly] on the outcome of the program with respect to its effect on distribution and abuse of controlled substances, including recommendations for improving control and prevention of the diversion of controlled substances in this State.

COMMENT

This section is patterned after Wisconsin Statutes Section 161.36. In selecting controlled substances it is intended that medical usefulness of the controlled substances be considered. Note that "diversion" as used in Section 303(a)(5) refers to diversion "into other than legitimate medical, scientific, research, or industrial channels."

ARTICLE IV

OFFENSES AND PENALTIES

SECTION 401. PROHIBITED ACTS A; PENALTIES.

(a) Except as authorized by this [Act], a person may not knowingly or intentionally manufacture, distribute, or deliver a controlled substance, or possess a controlled substance with intent to manufacture, distribute, or deliver, a controlled substance.

(b) A person is guilty of a crime and upon conviction may be imprisoned for not more than [ ], fined not more than [ ], or both, for a violation of subsection (d) with respect to:

(1) a mixture or substance containing heroin;

(2) a mixture or substance containing:

(i) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(ii) cocaine, or a salt, isomer, or salt of isomer of it;

(iii) ecgonine, or a derivative, salt, isomer, or salt of isomer of it; or

(iv) a compound, mixture, or preparation containing any quantity of a substance referred to in subparagraphs (i) through (iii);

(3) a mixture or substance described in paragraph (2) which contains cocaine base;

(4) phencyclidine or a mixture or substance containing phencyclidine;

(5) a mixture or substance containing lysergic acid diethylamide;

(6) a mixture or substance containing methamphetamine or any of its salts, isomers, or salts of isomers; or

(7) a mixture or substance containing [29] grams or more of marijuana.

(c) A person is guilty of a crime and upon conviction may be imprisoned for not more than [ ], fined not more than [ ], or both, for a violation of subsection (a) in the case of a controlled substance included in Schedule I or II, except as provided in subsections (b) and (f).

(d) A person is guilty of a crime and upon conviction may be imprisoned for not more than [ ], fined not more than [ ], or both, for a violation of subsection (a) in the case of a controlled substance included in Schedule III.

(e) A person is guilty of a crime and upon conviction may be imprisoned for not more than [ ], fined not more than [ ], or both, for a violation of subsection (a) in the case of a controlled substance included in Schedule IV or V.

(f) A person is guilty of a crime and upon conviction may be imprisoned for not more than [ ], fined not more than [ ], or both, for a violation of subsection (a) in the case of marijuana, except as provided in subsection (b)(7).

[(g) Notwithstanding any other provision of this section:

(1) A person may not knowingly or intentionally distribute, purchase, manufacture, or bring into this State, or possess [28] grams or more of any mixture or substance containing heroin. If the quantity involved is:

(i) [28] grams or more, but less than [100] grams, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ];

(ii) [100] grams or more, but less than [500] grams, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than

[ ] nor more than [ ] and fined not less than [ ];

(iii) [500] grams or more, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ];

(2) A person may not knowingly or intentionally manufacture, distribute, purchase, bring into this State, or possess [56] grams or more of any mixture or substance containing cocaine or its related substances as described in subsection (b)(2). If the quantity involved is:

(i) [56] grams or more, but less than [450] grams, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ];

(ii) [450] grams or more, but less than [1] kilogram, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ];

(iii) [1] kilogram or more, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ];

(3) A person may not knowingly or intentionally manufacture, distribute, purchase, bring into this State, or possess [5] grams or more of a mixture or substance containing cocaine base. If the quantity involved is:

(i) [5] grams or more, but less than [25] grams, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ];

(ii) [25] grams or more, but less than [50] grams, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ];

(iii) [50] grams or more, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ];

(4) A person may not knowingly or intentionally distribute, purchase, manufacture, or bring into this State, or possess [10] grams or more of a mixture or substance containing phencyclidine. If the quantity involved is:

(i) [10] grams or more, but less than [50] grams, the person is guilty of a crime and upon

conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ], or both;

(ii) [50] grams or more, but less than [100] grams, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ];

(iii) [100] grams or more, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ];

(5) A person may not knowingly or intentionally distribute, purchase, manufacture, bring into this State, or possess [500] milligrams or more of a mixture or substance containing lysergic acid diethylamide. If the quantity involved is:

(i) [500] milligrams or more, but less than [1] gram, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ];

(ii) [1] gram or more, but less than [5] grams, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than

[ ] nor more than [ ] and fined not less than [ ];

(iii) [5] grams or more, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ];

(6) A person may not knowingly or intentionally distribute, purchase, manufacture, bring into this State, or possess [56] grams or more of a mixture or substance containing methamphetamine or any of its salts, isomers, or salts of isomers. If the quantity involved is:

(i) [56] grams or more, but less than [450] grams, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ];

(ii) [450] grams or more, but less than [1] kilogram, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ];

(iii) [1] kilogram or more, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ];

(7) A person may not knowingly or intentionally distribute, purchase, manufacture, bring into this State, or possess [10] kilograms or more of marijuana. If the quantity of marijuana involved is:

(i) [10] kilograms or more, but less than [50] kilograms, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ];

(ii) [50] kilograms or more, but less than [100] kilograms, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ];

(iii) [100] kilograms or more, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ].]

(h) Except as authorized by law, a person may not knowingly or intentionally possess piperidine with intent to manufacture a controlled substance, or knowingly or intentionally possess piperidine knowing, or having reasonable cause to believe, that the piperidine will be used to manufacture a controlled substance contrary to this [Act]. A person who violates this subsection is guilty of a crime and upon conviction

may be imprisoned for not more than [ ], fined not more than [ ], or both.

[(i) Except as provided in subsection (j), with respect to an individual who is found to have violated subsection (g), adjudication of guilt or imposition of sentence may not be suspended, deferred, or withheld, nor is the individual eligible for parole before serving the mandatory term of imprisonment prescribed by this section.]

(j) Notwithstanding any other provision of this [Act], the defendant or the attorney for the state may request the sentencing court to reduce or suspend the sentence of an individual who is convicted of a violation of this section and who provides substantial assistance in the identification, arrest, or conviction of a person for a violation of this [Act]. The court shall give the arresting agency an opportunity to be heard in reference to the request. Upon good cause shown, the request may be filed and heard in camera. The judge hearing the motion may reduce or suspend the sentence if the judge finds that the assistance rendered was substantial.

COMMENT

Except for Section 406, which contains a specific reference to a misdemeanor, criminal penalties throughout the Act are referred to by language "is guilty of a crime and upon conviction may be imprisoned for not more than [ ], fined not more than [ ], or both." States that have a criminal penalty

ANALYSIS

SECTION 401. PROHIBITED ACTS A–; PENALTIES.

DISCUSSION OF 401(b)–(f) DISTRIBUTING RELATED OFFENSES

401(g) QUANTITY BASED ENHANCED PENALTIES

Introduction

Section 401 generally prohibits the manufacture, cultivation, distribution or possession with intent to distribute controlled substances. The subsections are organized to permit flexibility in punishment ranges based on the dangerousness of the substance and the quantity involved.

401(b)(1)–(7) establishes separate punishment provisions for trafficking in the seven most abused controlled substances (heroin, cocaine, cocaine base or "crack", PCP,LSD, methamphetamine and marijuana). This structure will facilitate its modification should drug abuse patterns change in the future.

401(c)–(f) sets forth a descending penalty structure for remaining controlled substances based on the schedule in which they are located. This tracks Article II's long established approach of placing the drugs in schedules according to their medical value and potential for abuse.

401(g) targets persons dealing in large quantities of the same seven substances listed in 401(b)(1)–(7).

Each subsection in 401(g), sets forth 3 tiers of punishment based on ascending quantities. While amounts are suggested, they are bracketed in recognition that significant traffickers in Wyoming will handle different amounts than those in Florida. (See Appendix for current state penalty schemes.)

Because prison overcrowding is a significant concern in the vast majority of jurisdictions, the bracketed amounts and years will permit states to identify those limited circumstances where some mandatory time is appropriate. A state with overcrowded prisons may place the amounts quite high and the years relatively low. Nevertheless, these provisions permit a state to identify those for whom prison space would be made. For drug traffickers certainty is at least as important as severity.

Hypothetical

The State of Justice adopts Section 401(g) of the UCSA (1990) and sets the threshold amount for imposition of enhanced or mandatory minimum penalties in large-scale trafficking cases involving cocaine at 500 grams or more of a mixture or substance containing cocaine and at five grams or more of a mixture or substance containing cocaine base ("crack").

Sometime thereafter, a drug courier named Sally Mule enters the State of Justice with one kilogram of 80 percent pure cocaine powder (cocaine hydrochloride) concealed on her person. Mule delivers the cocaine to Joe Doper pursuant to instructions from the supplier for whom he works. Joe Doper pays for the cocaine using money provided by Jack Financial, a well-to-do "investor" who has agreed with Doper that he will "front" the money for the cocaine but only after telling Doper that he doesn't want to know the specifics of the drug transaction and doesn't want to come anywhere near the cocaine itself.

Doper takes the kilogram of cocaine and "cuts" it once by adding one kilogram of Mannitol to create two kilograms (2,000 grams) of cocaine powder at less than 50 percent purity. He gives 1,000 grams of the diluted cocaine to Tom Aider and 1,000 grams to Dick Abettor. Tom Aider splits his cocaine into four equal quantities of 250 grams apiece for delivery to four of his "clients" and makes the deliveries.

Dick Abettor runs a chain of "stash houses" for the manufacture of "crack" throughout the city and delivers quantities of the cocaine to each of the houses where it is quickly converted into 100 grams of crack for delivery to the large number of "street dealers" working out of each of the houses. The police "take down" two of the houses later that day. In "House A", they find only one individual and 25 grams of crack. In "House B" they also find only one individual and 11 grams of crack divided into numerous plastic vials. Laboratory analysis of the 11 grams of crack reveals that it contains 9.8 percent of cocaine base.

Analysis

If Mule were arrested upon entering Justice, she would be subject to an enhanced or mandatory minimum penalty under Section 401(g) based upon her possession of the one kilogram of cocaine. This would be true notwithstanding her role as a "mere" courier because of her instrumental role in supplying the cocaine markets in Justice. However, a judge could consider her "minor" role in the drug trafficking scenario as a mitigating factor in setting a sentence within the range provided by Section 401(g). Moreover, if she agreed to make a "controlled delivery" of the cocaine to Doper following her arrest, she might avoid the enhanced or mandatory minimum penalties based upon her "substantial assistance" to law enforcement.

Both Doper and his co-conspirator, Jack Financial, would be subject to the enhanced or mandatory minimum penalties. Doper, of course, would be liable based on his role in trafficking the cocaine. Financial would be subject to the same penalties because he conspired with Doper concerning the acquisition of more than 500 grams of cocaine. This would be true notwithstanding his affirmative efforts to insulate himself from the drug trafficking.

Tom Aider and Dick Abettor would be subject to the penalties under Section 401(g) based on the fact that each of them distributed 1,000 grams of cocaine powder. This would be true notwithstanding the fact that the powder was less than 50 percent pure and thus contained less than 500 grams of pure cocaine because the penalties under Section 401(g) are based upon "gross weight," including that of any cutting agent, in order to reflect the realities of the drug markets.

The person found in "House A" would be subject to the Section 401(g) penalties based on his possession of 25 grams of crack (cocaine base). The person in "House B" would be subject to the same penalties based on his possession of the 11 "gross weight" grams of crack. It would defy credulity for either of these individuals to claim that they possessed such a large quantity of crack --- a quantity set by the state Legislature of Justice to reflect the quantity typically involved in large-scale trafficking in Justice -- merely for purposes of personal use.

The national market for narcotics and illegal drugs in the United States is pyramidal in structure. At the apex of the pyramid are the large scale traffickers and suppliers who either import controlled substances into the United States or who deal in bulk quantities of controlled substances to smaller-scale drug wholesalers. In the middle are the drug wholesalers who sell wholesale quantities of controlled substances to drug retailers or "street dealers." At the bottom of the pyramid are the ultimate consumers who buy small quantities of controlled substances for personal use. Together, the drug cultivators, manufacturers, smugglers, wholesalers, and all persons who assist them, make up what is known as the "supply-side" of the drug market.

The UCSA (1970) does not differentiate between drug wholesaler/suppliers and drug retailers in terms of the penalties for trafficking offenses. Both are subject to the same range of penalties regardless of the quantity of drugs involved in their respective offenses. Both are eligible for probation, parole, or suspension of sentence. As a result, persons convicted of trafficking in relatively large "wholesale" quantities of controlled substances often avoid imprisonment altogether while drug retailers, convicted of trafficking in lesser quantities of the same controlled substance, often receive very substantial terms of imprisonment.

Section 401(g) of the UCSA (1990) will rectify this situation by allowing states to impose greatly enhanced maximum prison terms and, at their option, mandatory minimum prison terms on those involved in supplying the retail drug markets as indicated by the quantity of drug involved in the offense. Only the most commonly abused substances have been singled out for "penalty enhancement" under this provision. Both the quantity of drug involved in the offense and the length of the prison term(s) to be served have been left bracketed to allow the individual states to set levels that reflect both the realities of their individual drug markets and the abilities of their prison systems to absorb those sentenced to mandatory minimum prison terms. The "mandatory minimum" option will permit a state to prioritize its scarce prison space for a class of drug offenders who in the view of its legislature, should go to prison in every case. This option also comports with the recommendation by the White House Conference for a Drug Free America that federal and state governments enact mandatory minimum sentences for drug traffickers.[1]

This provision of the USCA (1990) is based on federal legislation. In 1986, Congress acted to combat the "supply-side" of the drug market by providing for the imposition of "mandatory minimum" prison terms against those who traffic in particularly large quantities of the most commonly abused controlled substances. *See* 21 U.S.C. § 841(b)(1)(A)-(B) and § 960(b)(1)-(2). These provisions require courts to impose prison terms of at least the specified minimum (e.g., five or ten years), which varies depending on

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[1] The White House Conference For A Drug Free America, Final Report, 60 (June, 1988).

the quantity of drug involved in the offense and the prior drug conviction record of the defendant; they also allow the court, in its discretion, to impose a higher prison term up to the specified maximum. Persons sentenced under these provisions are not eligible for probation, parole or suspension of sentence but must serve the entire term of imprisonment imposed.

Congress stated its "strong belief" that:

> [T]he Federal government's most intense focus ought to be on [those] who are responsible for creating and delivering very large quantities of drugs....[Thus,] the Committee [reserved the most severe penalties for offenses involving] quantities of drugs which if possessed by an individual would likely be indicative of operating at such a high level. The quanti[ties] [are] based on the minimum quantity that might be controlled or directed by a trafficker in a high place in the processing and distribution chain.

The Committee determined that a second level of focus ought to be on the managers of the retail level traffic, the person who is filling bags with heroin, packaging crack into vials, or wrapping PCP into aluminum foil and doing so in substantial street quantities. The Committee is calling such traffickers serious traffickers because they keep the street markets going. [These traffickers are subject to a lesser level of mandatory minimum penalties.] H.R. Rep. No. 845, 99th Cong., 2d Sess. 11–12 (1986).

The federal mandatory minimum sentencing provisions have fulfilled their purpose of insuring that persons who traffic in extremely large quantities of the most commonly abused substances -- and thus supply the retail markets -- will face substantial prison terms which must be served in their entirety. The federal government has had enormous success with these provisions and, as discussed below, they have been consistently upheld by the federal courts. In addition, several states (e.g., Florida) have enacted mandatory minimum prison terms for persons trafficking in large amounts of the most commonly abused substances.

A considerable body of caselaw has developed construing various features of the federal provisions which are also found in the UCSA (1990). The following discussion addresses several of the more salient features. It also addresses the various unsuccessful constitutional challenges to the federal mandatory minimum sentencing scheme.

"Mixture or Substance"

The non-mandatory and unenhanced penalty provisions of Section 401(b)-(f) and the "enhanced/mandatory minimum" penalty provisions of Section 401(g) of the UCSA (1990) use a term from the federal mandatory minimum sentencing provisions in that they speak of a "mixture or substance containing [a specified controlled substance]." The purpose of this phrasing is to eliminate any concern with the purity of the controlled substance in determining which range of penalties apply to a particular offense. In other words, courts would take the controlled substance "as is" and consider only the gross weight -- including the weight of any "cut", binder, carrier-medium or excipient -- in determining the appropriate range of penalties under the statute.

Assume, for example, that a defendant stands convicted of distributing 100 grams of blotter paper that has been impregnated with LSD.[2] The net weight of the LSD in its pure form might be only 670 milligrams; under the UCSA (1990), however, the trial court would consider only the gross weight of the substance, including that of the blotter paper medium, in determining the appropriate range of penalties for the defendant. The court could then select, from within that range of penalties, a higher or lower sentence based on the retail purity of the drug involved in the particular offense or any other factor that the court might consider in aggravation or mitigation of sentence.

Under the federal system, the aforementioned defendant would be subject to the penalties for trafficking offenses involving ten grams or more of "a mixture or substance containing a detectable amount of [LSD]" which requires imposition of a term of imprisonment ranging from ten years up to life if the defendant has no prior felony drug convictions. *See* 21 U.S.C. § 841(b)(1)(A)(v). This would be true notwithstanding the fact that the net weight of the LSD was 670 milligrams. *See United States* v. *Marshall*, 706 F.Supp. 650 (C.D. Ill. 1989). The seeming harshness of this result disappears when one considers that, in the Marshall case, the defendant distributed 113 grams of blotter paper impregnated with 670 milligrams of LSD which translated into 11,751 "hits" or individual doses of LSD, with each "hit" sufficient to induce a "trip" lasting several hours or more. *Id.* at 651. *Accord United States* v. *Bishop*, 704 F. Supp. 910 (N.D. Iowa 1989) (punishment imposed based on gross weight of 19.75 grams of blotter paper impregnated with 263 milligrams of LSD constituting 2,630 individual "hits" or doses"); *Chapman v. United States*, No. 90-5744, (U.S. May 30, 1991) (punishment imposed based on gross weight of 5.7 grams of blotter paper impregnated with 50 milligrams of LSD); *See also United States* v. *Smith*, 840 F.2d 886 (11th Cir. 1988) (punishment imposed based upon gross weight of a mixture containing cocaine base). *Cf. United States* v. *McGeehan*, 824 F.2d 677, 681 (8th Cir. 1987) (noting *in dicta* the use of the phrase "mixture or substance containing a detectable amount of [LSD] 'demonstrates' that Congress was aware of the difference between LSD and LSD combined with a carrier substance").

The reliance on gross weight in setting the ranges of enhanced or mandatory minimum penalties simply reflects the realities of the modern drug markets in which drugs are commonly marketed based not only on purity but on the gross weight of the substance in question. *See* H.R. Rep. No. 845, 99th Cong., 2d Sess. at 12 (Congress took a "market-oriented approach" based upon "quantities...of mixtures, compounds, or preparations that contain a detectable amount of the drug -- these are not necessarily quantities of pure

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[2] LSD, like many other controlled substances, is far too potent in its pure form to be of any use to anyone who would ingest it. It is necessary, therefore, to dilute the LSD prior to ingestion. LSD is commonly mixed with an alcohol solution in which the LSD molecules are diluted and dispersed while, at the same time, retaining their hallucinogenic properties. This alcohol-based liquid has a tendency to evaporate over time; thus, various means have been devised to "capture" the diluted LSD in a stable "carrier-medium" which may be easily digested. The most common methods include placing drops of the LSD/alcohol solution on small squares or onto sugar cubes. The carrier-medium containing the LSD is then sold to users who ingest the entire substance. Other controlled substances such a heroin, cocaine, and methamphetamine are commonly "cut" with non-active ingredients to reduce their purity and potency prior to human ingestion. The important point is that the blotter paper itself--or any other form of dilutant, cutting agent, or carrier-medium--is intended to be ingested by the user with the drug itself.

substance"). Thus, a trafficker purchasing a kilogram of cocaine or heroin will expect that the kilogram is actually a mixture containing cocaine or heroin that has been "cut" or stepped on" several times -- the number of "cuts" will vary depending on the position of the seller and purchaser within the overall chain of distribution. As noted earlier, courts retain discretion to impose the highest penalties within the specified range on persons trafficking in large quantities of very pure substances while imposing lesser penalties on persons trafficking in equal quantities of highly diluted or "cut" substances.

Federal courts have consistently upheld the rationality of this sentencing scheme based on gross weight against charges that it arbitrarily ignores factors of purity and therefore violates due process. For example,one court ruled, in rejecting such a challenge, that:

> Congress clearly intended to base [the] mandatory minimum sentences on quantity. Congress' objective is rationally related to the means chosen. Large-volume dealers, regardless of purity of narcotic, pose a substantial danger to society.

United States v. *Klein*, 860 F.2d 1489, 1500-01 (9th Cir. 1988) (emphasis in original). Similarly, a panel of the Fourth Circuit has held that:

> [w]hile there may well be incidences where the quality of cocaine involved could have a impact on whether the upper echelons of criminal society will be more severely punished, we think that measuring the criminal's punishment by the quantity of bulk drug material rationally serves Congress' intent to punish drug traffickers severely.

United States v. *Whitehead*, 849 F.2d 849, 860 n.26 (4th Cir.), *cert. denied,* 109 S.Ct. 534 (1988). *Accord United States* v. *Jackson*, 863 F.2d 1168, 1171 (11th Cir. 1989); *United States* v. *Ramos*, 861 F.2d 228, 231 (9th cir. 1988); *United States* v. *Solomon*, 848 F.2d 156, 157-58 (11th Cir. 1988); *United States* v. *Savinovich*, 845 F.2d 834, 839 (9th cir.), *cert. denied,* 109 S. Ct. 369 (1988); *United States* v. *Holmes*, 838 F.2d 1175, 1177-78 (11th Cir.), *cert. denied,* 108 S. Ct. 2829 (1988); *United States* v. *Brady*, 680 F. Supp. 245, 247 (W.D. Ky. 1988).

Finally it must be pointed out that the "gross weight" sentencing scheme is rational because it merely sets a range of penalties and, by implication, "permit[s] differentiation between different defendants based on aggravating factors such as the defendant's role in distributing narcotics of the purity of the narcotics." *See United States* v. *Pineda*, 847 F.2d 64, 67 (2d Cir. 1988) (*per curiam*). Indeed, "[i]t is clear that a ... court, in its discretion, may impose a sentence above the mandatory minimum, and up to the statutory maximum, whenever such aggravating factors are present." *Id.* The discretion of a court to impose greater or lesser sentences depending on the presence of aggravating or mitigating factors is discussed in greater detail in another subsection below.

As these cases and the federal experience make clear, ordering a scheme of enhanced penalties based on the gross weight of the controlled substance involved in an offense is rational, constitutional, and effective.

"Mixture or Substance" in 401(g)

The enhanced or mandatory minimum sentencing provisions of Section 401(g) were amended by the Conference to replace the term "mixture" with the phrase "mixture or substance." This phrase is also found in the standard penalty provisions of Section 401(b)–(f). As just explained, the terms "mixture" and "mixture or substance" are both intended to refer to the "gross weight" of a controlled substance as it is found at the time of seizure, including the weight of any cutting agents, carrier–mediums or excipients. The expression "mixture or substance" is used in the federal mandatory minimum sentencing scheme to refer to the same principle: the "gross weight" of the controlled substance. As set forth below, however, some federal courts have begun distinguishing between what constitutes a "mixture" and what constitutes a "substance" in cases involving blotter paper that has been saturated with LSD. This distinction has no effect on federal law enforcement because the federal statute employs the phrase "mixture or substance." However, such a distinction would have had unintended consequences in a state adopting the UCSA (1990) if Section 401(g) referred only to "mixtures" because many large–scale dealers of "substances" could thereby avoid the enhanced or mandatory minimum penalties. The Conference therefore substituted the term "mixture or substance" for the term "mixture" wherever it appeared in Section 401(g).

As just noted, federal courts construing the phrase "mixture or substance containing a detectable amount" have recently begun to ascribe different meanings to the term "mixture" and the term "substance" in cases involving blotter paper that has been saturated with LSD for purposes of "street distribution." These courts have held that LSD, in its highly concentrated liquid form, constitutes a "mixture" while the blotter paper that has been saturated with the liquid LSD constitutes a "substance." One court, for example, recently rejected the argument that the term "mixture or substance" applied only to LSD in its liquid state and thus would not include the weight of any blotter paper carrier–medium:

> If the legislature had intended to go after LSD regardless of its purity, it could have stopped with the word "mixture" –– that word alone encompasses the meaning Defendant ascribes to the statute. But the legislature went on and included the words "or substance containing a detectable amount" of LSD. This latter phrase goes beyond merely the mixture of the drug itself –– it clearly contemplates the medium in which the drug is ingested, be it paper, sugar cube, chocolate chip cookies or any other substance"....Congress clearly understood the importance of the words "mixture" and "substance" containing a detectable amount.

United States v. *Marshall*, 706 F. Supp. 650, 653 (C.D.Ill. 1989). Another court noted that:

> The question the court must resolve is whether the blotter paper in which the LSD was dispersed is "a mixture or substance" under the statute. The court finds that the blotter paper, which held the LSD in this case, is a "substance" which contains a detectable amount of LSD.

United States v. *Bishop*, 704 F. Supp. 910, 912 (N.D. Iowa 1989).

Section 401(g) was therefore amended to replace the term "mixture" with the phrase "mixture or substance" throughout the subsection, thereby avoiding the unintended distinction drawn in the foregoing cases.

"Cocaine Base"

Section 401 draws a distinction between "cocaine base" and all other forms and derivatives of cocaine. In 401(g) this will enable states to set a lower threshold quantity for offenses involving the more dangerous and highly addictive "base" form of cocaine known as "crack" than for all other forms of cocaine. At least nine states currently target cocaine base or crack for enhanced penalties.[3] Some people have expressed concern over the lack of a definition for the term "cocaine base" to be used in Section 401(g). However, the term is well-known to organic chemists and needs no further definition.

It should be noted that "the phrase 'cocaine base' is ... included without definition in numerous state statutes." *See Brown,* 859 F.2d at 977 (citing Cal. Health & Safety Code Section 11054 (f)(1)). Moreover, the federal mandatory minimum sentencing scheme draws a distinction between "cocaine base" and all other forms of cocaine and does not define the term "cocaine base." The use of the undefined term "cocaine base" has been upheld as rational and as presenting no opportunity for prosecutorial abuse:

> If cocaine base is involved [in the offense], the defendant must be sentenced under...the more specific provision dealing with cocaine base....There is no inconsistency with Congress' [treatment of cocaine base as opposed to other forms of cocaine].

Id. at 976–77. The same court found that the undefined term "cocaine base" was not vague:

> The government [in using the term "cocaine base"] adopts the nomenclature of organic chemistry which classifies compounds with the hydroxyl radical (OH–) as a base and those with the hydrogen nucleus (H+) as an acid. "Cocaine base" therefore is any form of cocaine with the hydroxyl radical; "cocaine base" excludes...the salt forms of cocaine.

Id. at 976. *Accord United States* v. *Collado-Gomez*, 834 F.2d 280 (2d Cir. 1987) (*per curiam*) (noting that Congress provided for enhanced penalties for offenses involving specified amounts of "a particularly addictive form of cocaine base, known as 'crack'").

Moreover, federal courts have consistently recognized that the term "cocaine base" means "crack" as opposed to other forms of cocaine. *See, e.g., United States* v. *Robinson*, 870 F.2d 612, 613 (11th cir. 1989); *United States* v. *Ryan*, 866 F.2d 604, 605 (3rd Cir. 1989) (police officers "discovered cocaine base or 'crack'" inside bag); *United States* v. *Johnson*, 862 F.2d 1135, 1137 (5th cir. 1988) ("suitcases contained plastic bags filled with cocaine in

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[3] National Criminal Justice Association, A Guide to Controlled Substances Act. (1991) (See Appendix).

base form, commonly known as 'crack'"); *United States* v. *Felix-Cordero*, 859 F.2d 250,251 (2d Cir. 1988) (agents "arranged to purchase 200 vials of 'crack' (cocaine base)'); *United States* v. *Bartley*, 855 F.2d 547, 549 (8th Cir. 1988) (agent purchased "crack cocaine" which "was later analyzed to be 1.7 grams of cocaine base"); *Mitchell*, 699 F.Supp. at 2 ("paraphernalia commonly used to distribute cocaine base or 'crack'"); *United States* v. *Rodriguez*, 691 F.Supp. 1252 (W.D. Mo. 1988) (defendant "convicted of selling cocaine base ('crack')"); *United States* v. *Nenadich*, 689 F.Supp. 285, 285-86 (S.D.N.Y. 1988) ("indictment charged defendants with possessing cocaine base (commonly known as 'crack') with intent to distribute"); *United States* v. *Horton*, 685 F.Supp. 1479, 1480 (D. Minn. 1988) (defendant charged with "possession with intent to distribute cocaine base (crack)").

Deletion of Ambiguous Language in 401(g)

Section 401(g) of the UCSA (1990) is intended to give states the option of imposing "mandatory minimum" prison terms for serious trafficking offenses involving large quantities of certain controlled substances. The Section as presently drafted deletes language from the federal mandatory minimum sentencing provisions which has been criticized by the federal courts as inherently ambiguous.

The federal mandatory minimum sentencing provisions, which clearly were intended to provide for mandatory prison terms and optional fines, contains ambiguous language. For example, 21 U.S.C. §841(b)(1)(B) provides that a person convicted of a trafficking offense involving between 500 grams and five kilograms of a mixture or substance containing a detectable amount of cocaine:

> shall be sentenced to a term of imprisonment which may not be less than five years and not more than 40 years..., a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000..., or both..

Defendants have unsuccessfully argued that this statute imposes two inconsistent penalty schemes, one allowing a court to impose merely a fine and the other requiring imposition of a five-year minimum term of imprisonment. *See, e.g., United States* v. *Colon-Ortiz*, 866 F.2d 6 (1st Cir. 1989); *United States* v. *Musser*, 856 F.2d 1484, 1486 (11th Cir. 1988); *United States* v. *Restrepo*, 676 F. Supp. 368 (D. Mass. 1987).

The federal courts, in rejecting these arguments, have relied on the fact that the legislative history of the sentencing provisions clearly states that Congress intended to require imposition of mandatory minimum prison terms and the fact that a separate provision in the same subparagraph states that no person "sentenced under this subparagraph" shall be eligible for parole, probation or suspension of sentence, *Colon-Ortiz*, 866 F.2d at 9-10; *Restrepo*, 676 F.Supp. at 372-75. However, these courts have also criticized the ambiguity created by the inclusion of the term "or both" at the end of the penalty provisions.

For example, the panel in *Colon-Ortiz* stated:

> We cannot say that Section 841(b)(1)(B) as drafted affords fair notice to individuals as to the consequences of [a trafficking violation]. The express language of the statute describes two alternative penalty

> schemes that are directly contradictory. Given the "or both" language contained in the first sentence, the penalty provisions would appear to allow a court to consider the imposition of a prison term or a fine to be alternatives: "such person shall be sentenced to a term of imprisonment..., a fine..., or "both". The [no parole, no probation, no suspension of sentence] language that concludes the paragraph, however, is strong indication that the statute calls for a mandatory term of imprisonment.... The language of the statute is not only inconsistent, but is directly contradictory. This lack of clarity on the face of [the statute] constitutes a notice deficiency and raises serious due process concerns.

866 F.2d at 9. The panel, however, reviewed the statute's legislative history and other related sentencing provisions and concluded that:

> [T]he "or both" language... was an inadvertent drafting error, and should be stricken from the statute. We...conclude that Congress clearly intended to impose mandatory prison terms under this sentencing provision. The notice deficiency in the statute can be cured easily by striking the "or both" language...[T]he correct interpretation of the statute is to disregard the "or both" language, thus clarifying the penalties for violating [the trafficking statute].

Id. at 10–11. *Accord United States* v. *Musser,* 856 F.2d 1484, 1486 (11th Cir. 1988) ("The language ['term of imprisonment..., or fine..., or both'] might have been more precisely drafted, but lack of precision does not render it unconstitutionally vague").

There is no room for such an ambiguity and "notice deficiency" in a "uniform act." Thus the penalty provisions of Section 401(g) provides as follows:

"[may] [must] be imprisoned for not less than [] nor more than [] and fined not less than []."

"Possession" Offenses

It should be noted that Section 401(g) provides for imposition of the enhanced or mandatory minimum penalties for offenses involving possession of the large–scale quantities of controlled substances specified therein. This provision is plainly rational because the threshold quantities to be specified in Section 401(g) are those which would typically be involved in large–scale drug trafficking within the state in question. Indeed, it would defy credulity for anyone to claim to possess such quantities for purposes of personal use. This reflects the rule of law that possession of large quantities of a controlled substance, standing alone, may constitute sufficient evidence of possession with intent to distribute. *See, e.g., United States* v. *Olivier–Becerril,* 861 F.2d 424, 426 n.1 (5th cir. 1988); *United States* v. *Shurn,* 849 F.2d 1090, 1095 (8th Cir. 1988); *United States* v. *Quintero,* 848 F.2d 154, 156 (11th Cir. 1988); *United States* v. *MacDougall,* 790 F.2d 1135 (4th cir. 1986).

Mandatory Minimum Penalties Do Not Unduly Restrict a Court's Discretion or Limit the Role of Counsel at Sentencing

Courts have consistently held that the federal scheme of mandatory minimum penalties based upon the gross amount of controlled substance involved in a drug offense does not unduly restrict a court's discretion at sentencing. For example, a panel of the Eleventh Circuit has held that:

> the statute only establishes the minimum and the maximum number of years to which a defendant may be sentenced and in no way circumscribes [the Federal provisions] which permit a defendant to present information concerning his background, character and conduct to aid the sentencer in determining an appropriate sentence. Thus, within the congressionally established range for sentences, nothing in [the statute] restricts the discretion of a sentencing judge in fashioning an individualized sentence in light of the specific facts of the offense or history of the offender.

Holmes, 838 F.2d at 1177. *Accord United States* v. *Kidder*, 869 F.2d 1328, 1334 (9th Cir. 1989); *Klein*, 860 F.2d at 1499; *Brady*, 680 F.Supp. at 248. Courts have also held that, because the "mandatory minimum" penalty scheme does not unduly restrict a judge's discretion at sentencing it does not violate the "separation of powers" doctrine. *See e.g., Jackson*, 863 F.2d at 1171; *United States* v. *Linn*, 862 F.2d 735, 742 (9th Cir. 1988); *Klein*, 860 F.2d at 1499; *United States* v. *Kinsey*, 843 F.2d 383, 393 (9th Cir.), *cert. denied*, 109 S.Ct.99(1988); *Holmes*, 838 F.2d at 1178.

Similarly, courts have consistently held that the "mandatory minimum penalty scheme does not deny a defendant's Sixth Amendment right to counsel at sentencing.

> The Act provides a range--the range between the Congressionally established minimum and maximum sentences--of punishment for [drug] distribution. Counsel can assist a defendant with respect to the sentence imposed by the sentencer within [that range].

Holmes, 838 F.2d at 1178. *Accord Klein*, 860 F.2d at 1501; *Pinea*, 847 F.2d at 67; *Brady*, 680 F.Supp. at 248.

Mandatory Minimum Penalties for Serious Drug Offenses do not Constitute "Cruel or Unusual" Punishment

Federal courts have consistently held that the "mandatory minimum" sentencing scheme for drug offenses involving large quantities of drugs does not constitute "cruel and unusual punishment" in violation of the Eighth Amendment. For example, one court noted that:

> Congress determined that the distribution of certain dangerous narcotics, such as cocaine base, constituted a national menace and therefore created a comprehensive scheme of graduated penalties proportionate to the nature and severity of the offense in question. We do not find that the penalties Congress provided are cruel or unusual.

United States v. *Brown*, 859 F.2d 974, 977 (D.C. Cir.1988) (*per curiam*). *Accord Jackson*, 863 F.2d at 1171; *Linn*, 862 F.2d at 742; *Ramos*, 861 F.2d at 232; *Klein*, 860 F.2d at 1495–98 (noting, with approval,the Congressional conclusion that "possession of a sizable quantity of one of [the listed drugs] with intent to distribute is a grave offense" (emphasis in original)); United States v. *Cook*, 859 F.2d 777, 778–79 (9th Cir. 1988); *Musser*, 856 F.2d at 1486; *United States* v. *Zavala–Sera*, 853 F.2d 1512, 1518 (9th cir. 1988); *Whitehead*, 849 F.2d at 860; *Solomon*, 848 F.2d at 157; *Savinovich*, 845 F.2d at 840 ("[i]n light of the severity of the crime and drug–related problems of today's society, we find that [the sentencing scheme] is proportionate to the crime committed"); *United States* v. *Murillo–Guzman*, 845 F.2d 314, 315 (11th Cir.1988) (*per curiam*); *Kinsey*, 843 F.2d at 392–93); *Holmes*, 838 F.2d at 1178–79; *Brady*, 680 F.Supp. at 247; *Restrepo*, 676 F.Supp. at 377–78.

Defendant's Role in Drug Trafficking

Numerous courts have held that imposition of enhanced or mandatory minimum penalties, based upon the quantity of drug involved in the offense, is permissible notwithstanding the fact that the defendant may have played a minor or peripheral role in drug trafficking (e.g., as a courier or "mule"). Indeed, courts express disdain for claims that defendants who play relatively minor or peripheral roles should be subject to non–mandatory penalties notwithstanding the quantity of drugs involved in their respective offenses. For example, a panel of the Eleventh Circuit expressed its:

> disagreement with the appellant's characterization of his role as that of a mere courier. No drug organization can survive without the services of such individuals. While couriers may be sharing the same authority as others involved in a drug operation, they are nonetheless indispensable to the success of the operation, and thus Congress could certainly conclude that they are an appropriate target in the effort to halt the flow of drugs into and around the nation.

United States v. *Rodriquez–Suarez*, 856 F.2d 135, 137 n.1 (11th Cir. 1988). Moreover, the Supreme Court has lamented the contribution of "mules" and couriers to "the veritable national crises in law enforcement caused by the smuggling of narcotics. *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 538 (1985).

Other courts are in agreement. *See, e.g., Cook*, 859 F.2d at 779 ("[Appellant] argues that she was merely a 'mule' doing the bidding of more sophisticated dealers. We are not persuaded that this diminishes the level of culpability that attaches to her acts)"; *Solomon*, 848 F.2d at 157 ("Congress could rationally have concluded that the possession with intent to distribute of a fairly large quantity of cocaine base, a dangerous controlled substance, posed a particularly great risk to the welfare of society warranting heavy sentences, regardless of the individual offender's particular position in the drug operation's

hierarchy."). *See also United States* v. *Mitchell*, 699 F.Supp. 1,3 (D.D.C. 1988) ("These ["crack"] couriers are in reality merchants of death. It is vital to the well being of the city that trafficking of this type be stopped").

Application of the mandatory minimum penalties to such minor players is greatly mitigated by the fact that, as previously noted, courts have "wide discretion to sentence a defendant within a range above the statutory minimum and may take into account factors such as the role of a particular offender." *Murillo-Guzman*, 845 F.2d at 315.

SECTION 402. PROHIBITED ACTS B; PENALTIES.

(a) A person who is subject to Article III may not distribute or dispense a controlled substance in violation of Section 308.

(b) A person who is a registrant may not manufacture a controlled substance not authorized by that person's registration, or distribute or dispense a controlled substance not authorized by that person's registration to another registrant or other authorized person.

(c) A person may not refuse or fail to make, keep, or furnish any record, notification, order form,

statement, invoice, or information required under this [Act].

(d) A person may not refuse entry into any premises for an inspection authorized by this [Act].

(e) A manufacturer or distributor, or agent or employee of a manufacturer or distributor, having reasonable cause to believe that a person will possess or distribute a controlled substance in violation of this [Act], may not deliver the controlled substance to that person.

(f) A person may not knowingly or intentionally keep, maintain, manage, control, rent, lease, or make available for use any store, shop, warehouse, dwelling, building, vehicle, vessel, aircraft, room, enclosure, or other structure or place, which the person knows is resorted to for the purpose of keeping for distribution, transporting for distribution, or distributing controlled substances in violation of this [Act].

(g) Except as authorized by this [Act], a person may not:

(1) knowingly or intentionally open or maintain any place that the person knows is resorted to for the purpose of unlawfully manufacturing a controlled substance; or

(2) manage or control a building, room, or enclosure, as an owner, lessee, agent, employee, or

mortgagee, and knowingly or intentionally rent, lease, or make available for use, with or without compensation, the building, room, or enclosure that the person knows is resorted to for the purpose of unlawfully manufacturing a controlled substance.

(h) A person does not violate subsection (f):

(1) by reason of an act committed by another person while the other person is unlawfully on or in the structure or place, if the person lacked knowledge of the unlawful presence of the other person; or

(2) if the person has notified a law enforcement agency of the illegal conduct.

(i) A person who violates subsection (g) is guilty of a crime and upon conviction may be imprisoned for not more than [ ] years, fined not more than [ ], or both, or fined not more than [ ] if the person is not an individual.

(j) Except as provided in subsection (i), a person who violates this section is guilty of a crime and upon conviction may be imprisoned for not more than [ ], fined not more than [ ], or both.

COMMENT

This section defines those "commercial" offenses relating to registrants or other persons who unlawfully manufacture, distribute, or dispense controlled substances or fail to comply with the requirements of the Act.

Violation of subsection (a)(4) occurs when an inspector has an administrative inspection warrant, or

is not required to have such a warrant under Section 502(b)(4), and the person whose premises are to be inspected refuses admittance.

Subsection (b) is derived from the California Health and Safety Code § 11153.5(a). As is generally available under criminal statutes, duress should be available as a defense to prosecution under subsection (c). Subsection (d) provides a similar offense with respect to establishment of manufacturing operations as that found in the Anti-Drug Abuse Act of 1986, Public Law 99-570, § 1841. Actual penalties are not included because it is felt that such a designation is purely a state decision. The penalties imposed under the federal act are found at 21 U.S.C. 842 and 856.

ANALYSIS

SECTION 402. PROHIBITED ACTS B–; PENALTIES

SUBSECTION (f)

Drugs are dealt in the relative security of motel rooms, houses, apartments and other structures leased, owned or controlled by the criminals dealing drugs. This is the norm rather than the exception. A National Institute of Justice study found that 66% of crack purchases in Detroit occur in a "dope house" or "crack house".[4] While most hotel, motel, apartment and property managers recognize that drug dealing is both criminal and, in the long run, bad for business, subsection (f) provides sanctions for unscrupulous profiteers who give safe haven to those dealing drugs. Persons who knowingly permit drugs to be dealt are subject to felony prosecution. Over forty (40) states have already enacted "safehouse" provisions to reduce use of abandoned or neglected buildings for illegal drug activity.[5]

Criminal activity committed by trespassers and activity that is reported to law enforcement do not, of course, subject persons to prosecution under this subsection. America's police and prosecutors are greatly encouraged by the fact this fair but tough strategy came about as a result of amendments from the floor during the 1988 Annual Meeting of the National Conference of Commissioners on Uniform State Laws.

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[4] National Institute of Justice, NIJ Reports 8 (November/December, 1989).

[5] National Criminal Justice Association, A Guide to State Controlled Substances Acts, (1991).

SECTION 403. PROHIBITED ACTS C; PENALTIES.

(a) A person may not knowingly or intentionally:

(1) distribute as a registrant a controlled substance included in Schedule I or II, except pursuant to an order form required by Section 307;

(2) use in the course of the manufacture, distribution, or dispensing of a controlled substance, or to use for the purpose of acquiring or obtaining a controlled substance, a registration number that is fictitious, revoked, suspended, or issued to another person;

(3) acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge;

(4) furnish false or fraudulent material information in, or omit material information from, an application, report, or other document required to be

kept or filed under this [Act], or a record required to be kept by this [Act]; or

(5) possess a false or fraudulent prescription with intent to obtain a controlled substance.

(b) A person who violates this section is guilty of a crime and upon conviction may be imprisoned for not more than [ ], fined not more than [ ], or both.

COMMENT

This section sets out the fraud offenses relating to the manufacture and distribution of controlled substances. This area of criminal activity was segregated from Section 401 because of the nature of these offenses and their effect, regardless of the drug involved, on the integrity of the regulatory system.

It should be noted that the acts or omissions set forth in subsection (a)(4) are not only a violation of this Act but also provide a basis for revocation or suspension of registration under Section 304.

SECTION 404. COUNTERFEIT SUBSTANCES PROHIBITED; PENALTY.

(a) A person may not knowingly or intentionally manufacture or deliver, or possess with intent to manufacture or deliver, a controlled substance that, or the container or labeling of which, without authorization, bears the trademark, trade name, or other identifying mark, imprint, number, or device, or a likeness thereof, of a manufacturer, distributor, or dispenser, other than the person who manufactured, distributed, or dispensed the substance.

(b) A person may not knowingly or intentionally make or distribute or possess a punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or a likeness of any of the foregoing upon any drug or container or labeling of it without authorization.

(c) A person who violates this section is guilty of a crime and upon conviction may be imprisoned for not more than [ ], fined not more than [ ], or both.

COMMENT

This section is a consolidation of the counterfeit substance provisions found in Sections 101(e), 401(b), and 403(a)(5) of the 1970 Act. Provisions in this section may duplicate drug branding and labeling provisions in other laws of the enacting state.

SECTION 405. IMITATION CONTROLLED SUBSTANCES PROHIBITED; PENALTY.

(a) A person may not knowingly or intentionally deliver, or possess with intent to deliver, a noncontrolled substance representing it to be a controlled substance.

(b) A person may not knowingly or intentionally deliver or possess with intent to deliver, a noncontrolled substance intending it to be used or distributed as a controlled substance or under circumstances in which the person has reasonable cause

to believe that the noncontrolled substance will be used or distributed for use as a controlled substance.

(c) It is not a defense that the accused believed the noncontrolled substance to be a controlled substance.

(d) A person who violates this section is guilty of a crime and upon conviction may be imprisoned for not more than [ ], fined not more than [ ], or both.

COMMENT

This section is based on Annotated Code of Maryland Article 27, § 286B. Some states are more expansive, e.g., Wisconsin Statutes Section 161.41(2m), which prohibits the manufacture of an imitation controlled substance in lieu of a controlled substance, while others include "prima facie" factors to be considered evidence of delivery of "look-alikes," such as prior convictions, evasive tactics, and proximity to controlled substances, as well as immunity for using imitation controlled substances as placebos, e.g., North Dakota Century Code Chapter 19-03.2. Factors that may be useful in determining whether this section is violated include whether the physical appearance is substantially identical to that of a controlled substance, whether the noncontrolled substance was packaged in a manner normally used for the illegal distribution of controlled substances, and whether delivery included an exchange of money or property substantially greater than the reasonable value of the noncontrolled substance.

ANALYSIS

SECTION 404. COUNTERFEIT SUBSTANCES PROHIBITED; PENALTY

This section of the UCSA (1990) targets controlled drugs, illegally produced, which bear trademarks of legitimate companies. The problem this section addresses is typified with the drug commonly known as Quaaludes or Methaqualone. Methaqualone has commonly been manufactured in clandestine laboratories and then stamped with the legitimate manufacturer's imprint. These drugs, often contaminated and impure, are then sold as the genuine product in both legitimate and illegitimate markets. Counterfeiting has also occurred with Valium, Demerol and other frequently prescribed pharmaceuticals.

SECTION 405. IMITATION CONTROLLED SUBSTANCES PROHIBITED; PENALTY

This section prohibits the dealing in "turkey dope" or substances sold or held for sale as controlled drugs "speed" or cocaine which in fact are non-controlled substances such as caffeine or lidocaine. This must be contrasted with Section 404's prohibition of counterfeit substances in that counterfeit drugs are in fact controlled substances bearing a counterfeit marking while imitation controlled substances are not controlled drugs but rather non-controlled sold as controlled drugs.

Sometimes these imitations of controlled substances are sold with the intent to defraud the customer. However, most drug operations will keep some "turkey dope" on hand to sell persons suspected of being informers of law enforcement officers. This provision punishes drug dealers who guess correctly.

SECTION 406. POSSESSION AS PROHIBITED ACT; PENALTIES.

(a) An individual may not knowingly or intentionally possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while

acting in the course of the practitioner's professional practice, or was otherwise authorized by this [Act].

(b) An individual who violates subsection (a) with respect to a substance included in Schedule I or II, except for less than [29] grams of marijuana, is guilty of a [felony] and upon conviction may be imprisoned for not more than [ ], fined not more than [ ], or both.

(c) An individual who violates subsection (a) with respect to a substance included in Schedule III, IV, or V is guilty of a [felony] [misdemeanor] and upon conviction may be imprisoned for not more than [ ], fined not more than [ ], or both.

(d) An individual who violates subsection (a) with respect to less than [29] grams of marijuana is guilty of a [misdemeanor] and upon conviction may be imprisoned for not more than [ ], fined not more than [ ], or both.

COMMENT

This section is derived from Section 401(c) of the 1970 Act. The former Section 401(c) is treated as a separate section because the offense is mere possession as opposed to the other prohibited acts of Section 401.

ANALYSIS

SECTION 406. POSSESSION AS PROHIBITED ACT; PENALTIES

This provision of the UCSA (1990) applies to users of illegal drugs. Persons distributing, manufacturing, or possessing with the intent to do either are addressed in Section 401(b)-(f). Persons possessing large quantities of the most commonly abused drugs are addressed in Section 401(g). Earlier drafts of the UCSA (1990) would have reduced all "simple possession" offenses to misdemeanors. This represented a dramatic retreat that was inconsistent with existing punishments in virtually every jurisdiction with respect to Schedules I and II drugs.

America's police and prosecutors support sentencing flexibility which permits probation coupled with treatment and education to provide a "second chance" for those who demonstrate an acceptance of their personal responsibility. Nevertheless, the threshold position must continue to be that possessing drugs, particularly the "hard drugs" in Schedule I and II, is a serious offense and absent an affirmative willingness by a defendant to rehabilitate, should be punished accordingly. Common sense supports the reports of those in the field. The credible threat of stern punishment provides the best incentive for many, once caught, to rehabilitate themselves by taking advantage of education and treatment programs. Similarly, stern punishment is also the only sure way to protect society from those who have, through their conduct, demonstrated they are not prepared to function as law abiding members of our society.

SECTION 407. CONSPIRACY; PENALTY. A person may not conspire to commit a violation of this [Act]. A person who violates this section is guilty of a crime and upon

conviction is subject to the same penalty as provided for the offense that was the object of the conspiracy.

COMMENT

This section is based on 21 U.S.C. 846.

SECTION 408. SOLICITATION; [ATTEMPT;] PENALTY.

(a) A person may not knowingly or intentionally solicit, induce, or intimidate an individual to engage in specific conduct constituting a violation of this [Act].

(b) [A person may not attempt to commit a violation of this [Act].

(c)] A person who violates this section is guilty of a crime and upon conviction is subject to the same penalty as provided for the offense that was the object of the solicitation [or attempt].

COMMENT

Subsection (b) provides an option for a state that does not have a general statute imposing a penalty for attempting to commit a crime.

ANALYSIS

SECTION 407. CONSPIRACY; PENALTY

Section 407 of the UCSA (1990) specifies that "[a] person may not conspire to commit a violation of [the UCSA]" and that a person who so conspires "is guilty of a crime and upon conviction is subject to the same penalty as provided for the offense that was the object of the conspiracy.". Under this provision, therefore, persons who conspire to commit serious drug offenses involving more than the threshold quantities of the controlled substances identified in Section 401(g) of the UCSA (1990) would be subject to the enhanced or mandatory minimum penalties specified in that subsection.

This is as it should be since the object of the drug laws generally, and the enhanced or mandatory minimum penalties more specifically , is to deter equally both conspiracies to commit drug offenses and the actual commission of those offenses. Quite often the evidence against major traffickers only supports a conspiracy conviction since these traffickers only make the deals and are extremely careful to insulate themselves from any contact with the drugs through the use of loyal subordinates. The same is true of those "financiers" who "invest" in major drug deals, expecting an extremely high rate of return, but who do not want to know or be exposed to any of the drugs or drug trafficking operations. If we are truly to deter large-scale drug trafficking, we must equally deter those who plan and agree on the commission of large-scale drug offenses as those more directly involved in the commission of such offenses. The penalty provision of Section 407 would accomplish this purpose.

The federal government realized this point in 1988 when it amended the federal conspiracy statutes, 21 U.S.C. §§ 846 and 963. In 1986, Congress had enacted a "mandatory minimum" sentencing scheme for certain large-scale substantive drug trafficking offenses. However, the "conspiracy" statutes specified that persons who conspired to commit drug crimes were punishable by "imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense,the commission of which was the object of the...conspiracy." The bolded language, when viewed together with the rule of lenity, was interpreted as subjecting defendants who conspire to commit certain large-scale drug crimes to the new enhanced maximum penalties applicable to the substantive offenses but not to the new "mandatory minimum" penalties applicable to those offenses. This was incompatible with the will of Congress to deter both conspiracies and substantive drug offenses with the same force. Thus, in 1988, Congress amended the conspiracy statutes to provide that persons who conspire to commit drug offenses "shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the conspiracy."

The same policy would be effectuated through the adoption of Section 407 of the UCSA (1990). Adoption of this provision would not mean that those who "merely" conspire to commit large-scale trafficking offenses would receive penalties identical to those who actually complete the offense. As explained earlier, it would merely mean that these offenders would be subject to the same range of penalties. The trial judge would retain discretion to impose a lesser sentence within that range on a "mere" conspirator than he might impose on the actual drug trafficker. Nor would adoption of this provision militate against effective plea bargaining since the prosecutor would retain the option of allowing

a defendant to plead to a charge in which no specific quantity of drug is mentioned, thus not triggering the enhanced or mandatory minimum penalties.

SECTION 408. SOLICITATION; [ATTEMPT;] PENALTY

This section is intended to permit proactive undercover law enforcement strategies such as "reverse stings". The provision as written applies to persons who knowingly or intentionally solicit the purchase of, or attempt to purchase, illegal drugs. It allows officers to target ongoing criminal conduct without having to consummate the deal or use real drugs. To achieve its purpose, however, the section should also apply to persons who offer to sell or buy illegal drugs. These individuals should not receive a windfall because the customer or seller is an undercover police officer who prevents the crime from being completed. Many states now impose strong sanctions on users who try to buy illegal drugs. The Office of National Drug Control Policy (ONDCP) reports that 19 states punish attempts and either offers or solicitations to purchase or sell drugs the same as for the completed offense.[6]

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[6] Office of the National Drug Control Policy, State Drug Control Status Summary, State Drug Control Status Report (November, 1990).

SECTION 409. DISTRIBUTION TO INDIVIDUAL UNDER AGE 18; DISTRIBUTION NEAR SCHOOLS OR COLLEGES; PENALTIES.

(a) An individual 18 or more years of age who violates Section 401 by distributing a controlled substance to an individual under 18 years of age who is at least two years younger than that individual is guilty of a crime and upon conviction is punishable by a

term of imprisonment and fine not exceeding [two times] those authorized by Section 401.

(b) An individual may not violate Section 401 in or on, or within [one thousand feet] [300.48 meters] of, the real property comprising a public playground, a public or private elementary or secondary school, a public vocational school, or a public or private college or university. An individual who violates this subsection is guilty of a crime and upon conviction is punishable by a term of imprisonment and fine not exceeding [two times] those authorized by Section 401.

(c) An individual who violates subsection (b) after a previous judgment of conviction under that subsection has become final, is punishable by a term of imprisonment not exceeding [three times] that authorized by Section 401.

(d) It is not a defense to a violation of subsection (a) that the accused did not know the age of an individual to whom a controlled substance was distributed.

(e) It is not a defense to a violation of subsection (b) or (c) that the accused did not know the distance involved.

[(f) Notwithstanding any other provision of this section, with respect to an individual who is found to have violated this section:

(1) adjudication of guilt or imposition of sentence may not be suspended, deferred, or withheld;

(2) the individual must be imprisoned for at least [ ] for a violation of subsection (a) or (b); and

(3) the individual is not eligible for parole before serving the mandatory term of imprisonment prescribed by this section.]

COMMENT

This section is designed to impose stiffer penalties on those persons over eighteen years of age who distribute controlled substances to persons under eighteen years of age. However, the recipient must be at least two years younger than the distributor before this section comes into effect. The two-year differential is in lieu of accepting the 18-year-old/21-year-old age distinction in the federal act, 21 U.S.C. 845, which could result in the stiffer penalty for an 18-year-old selling to a 20-year-old. Subsections (b) and (c) are similar to penalties contained in the federal act, 21 U.S.C. 845a, as enacted in 1984 and as amended by the Anti-Drug Abuse Act of 1986, Public Law 99-570, § 1104 (the "Juvenile Drug Trafficking Act of 1986"), which added vocational school, college, and university, and also included "manufacturing." Subsection (c) provides for a special subsequent offense penalty with respect to manufacturing or distributing controlled substances near schools. The penalty in Section 410 for a second offense would not apply in this case.

SECTION 410. EMPLOYMENT OR USE OF INDIVIDUAL UNDER 18 YEARS OF AGE IN DRUG OPERATIONS; PENALTIES.

(a) An individual 18 or more years of age may not knowingly or intentionally employ, hire, use, persuade, induce, entice, or coerce an individual under 18 years

of age to violate or assist in avoiding detection or apprehension for a violation of this [Act].

(b) An individual who violates subsection (a) is guilty of a crime and upon conviction is punishable by a term of imprisonment and fine not exceeding [two times] those authorized by Section 401.

(c) An individual who violates subsection (a) after a previous judgment of conviction under that subsection has become final, is punishable by a term of imprisonment not exceeding [three times] that authorized by Sections 401(a) through (f).

(d) An individual who violates subsection (a) by employing, hiring, using, persuading, inducing, enticing, or coercing an individual who is under 15 years of age, may be imprisoned for not more than [ ] years and fined not more than [ ] in addition to any other punishment authorized by this section.

(e) It is not a defense to a violation of this section that the accused did not know the age of a protected individual.

[(f) Notwithstanding any other provision of this section, with respect to an individual who is found to have violated this section:

(1) adjudication of guilt or imposition of sentence may not be suspended, deferred, or withheld;

(2) the individual must be imprisoned for at least [ ] for a violation of subsection (a) or (b); and

(3) the individual is not eligible for parole before serving the mandatory term of imprisonment prescribed by this section.]

COMMENT

This section provides for a special offense for using minors in drug operations. The section is derived from similar provisions in the federal act, as created by the Anti-Drug Abuse Act of 1986, Public Law 99-570, § 1102 (the "Juvenile Drug Trafficking Act of 1986") and from the California Health and Safety Code, § 11353.

ANALYSIS

SECTION 409. DISTRIBUTION TO INDIVIDUAL UNDER 18; DISTRIBUTION NEAR SCHOOLS OR COLLEGES; PENALTIES

SECTION 410. EMPLOYMENT OR USE OF INDIVIDUAL UNDER 18 YEARS OF AGE IN DRUG OPERATIONS; PENALTIES

Hypothetical

Joe Doper is the 30-year-old kingpin of a street-level drug gang involved in the manufacture and sale of "crack" (cocaine base). Doper's distribution operation is run out of a bar, known as the "What It Is" lounge, which is located one block (300 feet) from the grounds of Mark Twain Elementary School. You cannot see the school from inside the bar because the bar has no windows. For the same reason, passers-by on the street cannot see into the bar. Doper's "stash house" where the "crack" is manufactured is located about one mile away, across the street from a public playground. Joe occasionally employs youngsters at the playground to act as "lookouts" for his "stash house" operation. He has taught them the identities of all undercover officers and of all unmarked cars.

At midnight on June 1, 1990, Joe gets a call from one of his corner "captains" that his dealers on that corner, which is a round-the-clock drug market , are running low on crack. Joe has his "cooker" make up 100 vials of crack which Joe then gives to a young "gofer" in the drug organization to take down to the bar and deliver it to the "captain". Unbeknownst to Joe, the "gofer" has just turned 18. He previously was employed as a "lookout" for one of Joe's corner "captains." The "gofer" takes the vials of "crack" and delivers them to the "captain" inside the bar at approximately 1:00 a.m.

The "captain" takes the crack and divides it up among his men working a corner that is several blocks away but still within 1,000 feet "as the crow flies" from Mark Twain school. One of the dealers is a 19-year-old named Curtis. Approximately one hour later, Curtis is approached by two individuals whom he knows to be crack addicts. Each of the individuals buys several vials of crack. Unbeknownst to Curtis, one of the individuals is 17 and the other is 16.

At the end of the night's shift, the "captain" collects the money from his team of dealers and drives to the bar to met Joe. Joe arrives at the bar driving a 1990 BMW. It is approximately 8:30 a.m. and the bar is closed. The "captain" hands Joe a roll of cash as several students walk by on their way to school.

Analysis

Joe would be subject to the enhanced penalties under Section 409(b) of the UCSA (1990) for distributing the crack to the "gofer" within 1,000 feet of a public playground. The purpose of Section 409(b) is to deter persons from conducting drug operations where the direct and indirect, immediate and more attenuated, consequences of those operations are likely to affect juveniles.

Joe would not be liable for distributing the crack to the "gofer" under Section 409(a) of the USCA (1990) because the "gofer" has just turned 18. If the "gofer" were under 18, Joe would be liable under Section 409(a) for distributing drugs to a juvenile and under Section 410(a) for using or hiring a juvenile to transport or carry a controlled substance. Joe would be liable under Section 410(a) for hiring juveniles to act as "lookouts" for his "stash house" operation. Like the federal statute on which it is based, Section 410(a) applies to those who employ juveniles to avoid detection or apprehension for a violation of the Act.

The "cooker" would face enhanced penalties under Section 409(b) for distributing the freshly made crack to Joe. However, the "cooker" would not be liable under Section 409(b) if all he did was manufacture the crack at the "stash house" and then personally carry it to a place more than 1,000 feet from a school or playground for distribution. This failure to include manufacturing offenses in Section 409(b) is troublesome because the "cooker" is just as likely as Joe to employ juveniles at the playground to act as "lookouts" and his operations will mean that drugs are readily available in the area around the playground whether he or one of his "clients" does the distribution. Under the federal statute on which Section 409(b) is based, the "cooker" would be liable for conducting a manufacturing operation within the prescribed distance from the playground.

The "gofer" would be subject to enhanced penalties under Section 409(b) for distributing the crack to the "captain" within 1,000 feet of a school. This is true notwithstanding the fact that the transaction cannot be seen from the school and that there are no juveniles likely to be present in or around the bar at 1:00 a.m. Again, the purpose of Section 409(b) is to deter persons from conducting their drug operations in areas where the direct and indirect consequences of those operations might affect juveniles. For the same reason, the "captain" and Curtis (indeed, all of the deals on the corner) would be subject to enhanced penalties under Section 409(b) for distributing drugs within 1,000 feet of the school.

Curtis would also be subject to enhanced penalties under Section 409(a) for distributing crack to the 16-year-old, a juvenile who is more than two years his junior. This is true not withstanding the facet that Curtis did not know the age of his customer. One who undertakes to sell drugs to young people should assume the risk that they may be juveniles for purposes of this statute. Curtis would not, however, be subject to the enhanced penalties under Section 409(a) as presently drafted, based on his sale to the 17-year-old juvenile, because of the requirement that the juvenile recipient of the drugs be two years the junior of the distributor. This requirement merely acts to protect the drug trafficker and should be eliminated.

One of the most devastating consequences of our national drug problem is the impact of drug trafficking on our nation's youth. Particularly in urban areas, young people are increasingly using dangerous and highly addictive drugs such as "crack", PCP, and methamphetamine which are readily available on many school grounds. Newspaper reports of pre-teen dropouts who have become major street-dealers of crack, often making thousands of dollars a week and spending it all on their own self-destruction, are commonplace. And,throughout our nation, drug traffickers have learned to hire juveniles as "lookouts" or street-dealers thereby reducing their own exposure to law enforcement authorities while, at the same time, resting secure in the knowledge that their juvenile "employees," if arrested, will face little or no "hard time" and therefore are unlikely to

cooperate with law enforcement authorities. The consequence for our society is the complete and utter corruption of an increasing number of young victims.

Equally insidious, but more difficult to quantify, is the effect of exposing young people to the "rewards" of drug trafficking. Inner-city children are often forced to bear witness to the street-trafficking of illegal drugs on their way to and from their local schoolyards and playgrounds. Everyday, they see the large bankrolls of the street-dealers and the expensive cars and jewelry of the drug traffickers. Most of their parents undoubtedly aspire to a better life for their children and work to instill in them the values of hard work, ambition and achievement. These parents and children must overcome enormous obstacles and disadvantages even without the prevalence of open-air drug markets and "crack houses" operating throughout their neighborhoods. But the corrupting effect of the drug markets is nearly insurmountable. Children, who are not yet themselves drug users or employed by drug traffickers, must decide each day whether to resist or give in to the "easy money" and "free and easy" lifestyle that comes from selling drugs. Teenagers who work part-time in fast food restaurants, strive to get into the best schools, join the armed services, or work to obtain a ROTC scholarship to college must seem foolish when one can literally make $5,000 a week or more dealing drugs on the street.

Sections 409 and 410 of the UCSA (1990) provide a much-needed degree of deterrence through the use of enhanced penalties against drug traffickers who would deal drugs to minors, employ minors in their drug dealing organizations, or corrupt minors by conducting their drug-dealing activities within close proximity to schools and playgrounds. In 1988, the White House Conference for a Drug Free America recognized the need to protect our children from drug activity. Conferees advocated mandatory minimum sentences for persons selling drugs to juveniles, or using juveniles to distribute drugs.[7] Most states have sent clear signals that use of children to perpetuate drug activity deserves severe punishment. Drug free school zones exist in 43 jurisdictions.[8] Forty-six (46) enhance penalties for employment of minors in a drug operation.[9] Almost every jurisdiction, 50, specifically address sales to juveniles in their penalty provisions.[10]

Section 409(a) of the UCSA (1990) is modeled on the federal statutes authorizing enhanced penalties for the distribution of drugs to juveniles: 21 U.S.C. §845. It is, however, somewhat narrower in scope that its federal counterpart. The federal statute applies to any person at 21 least years of age who distributes a controlled substance to any person under 21 year of age. This attacks those who are legally accountable as adults for their criminal conduct while, at the same time, deterring the distribution of controlled substances to those who are school-age (i.e., under 21) or younger. Section 409(a) provides for enhanced penalties for a person at least 18 years of age who distributes a controlled

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[7] The White House Conference for a Drug Free America, Final Report 60 (June, 1988).

[8] Office of National Drug Control Policy, State Drug Control Status Summary, State Drug Control Status Report (November, 1990); National Criminal Justice Association, A Guide to Conrolled Substances Acts (1991) (See Appendix).

[9] Office of National Drug Control Policy, supra note 8.

[10] National Criminal Justice Association, supra note 8. (See Appendix).

substance to an individual who is "under 18 who is at least two years [the distributor's] junior."

The elimination of the federal requirement that the "customer" be under 21 is less troubling than the additional requirement, under the UCSA (1990), that the "customer" also be at least two years the junior of the "dealer." There is no sound policy reason for this requirement. If the purpose of the statute is to deter the distribution of drugs to juveniles by those who are legally accountable as adults for their criminal conduct, this requirement adds nothing to serve that purpose and, in fact, merely adds a loophole by which young adult drug dealers can deal drugs to teenagers who are less than two years their junior and escape the enhanced penalties. Thus, an 18-year-old could sell drugs to anyone who was 16 or 17 without fear of the enhanced penalties. This "two-year age differential" should be eliminated.

Section 409(b) of the UCSA (1990) is modeled on the federal "schoolyard statute": 21 U.S.C. §845a. It is, however, considerable narrower in scope than its federal counterpart. First, it applies only to distribution offenses whereas the federal statute applies to distribution, manufacturing, or possession with intent to distribute offenses. Thus, persons operating "crack" manufacturing operations or "meth labs" within 1,000 feet of the protected areas, but who do not distribute drugs at these sites, would not face the enhanced penalties under UCSA (1990) whereas they would under the federal statute. Second, the scope of "protected areas" is narrower in that private vocational schools, junior colleges, youth centers, public swimming pools, and video arcade facilities are excluded from the UCSA (1990). We support enactment of Section 409(b) notwithstanding its considerably narrower scope.

Section 410 of the UCSA (1990) is modeled on the federal statute imposing enhanced penalties for persons who employ juveniles to violate any of the federal drug laws: 21 U.S.C. §845b(a). It is, however, somewhat narrower in scope than its federal counterpart because it does not impose enhanced penalties for those who receive a controlled substance from a person under 18 years of age other than an immediate family member. It does, however, address the primary kind of conduct which the statute was meant to deter: the employment of juveniles by adult drug traffickers. We support enactment of this provision.

Courts have long recognized the validity of the Congressional concern with protecting children from the multiple evils inherent in drug trafficking, even in prosecutions under the so-called "schoolyard statute" (21 U.S.C. §845a) where no children were present or involved in the charged drug offense.

> The presumption that narcotics sales in the vicinity of an elementary or secondary school endanger the students and thus should be subject to stiffer penalties is substantially related to Congress's interest in shielding these children from the evils of the drug trade. Whether or not a child is involved in or otherwise present during any particular sale of narcotics within one thousand feet of a school, subjecting the seller to enhanced penalties reasonably may be expected to deter the seller and other illicit dealers from conducting their operations near school property in the future. In such areas, where children congregate in large numbers before, during, and after school

> sessions, they are readily subject to the evils of addiction, a hazard to them not only physically and psychologically, but financially, with the prospect that their need for drugs, once they are addicted, will lead them into a life of crime to obtain funds to support their habit. They may be drawn into drug rings as participant themselves, adding the sales and distribution of narcotics to others, including their schoolmates. Indeed, judicial notice may be taken of the destructive results of drug addiction, the source of which Congress clearly intended to keep out of the easy reach of school-children. It is difficult to imagine a more rational way of keeping drug traffickers out of areas where children are more likely to come into contact with them than to subject them to the risk of stiffer penalties for doing business near school property....[D]efendant fails to consider the long term effect of Section 845a on the health and welfare of schoolchildren in general.

United States v. *Nieves*, 608 F.Supp. 1147, 1149-50 (S.D.N.Y. 1985) (*emphasis supplied; footnote omitted*). Another court has said:

> [T]he statute is designed to protect schoolchildren from the direct and indirect dangers of the narcotics trade. The statute attempts to do this by creating, in effect, a circular area, with a radius of one thousand feet, around all elementary and secondary schools which will be free of any narcotics traffic, and all of the direct and indirect evils posed by this activity.

United States v. *Cunningham*, 615 F.Supp. 519, 520 (S.D.N.Y. 1985) (*emphasis supplied*). Still another court has rejected a challenge that the conviction was based on a transaction that took place inside a dwelling entirely out of the sight of any students:

> The consequences of such transaction inevitable flow from inside the dwelling to the violent and dangerous milieu Congress sought to eliminate in the proximity of schools.

United States v. *Holland*, 810 F.2d 1215 (D.C. Cir.), *cert. denied,* 107 S.Ct. 2199 (1987).

Other cases upholding the foregoing federal statutes include the following: *United States* v. *Carter*, 854 F.2d 1102 (8th Cir. 1988) (affirming conviction for employment of minor under section 845b; defendant need not know age of distributee; "[t]o rule otherwise would permit drug dealers to close their eyes to the age of the minors who become part of the operation, without fear of reprisal"); *United States* v. *Ofarril*, 779 F.2d 791 (2d Cir. 1985); *cert. denied,* 475 U.S. 1029 (1986) (schoolyard statute; defendant need not know he was within proscribed distance); *United States* v. *Agilar*, 779 F.2d 123 (2d Cir. 1985), *cert. denied,* 475 U.S. 1069 (1986) (presumption that those who deal drugs within 1,000 feet of school are deserving of enhanced punishment is rational and constitutional); *United States* v. *Jones*, 779 F.2d 121 (2d Cir. 1985) *cert. denied,* 475 U.S. 1031 (1986) (upholding constitutionality of schoolyard statute); *United States* v. *Fahi*, 776 F.2d 46 (2d Cir. 1985) (defendant need not know he was within proscribed distance); *United States* v. *Pruitt*, 763 F.2d 1256 (11th Cir. 1985) *cert. denied,* 474 U.S. 1084 (1986) (affirming conviction for distribution to minor under Section 845; defendant need not have known age of distributee); *United States* v. *LaFluer*, 669 F.Supp. 1029 (D.Nev.1987) (proper to charge

distribution to minor notwithstanding fact that minor was willing co-conspirator); *United States* v. *Dixon*, 619 F. Supp. 1399 (S.D.N.Y. 1985) (presumption that those who deal drugs within 1,000 feet of school are deserving of enhanced punishment is rational and constitutional.

SECTION 411. CONTINUING CRIMINAL ENTERPRISE; PENALTY.

(a). A person who engages in a continuing criminal enterprise is guilty of a crime and upon conviction is punishable by a term of imprisonment and fine not exceeding [two times] those authorized by Section 401 for the underlying offense. For purposes of this subsection, a person is engaged in a continuing criminal enterprise if:

(1) the person violates any provision of this [Act] which is a felony; and

(2) the violation is a part of a continuing series of two or more violations of this [Act] on separate occasions:

(i) which are undertaken by the person in concert with five or more other persons with respect to whom the person occupies a position of organizer, supervisor, or any other position of management; and

(ii) from which the person obtained substantial income or resources.

(b) A person who violates subsection (a) after a previous judgment of conviction under that subsection has become final, is punishable by a term of imprisonment not exceeding [three times] that authorized by Section 401.

[(c) Notwithstanding any other provision of this section, with respect to an individual who is found to have violated subsection (a) or (b):

(1) adjudication of guilt or imposition of sentence may not be suspended, deferred, or withheld;

(2) the individual must be imprisoned for at least [ ] for a violation of subsection (a) or (b); and

(3) the individual is not eligible for parole before serving the mandatory term of imprisonment prescribed by subsection (a) or (b).]

COMMENT

This section provides penalties for continuing criminal enterprises, similar to the penalties contained in the federal act, 21 U.S.C. 848, which was amended by the Anti-Drug Abuse Act of 1986, Public Law 99-570, § 1253 (the "Continuing Drug Enterprise Act of 1986"), which provides for enhanced penalties for principals of

continuing drug enterprises. Under the comparable federal provision, 21 U.S.C. 848, the consensus of authority is that to establish a continuing "series" of violations the government must prove at least three felony violations, which does not necessarily mean that the government must obtain convictions on a minimum of three felony violations or that the defendant be indicted on three of the eligible predicate felonies. See United States v. Young, 745 F.2d 733 (2nd Cir. 1984).

ANALYSIS

SECTION 411. CONTINUING CRIMINAL ENTERPRISE; PENALTY

Hypothetical

Mr. K operates a heroin and cocaine distribution ring from his residence in Phoenix, Arizona. He has been doing this for nine months. He receives his drugs from couriers who obtain the drugs in Mexico. The drugs are often imported in leased trucks under his direction. On occasion, Mr. K also goes to Mexico to pick up drugs and discuss business with his foreign importer. Mr. K imports five pounds of heroin and cocaine weekly. The drugs are stored at his residence where they are prepared for distribution. In Phoenix Mr. K has six dealers who, under the supervision of Mr. K, prepare the drugs for sale and distribute them to mid-level dealers. The books and records are kept at the house by the wife of Mr. K. This record contains the date of sale. Mr. K has no other visible means of support. The business is a strictly cash business. Some of the proceeds are used to pay expenses, some are placed in bank accounts under the wife's name, and some are kept in the house. The wife has no other source of income. Search warrants are executed and $100,000 in cash is found at Mr. K's residence. Another $50,000 is found with one pound of cocaine. The records are also seized. The records reflect that the business has a gross income of $500,000 with expenses of $200,000 over nine months of operation. Records also show that Mr. K has used some of the drug proceeds to establish ABC Corporation. Mr. K has one general partner in ABC Corporation who does not know about Mr. K's drug dealing activity nor that ABC Corporation was purchased with drug proceeds.

Analysis

Section 411 of the UCSA (1990) is designed to reach those persons who engage in a Continuing Criminal Enterprise. *Jefers* v. *United States*, 97 S.Ct. 2207 (1977). To engage in a Continuing Criminal Enterprise a person must:

1) violate a felony provision of this Act;
2) that violation must be part of a continuing series of two or more violations;
3) act in concert with five or more persons;
4) act as an organizer, supervisor or manager and;
5) receive substantial income or resources.

Under these criteria only Mr. K is indictable for violating Section 411. The enterprise is ongoing and has been for nine months. Weekly shipments of drugs are received. Mr. K acts as an organizer/manager over more than five people: the couriers, the dealers and his wife. There are more than two violations of this act including sale of drugs, possession for sale and trafficking. Under the comparable federal law, 21 U.S.C. §848(d), to establish a continuing "series" of violations the government must prove at least three felony violations, which does not mean the government must obtain convictions on a minimum of three felony violations nor that the defendant must be indicted on the eligible predicate felonies, *United States* v. *Young*, 745 F.2d 733 (2nd Cir. 1985). Section 411 does not apply to possessory offenses pursuant to Section 406 of the UCSA (1990).

Mr. K has received substantial income. Substantial income or resources means the worth or value obtained from the enterprise, not the individual defendant. *United States* v. *Sisca*, 503 F.2d 1337 (2nd Cir. 1974). Income includes money or other property. *United States* v. *Jeffers*, 532 F.2d 1101 (7th Cir. 1976), *rev'd on other grounds*, 97 S. Ct. 221 (1977). It is not net income.

Section 411 is patterned after federal law 21 U.S.C. §848, which was amended by the Anti-Drug Abuse Act of 1986, Pub.L. 99-570, § 1253 which provides for enhanced punishment. This is a separate and distinct offense from the underlying predicate offenses. It punishes leaders of drug organizations and federally is commonly known as the "Drug Kingpin" statute. *United States* v. *Sinito*, 723 F.2d 1250 (Ohio 1983), *cert. denied*, 469 U.S. §817. The federal provision carries a mandatory sentence. 21 U.S.C. §848(a). In addition to the mandatory sentence,parole is unavailable. *United States* v. *Valenzuela*, 646 F.2d 352 (9th Cir. 1980). The mandatory sentencing provisions have been upheld as constitutional. *United States* v. *Erwin*, 793 F.2d 656 (5th Cir. 1986), *cert. denied* 107 S.Ct. 589.

Applicability of Model Asset Seizure and Forfeiture Act (MASFA) (1991)

Under the model act, separate civil remedies are also available to dismantle the enterprise. Turning first to forfeiture remedies, property is forfeitable if (1) it was used in any manner or part to facilitate conduct giving rise to forfeiture; 2) it is proceeds of conduct giving rise to forfeiture or 3) it is an interest in any enterprise that was established, operated or controlled through conduct giving rise to forfeiture. The residence of Mr. K is forfeitable because it was used to store and prepare drugs for sale. The entire residence is forfeitable and not just that part of the residence directly connected with drug activity. The language is clear from the words "the whole of any lot or tract of land." Innocent lienholders and good faith purchasers for value are protected. These include banks, mortgage companies, and other commercial interests. The bank accounts in the wife's name are also forfeitable because they are proceeds of the violation. The wife does not fall within an exemption under Section 5 because she is a co-conspirator and acted with knowledge of the unlawful activity.

The $100,000 in cash is also forfeitable because it is proceeds. There is probable cause to believe the $100,000 is proceeds because Mr. K's only known source of income is from drug dealing. Under Section 11(k) of the model act, there is a rebuttable presumption that property is forfeitable if the person has engaged in conduct giving rise to forfeiture, the property was acquired during the period of time the conduct was engaged in; and there is no other likely source for the property other than the conduct giving rise to forfeiture. This provision is based on 21 U.S.C. §853(d) which has been found to be constitutional. *United States* v. *Sandini*, 816 F.2d 869 (3rd Cir. 1987). *United States* v. *Haro*, 685 F.Supp. 1468 (Wis. E.D. 1988). The $50,000 in cash is also forfeitable for the same reasons. In addition, it was found with one pound of cocaine. Section 11(j) authorizes a rebuttable presumption that money is proceeds of drug dealing or was used or intended for use to facilitate drug dealing if it is found in proximity with the drugs.

ABC Corporation is forfeitable because it was established with drug proceeds, but only to the extent of the proceeds invested. The general partner's interest is exempt from forfeiture because he was not a party to the drug activity nor did he have any knowledge of it. Therefore, Mr. K would lose his interests but the general partner would not.

Mr.K is not entitled to offset the forfeiture by the extent of his expenses, which are $200,000. The definition of proceeds in Section 1(6) of the model act is all property derived from the conduct giving rise to forfeiture without reduction for expenses incurred for acquisition, maintenance or any other purpose. Only legitimate businesses can deduct business expenses. Illegitimate businesses have no rational or principled basis to claim deduction of expenses.

Finally, the forfeiture remedies must provide remedies relating to the $500,000 Mr. K acquired, but which cannot be located, and the leased trucks used to transport drugs. To the extent the $500,000 can be traced through accounts or expenditures, those derivative properties are forfeitable. However, to the extent they cannot be located, Section 14 of the model act comes into play. This provision allows the court to substitute other property up to the value of the property subject to forfeiture if that property cannot be located, has been transferred to a third party, is beyond the jurisdiction of the court, has been substantially diminished in value, has been commingled or is subject to any interest exempted from forfeiture.

Mr. K is liable for up to $500,000 and is liable to disgorge $500,000. If the original profit is unavailable,the court may substitute an asset in its place. The substitute asset provision is based on 21 U.S.C. §853(p). A similar concept relating to RICO forfeiture has been upheld in *United States* v. *Benevento*, 663 F.Supp. 1115 (S.D.N.Y. 1987), *affd.*, 836 F.2d 129 (2nd Cir. 1988).

As to the leased vehicles, they would normally be exempt from forfeiture as the lessor would have an exempt interest. However, under the substitute asset provision, Mr. K would be liable for the value of the leased vehicle even though the leased vehicle would not be forfeited. Drug dealers often use leased vehicles to avoid the forfeiture remedies; yet they still enjoy the economic advantage the vehicle provides in promoting the drug activity. The drug dealer should be liable for the value of the asset he or his enterprise used to promote drug activity.

These new tools reflect the principled stand that the organization behind the growing drug industry needs to be targeted and dismantled along with its corollary financial wealth.

SECTION 412. MONEY LAUNDERING AND ILLEGAL INVESTMENT; PENALTY.

(a) A person may not knowingly or intentionally receive or acquire proceeds, or engage in transactions involving proceeds, known to be derived from a violation of this [Act]. This subsection does not apply to a transaction between an individual and the individual's counsel necessary to preserve the individual's right to representation, as guaranteed by [insert reference to state's constitution] and by the Sixth Amendment of the United States Constitution. [This exception does not create a presumption against or prohibition of the right of the state to seek and obtain forfeiture of proceeds derived from a violation of this [Act].]

(b) A person may not knowingly or intentionally give, sell, transfer, trade, invest, conceal, transport, or otherwise make available anything of value that the person knows is intended to be used to commit or further the commission of a violation of this [Act].

(c) A person may not knowingly or intentionally direct, plan, organize, initiate, finance, manage, supervise, or facilitate the transportation or transfer of proceeds that the person knows are derived from a violation of this [Act].

(d) A person may not knowingly or intentionally conduct a financial transaction involving proceeds derived from a violation of this [Act] if the transaction is designed in whole or in part to conceal or disguise the nature, location, source, ownership, or control of the proceeds that the person knows are derived from a violation of this [Act] or to avoid a transaction reporting requirement under state or federal law.

(e) A person who violates this section is guilty of a crime and upon conviction may be imprisoned for not more than [ ] years, fined not more than [ ], or both.

COMMENT

This section makes it unlawful to finance, invest, acquire, or expend finances or assets that are actually known to have been derived from or are intended to further narcotics trafficking. It also protects the legitimate Sixth Amendment rights of the defendant by exempting the defendant's attorney from prosecution for certain limited acts. However, it does not shield from forfeiture those funds otherwise subject to forfeiture. Subsection (d) is derived from 18 U.S.C.A. 1956(a)(1)(b).

ANALYSIS

SECTION 412. MONEY LAUNDERING & ILLEGAL INVESTMENT; PENALTY

Hypothetical

Mr. D operates a cocaine and marijuana distribution business. He generates thousands of dollars in profits monthly. He has no other source of income. Mr. D. has a business arrangement with a local leasing company whereby Mr. D leases vehicles to transport drugs across the country. The lease company owner is aware of the use of the vehicles and charges an extra 10 percent over the standard rate. Some of the drug profits are given to Mr. C to invest in real estate and Mr. C is told these are drug proceeds and to put the property in the names of others. Mr. C advises Mr. D about state and federal forms that have to be filled out for the down payment of $12,000. Mr. C advises Mr. D to make two deposits of $6,000 in order to avoid the reporting forms. Mr. D is eventually arrested. Through the years Mr. D has employed an elite private attorney to represent him and the members of his drug organization in drug matters related to the ongoing cocaine and marijuana business. The attorney has always been paid with cash up front. Through the years, the attorney has known that Mr. D makes his money from drug dealing. Mr. D has often bragged to his attorney how lucrative cocaine dealing has been for him.

Analysis

This fact pattern repeats itself in every significant drug business. The organizers make money and require the assistance of others to keep the business operating and to transform the illicit cash into openly useable income. The money laundering provision is designed to drive the contributors of goods and services away from the drug trafficking industry. Previously this class of persons was not prosecutable. These people are not traditionally co-conspirators or aiders and abettors in the drug trade itself. Instead, they form a parallel support service by supplying advice, services or products that facilitate the main industry. The true pivotal point of liability is their culpability in knowingly promoting the flow of money in legitimate commercial avenues which has been corrupted and tainted by its drug genesis. Yet the federal money laundering statute did not go into effect until 1986. 18 U.S.C. §1956, 1957. The UCSA (1970) has no money laundering provision, but Section 412 of the UCSA (1990) criminalizes money laundering with drug proceeds. There is a growing trend among the states to criminalize money laundering. In 1985, Arizona became the first state to enact a money laundering statute. Several states, including California, Connecticut, Hawaii, Louisiana, New York, Oklahoma, and Virginia, have since followed Arizona's lead. Florida and Georgia also have money laundering prevention statutes.

A truly effective assault on the drug industry necessarily includes those who give economic support to its viability. In the fact pattern above several people have violated the money laundering statute. The owner of the lease company knows that his cars are being used to transport drugs. He not only supplies a necessary component to effectuate the distribution, he also parlays it into an opportunity to make more money himself. He has violated subsection (a) by knowingly receiving proceeds known to be derived from drug violations; and/or (b) by knowingly making available things of value which he

knows are intended for the purpose of committing or furthering a drug violation, i.e., transportation for drugs.

Mr. C knowingly accepts drug profits and invests them in real estate. It is quite common for drug dealers to invest their profits in real estate. In addition, Mr. C is willing to place the property in nominee names and advise Mr. D on how to avoid reporting requirements. Mr. C has violated subsection (a) by engaging in a transaction involving drug proceeds; (c) by managing or facilitating the transfer of proceeds; and (d) by conducting a financial transaction with drug proceeds while disguising the source of ownership of the proceeds and advising Mr. D on how to avoid the $10,000 reporting requirement. Subsection (d) is derived from 18 U.S.C. §1956(a)(1)(b).

The attorney is receiving monies he knows are drug proceeds. He knows this from his continuous representation of Mr. D and the other members of the drug ring; the statements of Mr. D and the fact that Mr. D has no other source of income. Subsection (a) excepts from criminal prosecution any transaction between an individual and that individual's counsel necessary to preserve that individual's Sixth Amendment right to counsel. This will guarantee that attorneys cannot be criminally prosecuted for money laundering if they knowingly receive drug proceeds as long as it is necessary to preserve the paying individual's right to counsel. The funds are not shielded from forfeiture. This concept is derived from the 1988 Anti-Drug Abuse Act, amendments to 18 U.S.C. § 1957(f)(10). The federal law exempts the attorney from criminal liability but does not exempt the funds from forfeiture.

Under the UCSA (1990), the attorney is explicitly protected only when he receives payment from the person to whom the right of representation attaches. The attorney is not protected if someone else pays the legal fees of the person to whom the right of representation attaches. In other words, if Mr. D hires the attorney, subsection (a)(1) applies; but if someone other than Mr. D hires the attorney, such as Mr. D's drug supplier, subsection (a) does not apply. What this subsection protects against is the situation where a kingpin pays for the legal services of his underlings to insure their silence. In such a case, the attorney's loyalty flows to the kingpin and not the client he formally represents. To avoid such conflicts of interest, the fee must come from the person who has the right to counsel. No other formulation can guarantee true independence of the attorney from the higher ups.

The United States Supreme Court decided the issue of the forfeitability for drug proceeds that have been paid to an attorney in *United States* v. *Monsanto*, 109 S.Ct. 2657 (1989), and *In re Hearings as to Caplin & Drysdale*, 109 S.Ct. 2646 (1989).

The Court espoused strong policy arguments supporting the forfeiture of drug proceeds. First, these monies are proceeds of a crime. In no other case where the monies are proceeds of a crime that are subject to forfeiture, can the attorney claim an entitlement. For example, as the Court pointed out in *Caplin & Drysdale*, if A robbed a bank and hired an attorney with the stolen money, the attorney will not be heard to say he should keep that money as necessary to preserve A's right to counsel. Second, the government's interest relates back to the commission of the act giving rise to forfeiture. 18 U.S.C. §1963(c); 21 U.S.C. §853(c). As a consequence transfers of corrupted property to third persons are void. Statutory exceptions have been created for good faith purchasers for value. 18 U.S.C.

§1963(m)(6)(h); 21 U.S.C. §853(n)(6)(b); and Section 5 of the Model Asset Seizure and Forfeiture Act (1991). An attorney usually does not become a good faith purchaser for value prior to the attachment of the government's interest because he commonly does not represent a person until after the commission of the act giving rise to forfeiture. By then, the government's interest has already attached. If a lawyer becomes a good faith purchaser for value after the attachment of the government's interest his fees are protected from forfeiture. This is consistent with the Model Asset Seizure and Forfeiture Act (1990) which protects good faith purchasers for value, who are service or product providers.

Third, an individual has a right to counsel in a criminal proceeding. He has the right to counsel of his choice but this right is qualified. If he cannot afford an attorney, he will be appointed one.

Fourth, the government has a deeply rooted countervailing interest to eradicate the economic roots of drug enterprises. The drug war is not a figure of speech. It is a literal war in which drug traffickers are armed with AK 47s, Uzis and machine guns. DEA agents are now being outfitted with submachine guns as standard equipment. The injuries in today's emergency rooms mimic the injuries seen from the battlefield from Viet Nam. For a more in depth discussion concerning forfeiture of attorney's fees, see the Analysis to Section 5 of the Model Asset Seizure and Forfeiture Act (1991).

Violence is the trademark of this imported industry which murders those in authority who continue the struggle against drugs. To allow a drug dealer to use his poisoned money to hire an attorney of his choice is to elevate the values of violence, addiction and drug trafficking to such a degree that a wealthy crook can purchase legal services, but a poor crook cannot. The constitutional right to counsel then becomes constitutional only to the extent one can buy it. Only money untainted by drug trafficking should be used to hire an attorney. At least then corruption and dishonesty are not rewarded.

SECTION 413. SECOND OR SUBSEQUENT OFFENSES; PENALTIES.

(a) A person convicted of a second or subsequent offense under this [Act] may be imprisoned for a term not exceeding two times the term otherwise authorized and fined an amount not exceeding two times the fine otherwise authorized.

(b) For purposes of this section, an offense is considered a second or subsequent offense, if, before conviction of the offense, the offender has at any time been convicted under this [Act] or under any statute of the United States or of any state relating to a narcotic drug, marijuana, or a stimulant, depressant, or hallucinogenic substance and judgment of that conviction has become final.

(c) This section does not apply to a second or subsequent offense under Section 406, 409(b), 410(a), or 411.

COMMENT

Sections 409(b), 410(a), and 411 are excepted from the application of this section because second offense penalties for those sections are provided by Sections 409(c), 410(c), and 411(b).

SECTION 414. CONDITIONAL DISCHARGE FOR POSSESSION AS FIRST OFFENSE.

(a) Whenever an individual who has not been convicted previously within the past ten years of any

offense under this [Act] or under any statute of the United States or of any state relating to a narcotic drug, marijuana, or a stimulant, depressant, or hallucinogenic substance, tenders a plea of admission, guilty, no contest, nolo contendere, or similar plea to a charge of possession of a controlled substance under Section 406, or is found guilty of that charge, the court, without entering a judgment of conviction and with the consent of the accused, may defer further proceedings and place that individual on probation upon terms and conditions that must include attendance and successful completion of an education program or, in the case of a drug dependent individual, of a treatment and rehabilitation program.

(b) Upon violation of a term or condition, the court may enter a judgment of conviction and proceed as otherwise provided. Upon fulfillment of the terms and conditions, the court shall discharge the individual and dismiss the proceedings against that individual. A nonpublic record of the dismissal must be retained by the [appropriate state agency] solely for the purpose of use by the courts in determining whether, in later proceedings, the individual qualifies under this section.

(c) Discharge and dismissal under this section is without adjudication of guilt and is not a conviction

for purposes of this section or for purposes of employment, civil rights, or any statute or regulation or license or questionnaire or any other public or private purpose, but not including additional penalties imposed for second or subsequent convictions or the setting of bail. Discharge and dismissal restores the individual, in the contemplation of the law, to the status occupied before the arrest, indictment, or information. The individual may not be held thereafter under any law to be guilty of perjury or otherwise giving a false statement by reason of failure to recite or acknowledge that arrest, indictment, or information, or trial in response to an inquiry made of that individual for any purpose. Discharge and dismissal under this section may occur only once with respect to an individual.

COMMENT

This section is designed to permit a judge to place a first offender on probation in lieu of sentencing the offender to prison. However, it is applicable only to cases involving simple possession of controlled substances and is available only once with respect to any person. It should also be noted that first offender treatment is not available as a matter of right, but rather is discretionary with the judge.

An additional aspect of this section is that it provides for confidentiality of the defendant's record upon fulfilling all the terms and conditions of probation. This will preclude any permanent criminal record from attaching to and following the individual in later life.

The language on the effect of discharge and dismissal is based on similar language in the federal

act, 21 U.S.C. 844(b)(2), and on Annotated Code of Maryland, Article 27, § 292. The language on attendance and completion of a treatment and rehabilitation program is to point out a specific condition that must be imposed.

[SECTION 415. TREATMENT OPTION FOR VIOLATION OF [ACT]. If an individual is adjudicated guilty of a violation of this [Act] for which the individual is eligible for probation, the court may impose a sentence authorized by this [Act], may place the individual on probation as authorized by this section, or may impose a combination of a sentence and probation as authorized by this section. The court, with the consent of the individual and with the consent of a treatment facility having inpatient or outpatient programs for the treatment of drug dependent individuals, may place the individual, if found by the court to be in need of treatment, on probation upon terms and conditions, including participation in a treatment program of the facility. The court shall order treatment for the period the treatment facility considers necessary. Treatment or a combination of a sentence and probation including treatment may not exceed the maximum sentence allowable unless the convicted individual consents to continued treatment. Upon violation of a term or condition, including failure to participate in the treatment program, the court may revoke the probation

and proceed as otherwise provided. Upon fulfillment of the terms and conditions, including attendance and successful completion of the treatment program, the court shall terminate the probation.]

COMMENT

This section provides for a treatment option in addition to or as an alternative to imprisonment. The section is intended as an authorization in addition to any authority of a court to place an individual on probation. See 18 U.S.C. 3553, 3651 for factors used by federal courts with respect to requiring participation in treatment programs. This section is bracketed so states that have a general statutory provision allowing commitment to a treatment facility need not use this section.

ANALYSIS

SECTION 414. CONDITIONAL DISCHARGE FOR POSSESSION AS FIRST OFFENSE

This provision of the USCA (1990) is supported by America's police and prosecutors. It permits persons found possessing illegal drugs to avoid having a conviction on their records by meeting the following conditions: First, they must never have been convicted of a drug offense within the past ten years. Second, their probation must include successful completion of a drug education program or if the defendant is drug dependent a rehabilitation and treatment program.

Should the individual successfully complete the probation they are returned to the status occupied before their arrest. As long as they lead a law abiding life their offense ceases to exist for all purposes, public and private. The only circumstance that would result in the use of the discharged offense is the commission of additional crimes. In this limited situation, for purposes of bail or any additional penalty imposed on repeat offenders, the discharged offense would constitute a prior conviction.

While there is some feeling that persons applying for jobs in law enforcement, medicine, or law or testifying under oath ought to be required to acknowledge a drug history -- prosecutors and police believe a compromise that encourages and rewards first offenders but permits the use of the prior record should they commit future crimes strikes a just balance.

SECTION 415. TREATMENT OPTION FOR VIOLATION OF [ACT]

This section has the support of America's police and prosecutors as part of a comprehensive plan to provide courts with the tools necessary to assist those defendants who are genuinely seeking rehabilitation. Such programs will only be available, however, if funding plans like that proposed in Section 416 are also adopted.

SECTION 416. ASSESSMENT FOR EDUCATION AND TREATMENT; APPROPRIATION OF MONEYS.

(a) A person convicted of a violation of this [Act], and every individual placed on probation under Section 414, must be assessed for each offense a sum of not less than [$500.00] nor more than [$3,000.00]. The assessment is in addition to and not in lieu of any fine, restitution, other assessment, or forfeiture authorized or required by law.

(b) The assessment provided for in this section must be collected as provided for collection of [appropriate term, e.g., fines, restitution] and must be forwarded to the [appropriate agency] as provided in subsection (c).

(c) Moneys collected under this section must be forwarded to the [appropriate agency] for deposit in the drug abuse education and treatment fund. Moneys in the fund are appropriated on a continuing basis and are not subject to [state lapsing and related fiscal and appropriations restraints].

(d) The [appropriate state agency] shall administer expenditures from the fund. Expenditures may be made only for drug abuse education, prevention, and treatment services. Moneys from the fund may not supplant other local, state, or federal funds.

COMMENT

It is not intended that payment of the assessment is a condition for probation. Assessments under this section are not intended for use for law enforcement purposes. Each state should tailor the language in subsection (c) to its own requirements for establishing special funds in the state treasury and to its own appropriation requirements.

ANALYSIS

SECTION 416. ASSESSMENT FOR EDUCATION AND TREATMENT; APPROPRIATION OF MONIES

This section of the UCSA (1990) is based on New Jersey Statutes Annotated, Section 2C:35-15. The New Jersey provision assesses each individual convicted of a drug offense, or placed on probation for a drug offense, a fee ranging from $500 to $3,000. Since its adoption, the law has been responsible for the collection of nine-ten million dollars annually for drug education and treatment. The premise underlying this provision is that the offenders causing the problem are the most appropriate members of society to fund education and treatment. A strong advocate of the New Jersey program is the National Commission on Drug-Free Schools. The Commission's recent report encourages all states to establish assessment funds.[1]

Funding for drug education and treatment is provided through this "users fee" rather than by siphoning off asset forfeiture funds because experience has shown programs like this, such as victims compensation assessment programs, provide a more reliable funding base than forfeiture actions. While every jurisdiction convicts drug offenders, not all jurisdictions have the resources for the long term investigations necessary for regular and substantial asset forfeiture.

Moreover, as California's experience illustrates, distribution of all or 90 percent of proceeds to enforcement (including prosecution) can also benefit non-enforcement purposes. In 1986, enforcement received none of the proceeds and state forfeitures totalled only $50,000. Seventy-five percent of the proceeds were allocated to enforcement in 1988 and state forfeiture statute coinciding with the re-allocation. Enforcement received $5.25 million and the state received $1.25 million as its 25 percent for the state. State forfeitures reached $50 million. While the state's percentage decreased over the years, its share in actual dollars steadily increased.[2]

As a policy matter funds collected under this provision should not be used for law enforcement purposes as this may reduce the incentive for jurisdictions to pursue asset forfeiture cases. Similarly, asset forfeiture funds should be used exclusively for law enforcement and prosecution purposes for the same reasons. Providing independent funding bases for education and treatment through this provision and for law enforcement through forfeiture proceeds eliminates counterproductive conflicts between these necessary components of a comprehensive response to the drug problem.

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[1] National Commission on Drug-Free Schools, Final Report-Toward A Drug-Free Generation: A Nation's Responsibility 56 (September, 1990).

[2] California Attorney General's Asset Forfeiture Program, 1991.

SECTION 417. PENALTIES UNDER OTHER LAWS. Penalties imposed for violation of this [Act] and civil remedies provided under this [Act] are in addition to, and not in lieu of, any civil remedy, administrative penalty, or sanction otherwise authorized by law.

SECTION 418. BAR TO PROSECUTION. If a violation of this [Act] is a violation of a federal law or the law of another state, a conviction or acquittal under federal

law or the law of another state for the same act is a bar to prosecution in this State.

ARTICLE V

ENFORCEMENT AND ADMINISTRATIVE PROVISIONS

[SECTION 501. POWERS OF ENFORCEMENT PERSONNEL. An officer or employee of the [appropriate agency] designated by the [appropriate person] may:

(1) carry firearms in the performance of the officer's or employee's official duties;

(2) execute and serve search warrants, arrest warrants, administrative inspection warrants, subpoenas, and summonses issued under the authority of this State;

(3) make arrests without warrant for an offense under this [Act] committed in the officer's or employee's presence, or if the officer or employee has probable cause to believe that the individual to be arrested has committed or is committing a violation of this [Act] which may constitute a felony;

(4) make seizures of property pursuant to this [Act]; and

(5) perform other law enforcement duties the [appropriate person] assigns.]

COMMENT

This section is bracketed to provide an option to consider in granting powers to personnel of the appropriate agency, particularly powers normally associated with law enforcement personnel, e.g., the carrying of firearms. The purpose of this section is to ensure that those individuals charged with the enforcement of the Act may be given full enforcement authority. Full enforcement authority, as opposed to

authority restricted to offenses relating only to controlled substances, should give additional flexibility in the utilization of enforcement personnel within the state. This section does not give blanket authority to all members of a particular agency to carry weapons, execute and serve search warrants, make arrests, make seizures or perform other law enforcement duties. It does place discretion in the appropriate person or agency to select those field enforcement personnel who will enforce the Act.

SECTION 502. ADMINISTRATIVE INSPECTIONS AND WARRANTS.

(a) In this section, "controlled premises" means:

(1) Places where persons registered or exempted from registration requirements under this [Act] are required to keep records; and

(2) Places, including factories, warehouses, establishments, and conveyances, in which persons registered or exempted from registration requirements under this [Act] are permitted to hold, manufacture, compound, process, sell, deliver, or otherwise dispose of a controlled substance.

(b) The procedure for issuance and execution of administrative inspection warrants is as follows:

(1) A [judge of a state court of record, or any state magistrate] within the [judge's or magistrate's] jurisdiction, and upon proper oath or affirmation showing probable cause, may issue warrants to conduct administrative inspections of controlled premises authorized by this [Act] or rules adopted under

this [Act], and seizures of property appropriate to the inspections. For the purpose of issuance of an administrative inspection warrant, probable cause exists upon showing a valid public interest in the effective enforcement of this [Act], or rules adopted under this [Act], sufficient to justify administrative inspection of the area, premises, building, or conveyance in the circumstances specified in the application for the warrant;

(2) A warrant may issue only upon an affidavit of a designated officer or employee having knowledge of the facts alleged, sworn to before the [judge or magistrate], and establishing the grounds for issuing the warrant. If the [judge or magistrate] is satisfied that grounds for the application exist or that there is probable cause to believe they exist, the [judge or magistrate] shall issue a warrant identifying the area, premises, building, or conveyance to be inspected, the purpose of the inspection, and, if appropriate, the type of property to be inspected, if any. The warrant must:

(i) state the grounds for its issuance and the name of each individual whose affidavit has been taken in support thereof;

(ii) be directed to an individual authorized by Section 501 to execute it;

(iii) command the individual to whom it is directed to inspect the area, premises, building, or conveyance identified for the purpose specified and, if appropriate, direct the seizure of the property specified;

(iv) identify the item or types of property to be seized, if any; and

(v) direct that it be served during normal business hours and designate the [judge or magistrate] to whom it must be returned;

(3) A warrant issued pursuant to this section must be executed and returned within ten days after its date unless, upon a showing of a need for additional time, the court orders otherwise. If property is seized pursuant to a warrant, a copy must be given to the person from whom or from whose premises the property is taken, together with a receipt for the property taken. The return of the warrant must be made promptly, accompanied by a written inventory of any property taken. The inventory must be made in the presence of the individual executing the warrant and of the person from whose possession or premises the property was taken, if present, or in the presence of at least one credible individual other than the individual executing the warrant. A copy of the inventory must be delivered

to the person from whom or from whose premises the property was taken and to the applicant for the warrant;

(4) The [judge or magistrate] who has issued a warrant shall attach to the warrant a copy of the return and all papers returnable in connection therewith and file them with the clerk of the [appropriate state court for the judicial district] in which the inspection was made.

(c) The [appropriate person or agency] may make administrative inspections of controlled premises in accordance with the following provisions:

(1) If authorized by an administrative inspection warrant issued pursuant to subsection (b), an officer or employee designated by the [appropriate person or agency], upon presenting the warrant and appropriate credentials to the owner, operator, or agent in charge, may enter controlled premises for the purpose of conducting an administrative inspection;

(2) If authorized by an administrative inspection warrant, an officer or employee designated by the [appropriate person or agency] may:

(i) inspect and copy records required by this [Act] to be kept;

(ii) inspect, within reasonable limits and in a reasonable manner, controlled premises and all pertinent equipment, finished and unfinished material,

containers and labeling found therein, and, except as provided in paragraph (4), all other things therein, including records, files, papers, processes, controls, and facilities bearing on violation of this [Act]; and

(iii) inventory any stock of a controlled substance therein and obtain samples thereof;

(3) This section does not prevent the inspection without a warrant of books and records pursuant to an administrative subpoena issued in accordance with [insert appropriate state code section], nor does it prevent entries and administrative inspections, including seizures of property, without a warrant:

(i) if the owner, operator, or agent in charge of the controlled premises consents;

(ii) in situations presenting imminent danger to health or safety;

(iii) in situations involving inspection of conveyances if there is reasonable cause to believe that the mobility of the conveyance makes it impracticable to obtain a warrant;

(iv) in an emergency or other exceptional circumstance where time or opportunity to apply for a warrant is lacking; or

(v) in all other situations in which a warrant is not constitutionally required;

(4) An inspection authorized by this section may not extend to financial data, sales data, other than shipment data, or pricing data unless the owner, operator, or agent in charge of the controlled premises consents in writing.

COMMENT

The purpose of this section is to codify certain United States Supreme Court decisions, in particular Camara v. Municipal Court of the City and County of San Francisco, 387 U.S. 523 (1967), See v. City of Seattle, 387 U.S. 541 (1967), and Colonnade Catering Corp. v. U.S., 397 U.S. 72 (1970), with regard to inspection warrants.[1] The section sets out in very careful terms the procedures and restrictions for obtaining and issuing an administrative inspection warrant. This is of vital importance to the states because they are involved in the regulation of the legitimate drug industry and must have the ability to inspect records, books, and premises if access is denied. By having a carefully delineated code section dealing with administrative inspection warrants, law enforcement officers will be more certain of what is needed to obtain them and the courts can apply a uniform standard. Perhaps even more important, the industry being inspected will have more certainty as to its rights and obligations in this area.

It should be noted that the Supreme Court, in Camara v. Municipal Court spoke of the requirement of "probable cause" for issuance of an administrative inspection warrant. But the Court was not, however, speaking in terms of criminal probable cause, which would require a specific knowledge of the condition of the particular building to be inspected. Instead, rejecting the criminal probable cause argument, it required merely a valid public interest in the effective enforcement of a particular public health or safety act which justified the intrusion contemplated.

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[1] See also: Kramer Grocery v. U.S., 294 F.Supp. 65 (1968); and United States v. Stanack Sales Co., 387 F.2d 849 (1968).

Although this section codifies the Court's view for administrative inspection warrants, it in no way affects criminal probable cause as that phrase is defined under present criminal statutes or case law.

Finally, it should be noted that while Section 402(a)(4) makes it a violation of the Act to refuse entry into any premises for inspection, it is contemplated that such inspection will have been authorized under the rules set out in this section.

SECTION 503. INJUNCTIONS.

(a) The [trial courts of this State] have [may exercise] jurisdiction to restrain or enjoin violations of this [Act].

(b) The defendant may demand trial by jury for an alleged violation of an injunction or restraining order under this section.

SECTION 504. COOPERATIVE ARRANGEMENTS AND CONFIDENTIALITY.

(a) The [appropriate person or agency] shall cooperate with federal and other state agencies in discharging the [appropriate person's or agency's] responsibilities concerning traffic in controlled substances and in suppressing the abuse of controlled substances. To this end, the [appropriate person or agency] may:

(1) arrange for the exchange of information among governmental officials concerning the use and abuse of controlled substances;

(2) coordinate and cooperate in training programs concerning controlled substance law enforcement at local and state levels;

(3) cooperate with the Drug Enforcement Administration by establishing a centralized unit to accept, catalog, file, and collect statistics, including records of drug dependent persons and other controlled substance law offenders within this State, and make the information available for federal, state, and local law enforcement purposes, but may not furnish the name or identity of a patient or research subject whose identity could not be obtained under subsection (c); and

(4) conduct programs of eradication aimed at destroying wild growth or unlawful propagation of plant species from which controlled substances may be extracted.

(b) Results, information, and evidence received from the Drug Enforcement Administration relating to the regulatory functions of this [Act], including results of inspections conducted by it, may be relied and acted upon by the [appropriate person or agency] in the exercise of its regulatory functions under this [Act].

(c) A practitioner engaged in medical practice or research is not required or compelled to furnish the name or identity of a patient or research subject to the [appropriate person or agency], nor may the practitioner

be compelled in any state or local civil, criminal, administrative, legislative, or other proceedings to furnish the name or identity of an individual that the practitioner is obligated to keep confidential.

COMMENT

The purpose of this section is to establish a basis for increased cooperation and exchange of information among state, local, and federal law enforcement agencies. Implementation of these cooperative arrangements will provide a means of obtaining meaningful statistics on drug dependent persons and other controlled substance law offenders. There is a definite need to obtain these statistics if there is to be an accurate assessment of the total drug abuse problem in the United States. The intent of this section is to ensure that federal and state agencies responsible for enforcement of these laws work in harmony and maximize their direction and efforts, rather than duplicate and overlap each other's activities.

SECTION 505. PLEADINGS; PRESUMPTIONS; LIABILITIES.

(a) It is not necessary for the state to negate any exemption or exception in this [Act] in any complaint, information, indictment, or other pleading or in any trial, hearing, or other proceeding under this [Act].

(b) No person is presumed to be the holder of an appropriate registration or order form issued under this [Act].

(c) This [Act] does not impose civil or criminal liability on any authorized state, county, or municipal officer, engaged in the lawful administration or enforcement of this [Act].

COMMENT

Subsections (a) and (b) are not intended to affect the rule in any state as to who has the burden of persuasion. Under subsection (c), the immunity from civil or criminal liability only extends to administration or enforcement of the Act, not to performance of other duties.

SECTION 506. JUDICIAL REVIEW. Final determinations, findings, and conclusions of the [appropriate person or agency] under this [Act] are subject to judicial review under [the State Administrative Procedure Act].

COMMENT

This section recognizes state administrative agencies practice acts, which generally provide for judicial review of agency decisions. The Uniform Law Commissioners' Model State Administrative Procedure Act (1981) provides for judicial review of final, and in some cases nonfinal, decisions of administrative agencies and for the scope of review. Paragraph 5-116(c)(7) of the model Act establishes the "substantial evidence on the whole record" test for judicial review of determinations of fact. Other standards are the "clearly erroneous" test or the "preponderance of evidence" standard.

SECTION 507. EDUCATION AND RESEARCH.

(a) The [appropriate person or agency] shall carry out educational programs designed to prevent and deter misuse and abuse of controlled substances. In connection with these programs the [appropriate person or agency] may:

(1) promote better recognition of the problems of misuse and abuse of controlled substances within the

regulated industry and among interested groups and organizations;

(2) assist the regulated industry and interested groups and organizations in contributing to the reduction of misuse and abuse of controlled substances;

(3) consult with interested groups and organizations to aid them in solving administrative and organizational problems;

(4) evaluate procedures, projects, techniques, and controls conducted or proposed as part of educational programs on misuse and abuse of controlled substances;

(5) disseminate the results of research on misuse and abuse of controlled substances to promote a better public understanding of what problems exist and what can be done to alleviate them; and

(6) assist in the education and training of state and local law enforcement officials in their efforts to control misuse and abuse of controlled substances.

(b) The [appropriate person or agency] shall encourage research on misuse and abuse of controlled substances. In connection with the research, and in furtherance of the enforcement of this [Act], the [appropriate person or agency] may:

(1) establish methods to assess accurately the effects of controlled substances and identify and characterize those with potential for abuse;

(2) make studies and undertake programs of research to:

(i) develop new or improved approaches, techniques, systems, equipment, and devices to strengthen the enforcement of this [Act];

(ii) determine patterns of misuse and abuse of controlled substances and the social effects thereof; and

(iii) improve methods for preventing, predicting, understanding, and dealing with the misuse and abuse of controlled substances; and

(3) enter into contracts with public agencies, institutions of higher education, and private organizations or individuals for the purpose of conducting research, demonstrations, or special projects that bear directly on misuse and abuse of controlled substances.

(c) The [appropriate person or agency] may enter into contracts for educational and research activities without performance bonds and without regard to [appropriate code section].

(d) The [appropriate person or agency] may authorize persons engaged in research on the use and

effects of controlled substances to withhold the names and other identifying characteristics of individuals who are the subjects of the research. A person who obtains this authorization is not compelled in any civil, criminal, administrative, legislative, or other proceeding to identify the individuals who are the subjects of research for which the authorization was obtained.

(e) The [appropriate person or agency] may authorize the possession and distribution of controlled substances by persons engaged in research. A person who obtains this authorization is exempt from state prosecution for possession and distribution of controlled substances to the extent of the authorization.

COMMENT

This section, setting out the education and research provisions, is designed to make it clear that education and research are an integral part of the total law enforcement effort. Broad language is used in order to provide maximum latitude. The various authorizations granted by this section may be relevant to several state agencies, e.g., education, human services, law enforcement, and occupational licensure. Thus, the "appropriate person or agency" may be an entity other than the agency that administers this Act.

Of primary importance are subsections (c) and (d) authorizing persons engaged in legitimate research to withhold the identities of research subjects and allowing the state to authorize possession and distribution of controlled substances. These provisions allow legitimate researchers to carry on much needed research without fear of exposing either themselves or their research subjects to criminal prosecution.

It should be noted that a grant of federal immunity would preempt any state grant or denial of immunity. However, the converse would not be true, and a researcher in possession of controlled substances under a state grant of immunity could be prosecuted under federal law if the federal government elected not to confer immunity. However, it is unlikely that this situation will arise.

ARTICLE VI

MISCELLANEOUS

SECTION 601. PROSPECTIVE APPLICATION. This [Act] applies to violations of law, seizures and forfeiture, injunctive proceedings, administrative proceedings, and investigations that occur following its effective date.

SECTION 602. PENDING PROCEEDINGS.

(a) This [Act] does not affect or abate a prosecution for a violation of law occurring before the effective date of this [Act]. If the offense being prosecuted is similar to one set out in Article IV, the penalties under Article IV apply if they are less than those under former law.

(b) This [Act] does not affect a civil seizure, forfeiture, or injunctive proceeding commenced before the effective date of this [Act].

(c) An administrative proceeding pending under laws that are superseded by this [Act] must be continued and brought to a final determination in accordance with the laws and rules in effect before the effective date of this [Act]. A substance controlled under superseded law but which is not listed in Section 204, 206, 208, 210, or 212 is automatically controlled without further

proceedings and must be added in the appropriate schedule.

(d) The [appropriate person or agency] shall initially permit a person to register who owns or operates an establishment engaged in the manufacture, distribution, or dispensing of a controlled substance before the effective date of this [Act] and who is registered or licensed by the state.

COMMENT

Subsection (d) is a provisional grandfather clause that provides for the automatic licensing of any person already licensed or registered by the state to engage in the manufacture, distribution, or dispensing of controlled substances on the Act's effective date. After that date, they will then be subject to the annual renewal requirements and will have to meet all the requirements of Sections 302 and 303.

SECTION 603. CONTINUATION OF RULES; APPLICATION TO EXISTING RELATIONSHIPS. Orders issued and rules adopted under any law affected by this [Act] and in effect on the effective date of this [Act] and not in conflict with this [Act] continue in effect until modified, superseded, or repealed. Rights and duties that matured, penalties that were incurred, and proceedings that were begun before the effective date of this [Act] continue in effect and are not affected by Section 609.

SECTION 604. CONTINUING CRIMINAL ENTERPRISE; CIVIL ACTION.

(a) The [appropriate authority] may maintain a civil action against a person who violates Section 411 to obtain a judgment for damages in an amount equal to three times the gross income and the value of assets acquired directly or indirectly by the person by reason of violation of Section 411, together with costs incurred for resources and personnel used in the investigation and prosecution of the proceedings through which liability was established.

(b) The standard of proof in actions brought under this section is a preponderance of the evidence.

ANALYSIS

SECTION 604. CONTINUING CRIMINAL ENTERPRISE; CIVIL ACTION

A civil cause of action is authorized pursuant to Section 604 against the kingpin of a Continuing Criminal Enterprise (CCE). Each kingpin is liable for three times the value of the proceeds acquired by all persons by reason of their conduct in the enterprise. The liability of the drug kingpin is based on the gross proceeds of the entire enterprise whether acquired by the kingpin or any other participant in the enterprise. The kingpin would be liable for treble damages on all money made by his enterprise, an amount calculated based on the income of his dealers, the income recorded in the ledgers, the currency found at his residence and in bank accounts, and the money invested in his corporation.

Why provide a civil action in addition to the criminal CCE penalties? First, the state may be unable to prosecute a kingpin because he has fled the country. Second, the kingpin may already be in prison so additional criminal penalties are less effective. While the kingpin escapes prosecution in these circumstances, he is still able to direct his enterprise through subordinates. The treble damage provision of the civil action helps break the enterprise's financial backbone by removing assets from the kingpin's use.

CCE is not a new concept. Both federal RICO, 18 U.S.C. § 1963(a), and federal criminal forfeiture under Continuing Criminal Enterprise, 21 U.S.C. § 853(a), authorize criminal penalties and a fine in the amount of twice the gross profits or proceeds of felony drug offenses. In civil RICO actions, pursuant to 18 U.S.C. § 1964, treble damages are also authorized.

[SECTION 605. STATUTE OF LIMITATIONS. A civil action under this [Act] must be commenced within [seven] years after the [claim for relief] became known or should have become known, excluding any time during which a party is out of the state or in confinement or during which criminal proceedings relating to a party are in progress.]

COMMENT

This statute of limitations applies to any civil action under this Act including continuing criminal enterprise.

CONSTRUCTION. This [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.

SECTION 607. SHORT TITLE. This [Act] may be cited as the Uniform Controlled Substances Act (1990).

SECTION 608. SEVERABILITY CLAUSE. If any provision of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

COMMENT

This section is included for states which have no general saving statute. If a state has such a statute, with a comparable severability clause, this section is not necessary as part of the Act.

SECTION 609. REPEALS. The following laws are repealed:

[List statutes to be repealed].

SECTION 610. EFFECTIVE DATE. This Act takes effect on [ ].

NATIONAL ASSOCIATION OF STATE CONTROLLED SUBSTANCES AUTHORITIES

1990 CONTROLLED SUBSTANCE SURVEY

RESULTS

1. Check the appropriate controlled substances authority for the following groups.

	Scheduling	Licensing	Licit Enforcement	"Street" Enforcement	Treatment	Other
ALABAMA	B	A,F	A,D,F	D	F	Medical & Dental Examiners
ALASKA	E	F	A	D	B	DEA
ARIZONA	A,E	F	F	F		DEA
ARKANSAS	B	A	A	A,D		
CALIFORNIA	C	A	A	B	B	
COLORADO	E	A	A	D	F	
CONNECTICUT	E	A	A	D	F	
DELAWARE	B	B	B	D		
WASHINGTON DC	F	F	F	D	B	DC Pharmacists & Radiologist
FLORIDA	E					
GEORGIA	A	A	A	D	A	
HAWAII	F	A	F	F		
IDAHO	A,E	A	A	C,D,F	F	
ILLINOIS	E,F	A,F	A,F	C,D	F	Division of Alcohol & Substance Abuse
INDIANA	E	A	A,D	D	B	
IOWA	A,E	A	A	D,F	B	
KANSAS	E	A	A	C	C	
KENTUCKY	F	F	A,F	C,D	A	Cabinet for Human Resource Drug Control
LOUISIANA	F	A	A	D	F	Department of Health and Human Services
MAINE						
MARYLAND	B	B	B,C,D,F	C,D,F	B	Law Enforcement
MASSACHUSETTS	B	A	A	D	F	
MICHIGAN	A	A	A,C,D	D	B	
MINNESOTA	A,E	NONE	A	D	F	
MISSISSIPPI	E	A	A	D		
MISSOURI	B,E	B	B	B,D		
MONTANA	A	A	A	C		
NEBRASKA	E	A	A,C	D	E	
NEVADA	A	A	A	D	F	Bureau of Alcohol & Drug Abuse
NEW HAMPSHIRE	B	NONE	A	D	B	
NEW JERSEY	B	B	A,C	C,D,F	B	All enforcement agencies
NEW MEXICO	A	A	A	D		
NEW YORK	B	A,B	A,B	C,D	B,F	
NORTH CAROLINA	F		A,C	C,F	F	
NORTH DAKOTA	F*	NONE	A,F**	C,D	F***	

*Controlled Substance Board
**Pharmacy and other regulatory Boards
***Coalition of Health Care Providers, also Pharmacy as an Impaired Pharmacist Committee

OHIO	A	A	A	A	F	
OKLAHOMA	F	F	A,F	F	F	
OREGON	A	A		D	B	
PENNSYLVANIA	B,E	F	C	C,D,F	B	
PUERTO RICO						
RHODE ISLAND	F	F	F	F		
SOUTH CAROLINA	B,E	B	B	D,F*	F**	*Local **Alcohol and Drug Abuse Commission
SOUTH DAKOTA	E	B	B	C,D		
TENNESSEE	F	A	A	D	F	Department of Mental Health
TEXAS	E	D	A,B,D,F*	D,F**	D***	

*Texas State Board of Medicine, Dentistry, Podiatry, Veterinary Medicine, Nursing
**Local Police Agencies, Drug Enforcement Administration
***Texas Commission on Alcohol and Drug Abuse

UTAH		A	D			
VERMONT		A	C,D	C,D		
VIRGINIA	A,F	A	A,D	D	F*	Mental Health
VIRGIN ISLANDS						
WASHINGTON	A	A	A	D,F*	F**	*Fire Dept State Health License **Local Law Agencies
WEST VIRGINIA	A	A		D		
WISCONSIN	F					Controlled Substance Board
WYOMING	A	A	A	F*	F**	*Criminal Investigation **Special Program

LEGEND

A = Board of Pharmacy
B = Board of Health
C = Attorney General
D = State Police
E = Legislature
F = Other

NO RESPONSE TO ENTIRE SURVEY: Maine
Puerto Rico
Virgin Islands

2429p/2

	2. Are controlled substances automatically scheduled (usually in 30 days after DEA scheduling) without a hearing?			3. Can you schedule CII through CV drugs in schedules which are different from DEA scheduling?			4. Are controlled substances scheduled, reschscheduled, or deleted to parallel DEA scheduling and after notice and hearing as provided in the State Administrative Procedures Act?		
	YES	NO	COMMENT	YES	NO	COMMENT	YES	NO	COMMENT
ALABAMA	YES			YES			YES		
ALASKA	YES			YES			YES		
ARIZONA		NO		YES				NO	
ARKANSAS		NO		YES			YES		
CALIFORNIA		NO		YES				NO	
COLORADO		NO		YES			YES		
CONNECTICUT	YES			YES			YES		
DELAWARE		NO		YES			YES		
WASHINGTON DC		NO		YES			YES		
FLORIDA		NO		YES				NO	1
GEORGIA		NO		YES				NO	
HAWAII	YES			YES				NO	2
IDAHO	YES			YES			YES		
ILLINOIS	YES	NO		YES				NO	
INDIANA		NO		YES				NO	
IOWA	YES			YES			YES		
KANSAS		NO		YES				NO	
KENTUCKY		NO		YES			YES		
LOUISIANA		NO		YES					3
MAINE									
MARYLAND	YES			YES				NO	
MASSACHUSETTS	YES			YES			YES		4
MICHIGAN		NO		YES			YES		
MINNESOTA		NO		YES			YES		
MISSISSIPPI		NO		YES				NO	
MISSOURI	YES				NO		YES		
MONTANA		NO		YES			YES		
NEBRASKA		NO		YES		1		NO	
NEVADA		NO		YES			YES		
NEW HAMPSHIRE	YES			YES			YES		
NEW JERSEY	YES			YES				NO	5
NEW MEXICO		NO			NO		YES		
NEW YORK	YES			YES			YES		
NO. CAROLINA	YES			YES			YES		
NORTH DAKOTA	YES		1	YES			YES		
OHIO	YES				NO			NO	
OKLAHOMA		NO		YES			YES		
OREGON		NO		YES			YES		
PENNSYLVANIA		NO		YES			YES		
PUERTO RICO									
RHODE ISLAND	YES			YES			YES		
SO. CAROLINA	YES			YES			YES		
SOUTH DAKOTA		NO		YES				NO	
TENNESSEE	YES			YES			YES		6
TEXAS	YES			YES				NO	
UTAH		NO		YES				NO	
VERMONT	YES				NO			NO	7
VIRGINIA		NO		YES			YES		
VIRGIN ISLANDS									
WASHINGTON		NO		YES			YES		
WEST VIRGINIA		NO						NO	
WISCONSIN		NO		YES			YES		
WYOMING		NO	2	YES				NO	8

COMMENTS:

1. 60 days
2. No Hearing, must have an Official Order

COMMENTS:

1. Steroids, but usually follow DEA

COMMENTS:

1. Legislature confirms schedules with DEA scheduling. Attorney General by rule.
2. Legislative
3. Sometimes
4. Automatically
5. Sometimes
6. Usually
7. Go by Federal and parallel DEA guidelines
8. Attorney General Offical Order

2429/p3

	5. Have you defined anabolic steroids as controlled substances? If yes, in what schedules?			6. Is the controlled substance statute			
	YES	NO	COMMENT	INCORPORATED INTO THE PHARMACY STATUTE?	A SECTION OF OF THE PHARMACY STATUTE?	A SEPARATE STATUTE?	OTHER?
ALABAMA	YES-V						1
ALASKA		NO				X	
ARIZONA	YES-IV					X	
ARKANSAS		NO				X	
CALIFORNIA	YES-III					X	
COLORADO		NO			X		
CONNECTICUT	YES-IV			X			
DELAWARE		NO				X	
WASHINGTON DC		NO			X		
FLORIDA	YES-IV				X		
GEORGIA		NO			X		
HAWAII		NO					
IDAHO	YES					X	
ILLINOIS		NO				X	
INDIANA		NO				X	
IOWA		NO				X	
KANSAS	YES-IV					X	
KENTUCKY		NO				X	
LOUISIANA		NO				X	
MAINE							
MARYLAND		NO				X	
MASSACHUSETTS	YES-IV					X	
MICHIGAN		NO					2
MINNESOTA	YES-IV					X	
MISSISSIPPI		NO				X	
MISSOURI		NO				X	
MONTANA		NO				X	
NEBRASKA	YES		1			X	
NEVADA	YES-III					X	3
NEW HAMPSHIRE		NO				X	
NEW JERSEY		NO				X	
NEW MEXICO	YES					X	
NEW YORK	YES-II					X	
NORTH CAROLINA	YES-III					X	
NORTH DAKOTA		NO				X	
OHIO		NO				X	
OKLAHOMA		NO		X	X		
OREGON	YES-III					X	
PENNSYLVANIA	YES - III					X	
PUERTO RICO							
RHODE ISLAND	YES - V					X	
SOUTH CAROLINA		NO					
SOUTH DAKOTA		NO				X	
TENNESSEE		NO				X	
TEXAS	YES					X	
UTAH	YES-III					X	
VERMONT		NO					4
VIRGINIA		NO					5
VIRGIN ISLANDS							
WASHINGTON		NO				X	
WEST VIRGINIA	YES-III					X	6
WISCONSIN		NO				X	
WYOMING		NO				X	

COMMENTS:

1. Special schedule

CITATIONS (PHARMACY & CONTROLLED SUBSTANCES)

1. Follows State Controlled Substance Act
2. Public Health Code
3. Administrative Code for Schedules
4. Uses DEA Guidelines for all schedules
5. Drug Control Act
6. Board recommends

2429p/p4&5/2440p/dc

	7. Who has the authority to promulgate controlled substance regulations?		8. Are manufacturers licensed to manufacture controlled substances?		9. Are wholesalers licensed to distribute controlled substances?	
	AUTHORITY	COMMENTS	YES	NO	YES	NO
ALABAMA	A		YES		YES	
ALASKA			YES		YES	
ARIZONA	A			NO		NO
ARKANSAS	A,B		YES		YES	
CALIFORNIA	C		YES		YES	
COLORADO	A,B	1	YES		YES	
CONNECTICUT	F	2	YES		YES	
DELAWARE	B		YES		YES	
WASHINGTON DC	F		YES		YES	
FLORIDA	C			NO		NO
GEORGIA	A			NO		NO
HAWAII	E		YES		YES	
IDAHO	A		YES		YES	
ILLINOIS	F	3	YES		YES	
INDIANA	F	4	YES		YES	
IOWA	A		YES		YES	
KANSAS	A		YES		YES	
KENTUCKY	F	5		NO	YES	
LOUISIANA	A,B		YES		YES	
MAINE						
MARYLAND	B		YES		YES	
MASSACHUSETTS	A			NO	YES	
MICHIGAN			YES		YES	
MINNESOTA	A					
MISSISSIPPI	A		YES		YES	
MISSOURI	B		YES		YES	
MONTANA					YES	
NEBRASKA	B		YES		YES	
NEVADA	F	6	YES		YES	
NEW HAMPSHIRE	E	7	YES		YES	
NEW JERSEY	F		YES		YES	
NEW MEXICO	A		YES		YES	
NEW YORK	B	8	YES		YES	
NORTH CAROLINA	F	9	YES		YES	
NORTH DAKOTA	F		YES		YES	
OHIO	A		YES		YES	
OKLAHOMA	A,F	10	YES		YES	
OREGON			YES		YES	
PENNSYLVANIA	B		YES		YES	
PUERTO RICO						
RHODE ISLAND	B		YES		YES	
SOUTH CAROLINA	B		YES		YES	
SOUTH DAKOTA	B		YES		YES	
TENNESSEE	B		YES		YES	
TEXAS	F		YES		YES	
UTAH	F	11	YES		YES	
VERMONT	F			NO	YES	
VIRGINIA			YES		YES	
VIRGIN ISLANDS						
WASHINGTON	A		YES		YES	
WEST VIRGINIA	A		YES		YES	
WISCONSIN	F		YES		YES	
WYOMING	F		YES		YES	

LEGEND

A = Board of Pharmacy
B = Board of Health
C = Attorney General
D = State Police
E = Legislature
F = Other

COMMENTS ON QUESTION 7:

1. A: Wholesaler, Manufacturer, Limited License
   B: Research & addiction programs
2. Legal Division for the Department of Consumer Protection
3. Legislature, Department of Alcohol & Substance Abuse, State Police, and Department of Professional Regulation
4. Controlled Substance - Advisory Board
5. Cabinet for Human Resources Drug Control Office
6. Board of Pharmacy and Nevada Legal Council Bureau
7. Any Professional Board
8. Bureau of Controlled Substances in Department of Health
9. Commission on Mental Health, Mental Retardation and Substance Abuse
10. Board of Pharmacy and Bureau of Narcotics
11. Division by Statute Authority

2429/p6

	10. Are out-of-state manufacturers that ship controlled substances into your state licensed?		11. Are out-of-state distributors that ship controlled substances into your state licensed?		12. Who receives application and issues the license for controlled substances?	
	YES	NO	YES	NO	AUTHORITY	COMMENTS
ALABAMA	YES		YES		A	
ALASKA	YES		YES			1
ARIZONA		NO		NO		2
ARKANSAS	YES		YES		A	
CALIFORNIA		NO	YES		A	3
COLORADO		NO		NO	A,B	4
CONNECTICUT	YES		YES		F	5
DELAWARE	YES		YES		F	
WASHINGTON DC	YES		YES		F	
FLORIDA		NO		NO		
GEORGIA	YES		YES		A,F	6
HAWAII		NO		NO	F	7
IDAHO	YES		YES		A	
ILLINOIS	YES		YES		F	8
INDIANA		NO		NO	A	
IOWA	YES		YES		A	
KANSAS	YES		YES		A	
KENTUCKY		NO		NO	F	9
LOUISIANA	YES		YES		B	10
MAINE						
MARYLAND	YES		YES		B	
MASSACHUSETTS		NO		NO	A	
MICHIGAN	YES		YES		A	
MINNESOTA						11
MISSISSIPPI		NO		NO	A	
MISSOURI		NO		NO	B	
MONTANA	YES		YES		A	
NEBRASKA		NO		NO	A,B	
NEVADA	YES		YES		A	
NEW HAMPSHIRE	YES		YES		A	
NEW JERSEY						12
NEW MEXICO	YES		YES		A	
NEW YORK	YES		YES		F	13
NORTH CAROLINA		NO		NO	F	14
NORTH DAKOTA	YES		YES		A	15
OHIO	YES		YES		A	
OKLAHOMA		NO		NO	F	16
OREGON	YES		YES		A	
PENNSYLVANIA	YES		YES		B	
PUERTO RICO						
RHODE ISLAND	YES		YES		A,F	17
SOUTH CAROLINA		NO		NO	B	
SOUTH DAKOTA	YES		YES		B	
TENNESSEE	YES		YES		A	
TEXAS		NO		NO	F	18
UTAH	YES		YES		F	19
VERMONT		NO		NO	F	20
VIRGINIA		NO		NO	A	
VIRGIN ISLANDS						
WASHINGTON	YES		YES		A	
WEST VIRGINIA	YES		YES		A	
WISCONSIN	YES		YES		F	21
WYOMING	YES		YES		A	

LEGEND FOR QUESTION 12

A = Board of Pharmacy
B = Board of Health
C = Attorney General
D = State Police
E = Legislature
F = Other

COMMENTS ON QUESTION 12

1. No state registration
2. Not applicable
3. Wholesalers by Board of Pharmacy, Rx Blanks by Bureau of Narcotic Enforcement
4. Researchers and addictions programs,\Department of Health
5. Drug Control Division - Department of Consumer Protection
6. Board of Pharmcy processes; license issued by DEA
7. Narcotic Enforcement Division
8. Department of Professional Registrations, Pharmacy Unit
9. Cabinet for Human Resources, Drug Control Office
10. Board of Pharmacy, OHH (State Food & Durgs)
11. Does not have a separate controlled substance law
12. Any professional Board
13. Bureau of Controlled Substance in Department of Health
14. Division of Mental Health
15. Controlled Substance Bureau
16. Oklahoma Bureau of Narcotics and Dangerous Drugs
17. Board of Pharmacy licenses; registers with Division of Drug Control
18. Texas Department of Safety
19. Utah Department of Occupational and Professional Licensing
20. DEA
21. Scheduling by Controlled Substance Board

2429p/p

13. Please list by title (i.e. "practitioner") the people who prescribe, possess, and/or dispense controlled substances.

	MD	DO	DDS	DPM	DVM	SI	RP	ANP	PA	PHY	OD	CLN	HSP	NA	WHL	MFG	AN	TRT	CRE	DST	ANLB	RSRC	RT	EMT	RNLN	STU	MIN
ALABAMA	X	X	X	X	X	X	X																				
ALASKA	X		X		X		X	X																			
ARIZONA	X	X	X		X		X	X																			
ARKANSAS	X	X	X		X		X																				
CALIFORNIA	X		X	X	X					X					X	X										
COLORADO	X	X	X	X	X	X				X	X				X	X	X	X									
CONNECTICUT	X	X	X	X	X																						
DELAWARE	X		X	X	X					X		X	X														
WASHINGTON, DC	X		X	X	X			X						X													
FLORIDA	NO RESPONSE																										
GEORGIA	X	X	X	X	X																						
HAWAII	X	X	X	X	X	X					X				X	X				X							
IDAHO	X	X	X	X	X		X																				
ILLINOIS	X		X	X			X																				
INDIANA	X	X	X	X	X																						
IOWA	X	X	X	X	X	X				X	X		X			X			X	X							
KANSAS							X									X				X	X	X					
KENTUCKY	X	X	X	X	X		X																				
LOUISIANA	X	X	X		X																						
MAINE																											
MARYLAND	X		X	X	X		X	X		X																	
MASSACHUSETTS	NO RESPONSE																										
MICHIGAN	X	X	X	X	X	X	X			X																	
MINNESOTA	X	X	X	X	X																						
MISSISSIPPI	NO RESPONSE																										
MISSOURI	X		X	X	X					X	X																
MONTANA	X	X	X	X	X																						
NEBRASKA	X		X		X	X	X				X																
NEVADA	*	*		*			*	*	*															*	*	*	*	*
NEW HAMPSHIRE	X	X	X	X	X		X	X	X																		
NEW JERSEY	X		X	X	X		X										X										
NEW MEXICO	X	X	X	X	X																						
NEW YORK	X		X	X	X		X																				
NO. CAROLINA	X		X				X				X																
NORTH DAKOTA	X	X	X	X	X	X				X													X				
OHIO	X	X	X	X	X																						
OKLAHOMA	NO RESPONSE																										
OREGON							X			X																	
PENNSYLVANIA	X	X	X	X	X																						
PUERTO RICO																											
RHODE ISLAND	X	X	X	X	X					X																	
SO.CAROLINA	X	X	X	X	X					X			X														
SOUTH DAKOTA	NO RESPONSE																										
TENNESSEE	X	X	X	X	X																						
TEXAS	X	X	X	X	X		X			X			X		X	X											
UTAH	X						X																				
VERMONT	X	X	X					X																			
VIRGINIA	X	X	X		X	X				X							X										
VIRGIN ISLANDS																											
WASHINGTON	X	X	X	X	X		X	X	X																		
W. VIRGINIA	X																										
WISCONSIN	X						X																				
WYOMING	X	X				X				X																	

LEGEND

MD	= Doctors of Medicine	CLNC	= Clinics	RN	= Respiratory Therapists
DO	= Doctors of Osteopathy	HOP	= Hospitals	EMT	= Emergency Medical Techs
DDS	= Doctors of Dental Science	NA	= Nurse Anesthetists	RNLN	= Nurses (RN's & LPN's)
DPM	= Doctors of Podiatry	WHL	= Wholesalers	STU	= Students
DVM	= Doctors of Veterinary Medicine	MFG	= Manufacturers	MIN	= Medical Interns
SI	= Scientific Investigators	AN	= Animal Shelters (Limited Licenses)		
RP	= Pharmacists	TRT	= Treatment Centers		
ANP	= Advanced Nurse Practitioners	CRE	= Care Facilities		
PA	= Physician Assistants	DST	= Distributors		
PHY	= Pharmacies	ANLB	= Analytical Labs		
OD	= Doctors of Optometry	RSRC	= Research		

*Nevada response states—
For prescribing: Practitioners, Advanced Nurse Practitioners, & Physician's Assistants. For possession and administration: Practitioners, Physician Assistants, Nurse Practitioners, RN, LPN, Respiratory Therapist, Medical Student (supervised), Student Nurse (supervised), Medical Intern, Ultimate User. For dispensing: Practitioners, Pharmacist, Physician Assistant, Medical Intern, Advanced Nurse Practitioner.
2429p/p8

	14. Are practitioners as identified in #13 licensed separately from their state practice license to:					15. Are the individual practitioners identified above licensed at each location where they have inventories of controlled substances?		16. Are pharmacies issued a controlled substance registration separate from the pharmacy license?	
	A	B	C	D	E	YES	NO	YES	NO
ALABAMA	N	Y	N			YES		YES	
ALASKA					X	YES			NO
ARIZONA					X		NO		NO
ARKANSAS	N	N	Y			YES			NO
CALIFORNIA					X		NO		NO
COLORADO					X		NO		NO
CONNECTICUT					X		NO		NO
DELAWARE				X		YES		YES	
WASHINGTON DC				X		YES		YES	
FLORIDA				X			NO		NO
GEORGIA					X		NO		NO
HAWAII				X		YES		YES	
IDAHO				X			NO		NO
ILLINOIS				X		YES		YES	
INDIANA					X	YES		YES	
IOWA				X		YES		YES	
KANSAS					X		NO		NO
KENTUCKY					X	YES			NO
LOUISIANA				X		YES		YES	
MAINE									
MARYLAND				X		YES		YES	
MASSACHUSETTS					X		NO	YES	
MICHIGAN	Y	N	Y			YES		YES	
MINNESOTA					X		NO		NO
MISSISSIPPI	Y	N	Y			YES		YES	
MISSOURI				X		YES		YES	
MONTANA					X		NO	YES	
NEBRASKA				X		YES		YES	
NEVADA	N	Y	Y			YES			NO
NEW HAMPSHIRE					X		NO		NO
NEW JERSEY				X		YES		YES	
NEW MEXICO				X		YES		YES	
NEW YORK				X			NO		NO
NORTH CAROLINA					X	YES			NO
NORTH DAKOTA				X			NO		NO
OHIO					X	YES			NO
OKLAHOMA				X		YES		YES	
OREGON					X			YES	
PENNSYLVANIA					X		NO		NO
PUERTO RICO									
RHODE ISLAND				X		YES		YES	
SOUTH CAROLINA				X		YES		YES	
SOUTH DAKOTA					X	YES		YES	
TENNESSEE					X	YES		YES	
TEXAS				X		YES		YES	
UTAH				X		YES		YES	
VERMONT				X			NO	YES	
VIRGINIA	Y	Y	N			YES			NO
VIRGIN ISLANDS									
WASHINGTON					X		NO	YES	
WEST VIRGINIA									
WISCONSIN	N	Y	N			YES			NO
WYOMING				X		YES		YES	

LEGEND FOR QUESTION 14

A = prescribe controlled substances?
B = possess controlled substances?
C = dispense controlled substances?
D = all of the above?
E = none of the above?

2429p/p9

	controlled substance registration separate from their individual pharmacist license?		from these licenses go?	levied for violations of controlled substance statutes by					
	YES	NO		A	B	C	D	E	F
ALABAMA	YES		Individual boards	Y	N	N	N	Y	
ALASKA		NO	No revenue generated						
ARIZONA		NO	N/A	Y					
ARKANSAS		NO	N/A	Y	N	N	N	N	
CALIFORNIA		NO	N/A					Y	1
COLORADO		NO	Board of Pharmacy	N	N	N	N	N	
CONNECTICUT		NO	Treasurer - General Fund	N	N	N	N	N	
DELAWARE		NO	General Fund						2
WASHINGTON DC		NO	D. C. Treasurer						
FLORIDA		NO		Y	Y				
GEORGIA		NO	General Fund	Y		Y			
HAWAII		NO	General Fund						3
IDAHO	YES		Board of Pharmacy	Y					
ILLINOIS		NO	General Fund	Y	Y	Y		Y	
INDIANA		NO	General Fund	Y	Y				
IOWA		NO	General Fund	Y					
KANSAS		NO	Board 80%: General Fund 20%	N	?	?	Y	?	
KENTUCKY		NO	N/A	Y	Y	Y	Y	Y	
LOUISIANA		NO	DHH, Board of Pharmacy	Y			Y		
MAINE									
MARYLAND		NO	General Fund	Y	Y	Y		Y	
MASSACHUSETTS		NO	General Fund	N			N	N	
MICHIGAN	YES		State Treasurer	Y			Y		
MINNESOTA		NO	N/A	N	Y	Y	N	N	
MISSISSIPPI	YES		To the licensir agency	Y					
MISSOURI		NO	General Revenu	N	N	N	N	N	
MONTANA		NO	Earmarked Funds	Y	Y	N			4
NEBRASKA		NO	Bureau of Examining Boards					Y	
NEVADA		NO	Board of Pharmacy	Y					
NEW HAMPSHIRE		NO	N/A	Y			Y		
NEW JERSEY		NO	Treasurer	Y	Y		Y	Y	
NEW MEXICO		NO	Board of Pharmacy	N	N	N	N	N	
NEW YORK		NO		Y				Y	
NORTH CAROLINA		NO	N/A	N	N	N	N	N	
NORTH DAKOTA		NO	N/A	Y	Y		N	N	
OHIO		NO	General Fund	Y	N	N	N	N	
OKLAHOMA		NO	Board of Pharmacy	Y	N	N	N	N	
OREGON		NO	Board of Pharmacy	Y				Y	
PENNSYLVANIA		NO		Y					
PUERTO RICO									
RHODE ISLAND		NO	General Fund	N	N	N	N	N	
SOUTH CAROLINA		NO	General Fund	N	Y	Y	Y	Y	5
SOUTH DAKOTA		NO	No fees	N	Y			Y	
TENNESSEE	YES		Individual boards	Y			Y		
TEXAS		NO	General Fund,	Y				Y	
UTAH	YES		General Fund	N	N	N	N	N	
VERMONT		NO	General Fund	Y	Y				
VIRGINIA		NO	Department & Board	Y					6
VIRGIN ISLANDS									
WASHINGTON		NO	General Fund	N	N	N	Y	N	
WEST VIRGINIA			Board of Pharmacy	N	N		N	N	
WISCONSIN		NO	N/A	Y					
WYOMING		NO	Earmarked Funds	N	Y				

LEGEND FOR QUESTION 19

A = Board of Pharmacy
B = Board of Health
C = Attorney General
D = State Police
E = Legislature
F = Other

COMMENTS ON QUESTION 19:

1. Recovery of Cost
2. Department of Social Services or designee
3. Regulatroy Investigation Complaint Office (RICO)
4. County Attorney
5. "Other" = Dental Board
6. Licensing Boards

2249p/p10

	20. If yes (to #19), where do these revenues go?	21. The Board of Pharmacy inspectors: A	B	C	D	E	Are the inspectors pharmacists? A	B	C
ALABAMA	To the individual Boards	X						X	
ALASKA			X	X				X	
ARIZONA	General Fund	X					X		
ARKANSAS	Board of Pharmacy; can only be used to offset cost	X							X
CALIFORNIA	To recovering agency	X					X		
COLORADO	N/A	X					X		
CONNECTICUT							X		
DELAWARE	General Fund					1			X
WASHINGTON DC	Treasury - General Bank								
FLORIDA			X		X				X
GEORGIA	General Fund	X					X		
HAWAII	General Fund		X		X			X	
IDAHO	Board of Pharmacy	X							X
ILLINOIS	Evidence Fund, General Revenue Fund	X					X		
INDIANA	General Fund	X						X	
IOWA	General Fund	X					X		
KANSAS	Unknown	X					X		
KENTUCKY	Trust & Agency for Pharmacy Board. General Trust, Board of Health (Cabinet for Human Resources)	X					X		
LOUISIANA	Board of Pharmacy	X					X		
MAINE									
MARYLAND	General Fund		X		X		X		
MASSACHUSETTS	If yes on the above (#19), again probably to the General Fund	X					X		
MICHIGAN	State Treasury		X		X		X		
MINNESOTA	General Fund	X					X		
MISSISSIPPI	Board of Pharmacy	X					X		
MISSOURI		X					X		
MONTANA	General Fund	X					X		
NEBRASKA	Permanent School Fund		X				X		
NEVADA	General Fund	X							X
NEW HAMPSHIRE	General Fund	X					X		
NEW JERSEY	State Treasurer		X	X			X		
NEW MEXICO		X					X		
NEW YORK	General Fund		X		X				X
NORTH CAROLINA		X						X	
NORTH DAKOTA	Board of Pharmacy & Medical Examiners (directly to the respective Board), Attorney General to State General Fund	X					X		
OHIO	General Fund	X							X
OKLAHOMA	Agency Fund, State General Fund (%)	X						X	
OREGON	Boards	X					X		
PENNSYLVANIA	Pharmacy Board	X					X		
PUERTO RICO									
RHODE ISLAND						2			X
SO. CAROLINA	State supported drug treatment centers—state police and others (Funds to DHEC)	X					X		
SOUTH DAKOTA	General Fund	X					X		
TENNESSEE	To the individual Boards	X						X	
TEXAS	General Revenue	X					X*		
UTAH	N/A		X		X				X
VERMONT	General Fund	X					X		
VIRGINIA	Literacy Fund.		X	X			X		
VIRGIN ISLANDS									
WASHINGTON	Health Professions Account for possible appropriation to Medical Board.	X					X		
WEST VIRGINIA		X			X		- X		
WISCONSIN	Department of Public Instructions		X	X				X	
WYOMING	General Fund	X					X		

LEGEND FOR #21

A = work exclusive for the Board of Pharmacy
B = are from a central pool and assigned to the Board of Pharmacy
C = permanently.
D = case-by-case.
E = temporarily.

COMMENTS ON #21

1. Public Health
2. Drug Control Agency

LEGEND FOR #22

A = Yes
B = No
C = A mix

COMMENTS ON #22

*Investigators are non-pharmacist commissioned police officers.

2429p/p11

	23. Precursors are:				24. What role does the Board of Pharmacy play in the investigation of possible controlled substance violations by its registrant?
	A	B	C	COMMENTS	
ALABAMA		X			Inspectors are empowered to investigate and prosecute. However, prosecution is normally left to state and local law enforcing agencies.
ALASKA				1	None
ARIZONA		X			Perform investigation or cooperate with another agency.
ARKANSAS	X				Major responsibility
CALIFORNIA	X				Investigations; coordinate with BNE
COLORADO	X				Investigation; charges; discipline
CONNECTICUT			X	2	None
DELAWARE	X				None - distipline
WASHINGTON DC					
FLORIDA	X			3	Grounds for discipline 8-93/465
GEORGIA	X				Drug and Narcotic Agency is regulatory and enforcement arm of the Board of Pharmacy.
HAWAII	X				None
IDAHO	X				Investigation and discipline
ILLINOIS	X				Hearings and discipline
INDIANA				4	Independent investigation or with State Police
IOWA				5	Audits of registrants; seizure of property
KANSAS	X				Investigation
KENTUCKY	X				Investigate, hearing, discipline
LOUISIANA	X				
MAINE					
MARYLAND	X				Investigation and discipline
MASSACHUSETTS	X				Investigation and discipline
MICHIGAN				6	Discipline
MINNESOTA				7	Investigation, hearing, discipline
MISSISSIPPI	X				Board of Pharmacy responsible for investigation.
MISSOURI	X				Board--investigation and discipline
MONTANA			X	8	Investigation
NEBRASKA	X				Advisory
NEVADA	X				Investigation, hearing, discipline
NEW HAMPSHIRE				9	Total
NEW JERSEY	X				Individual and in cooperation with the Health Department
NEW MEXICO	X				Investigation, hearing, discipline
NEW YORK					Board
NORTH CAROLINA					Investigation, hearing, discipline
NORTH DAKOTA		X			Investigation, hearing, discipline--pharmacists only
OHIO				10	Investigation, hearing, discipline
OKLAHOMA		X			Investigation, hearing, discipline
OREGON	X				Cooperate with other health licensing boards and law enforcement
PENNSYLVANIA	X				Board
PUERTO RICO					
RHODE ISLAND	X				Hearings--recommendation only
SOUTH CAROLINA	X				None
SOUTH DAKOTA	X				Coordinate with Health Department
TENNESSEE			X		Prepare case for administrative action
TEXAS	X				Board of Pharmacy
UTAH	X				Adjudicate
VERMONT		X			
VIRGINIA	X				Central investigations by pharmacists
VIRGIN ISLANDS					
WASHINGTON	X		X		Board of Pharmacy does all investigation and refers to proper Board.
WEST VIRGINIA					Leading role
WISCONSIN					Members assigned as case advisors.
WYOMING	X				Investigate, hearing, discipline

LEGEND FOR #23:

A = treated as controlled substances.
B = under consideration to be treated as controlled substances.
C = treated in some non-traditional manner.

COMMENTS ON #23:

1. Not treated
2. Federal only criteria
3. Attorney General may add by rule.
4. No action
5. Legislation pending
6. PC is not CS just because it is a PC.
7. Some
8. Separate
9. Not subject to control
10. Legislation being drafted.

2429p/p12

25. Briefly describe how your state addresses the analog issue.

ALABAMA	Does not
ALASKA	
ARIZONA	Throw the rascals out of office
ARKANSAS	Covered as a controlled substance
CALIFORNIA	Fit under the Controlled Substance Act
COLORADO	Does not
CONNECTICUT	
DELAWARE	Same as Feds
WASHINGTON DC	
FLORIDA	Attorney General may add by rule.
GEORGIA	
HAWAII	
IDAHO	
ILLINOIS	
INDIANA	
IOWA	Statute 204A
KANSAS	In order to answer, be more specific.
KENTUCKY	Do not know.
LOUISIANA	Control Drug Statute
MAINE	
MARYLAND	
MASSACHUSETTS	
MICHIGAN	Defined CI or CII violations and penalties same as CI or CII
MINNESOTA	Schedule individually
MISSISSIPPI	Goes along with Feds
MISSOURI	Controlled and scheduled by Health Department
MONTANA	Not addressed
NEBRASKA	28-104(37) CI or II: same penalties
NEVADA	Schedules address substance and analogs and usually includes their isomers, etc.
NEW HAMPSHIRE	Parallels controlled substance penalities
NEW JERSEY	On an analysis basis in the Controlled Substance Act
NEW MEXICO	Most analogs are covered in the Controlled Substance Act.
NEW YORK	May add to the controlled substance listing
NORTH CAROLINA	
NORTH DAKOTA	If necessary, will schedule the analog
OHIO	Included by way of definition
OKLAHOMA	
OREGON	Schedule as fast as possible
PENNSYLVANIA	
PUERTO RICO	
RHODE ISLAND	Specific schedule, by rule, which amends the Law
SOUTH CAROLINA	By statute, includes salts, isomers, etc.
SOUTH DAKOTA	
TENNESSEE	Have not
TEXAS	Treated as controlled substance
UTAH	No imitation controlled substance law
VERMONT	Does not
VIRGINIA	Treated as a controlled substance
VIRGIN ISLANDS	
WASHINGTON	Not addressed
WEST VIRGINIA	Not addressed
WISCONSIN	Scheduled individually
WYOMING	Have not

ELEMENTS OF CONTROLLED SUBSTANCES ACTS

JURISDICTION \ ELEMENT	Offenses			Forfeiture			Special Provisions											
	Use	Possession	Manufacturing, Delivery, Sale	Civil	Criminal	Administrative	Targeted Substances	Sale to Minors	Paraphernalia	Imitation Drugs	Analogs	Safehouses	Schoolyards	Triplicate Prescriptions	Precursor Chemicals	Offender Drug Testing	Anabolic Steroids
ALABAMA		●	●	●			●	●	●	●		●	●		●	●	●
ALASKA	●	●	●	●	●			●		●		●	●		●		
ARIZONA	●	●	●	●	●			●	●	●			●		●	●	●
ARKANSAS		●	●	●				●	●	●		●	●				
CALIFORNIA	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●
COLORADO	●	●	●	●			●	●	●	●		●	●		●	●	
CONNECTICUT	●	●	●	●			●	●	●	●		●	●			●	
DELAWARE	●	●	●	●			●	●	●	●		●	●		●	●	
DISTRICT OF COLUMBIA		●	●	●			●	●	●			●			●	●	
FLORIDA		●	●	●			●	●	●	●	●	●	●		●	●	●
GEORGIA		●	●	●			●	●	●	●		●	●				●
HAWAII		●	●	●			●	●	●	●		●	●		●	●	●
IDAHO		●	●	●			●	●	●	●		●	●	●	●		●
ILLINOIS		●	●	●		●	●	●	●	●	●	●	●			●	
INDIANA		●	●	●				●	●	●		●	●		●	●	
IOWA		●	●	●			●	●	●	●		●	●				
KANSAS		●	●		●		●	●	●	●		●	●		●	●	●
KENTUCKY		●	●	●			●	●	●	●			●				
LOUISIANA		●	●	●			●	●	●	●		●	●		●	●	
MAINE		●	●	●			●	●	●	●		●	●			●	
MARYLAND		●	●	●			●	●	●	●		●	●				
MASSACHUSETTS		●	●	●			●	●	●	●			●				
MICHIGAN	●	●	●	●		●		●	●	●		●	●	●			
MINNESOTA		●	●	●		●	●	●	●	●			●		●		●
MISSISSIPPI		●	●	●			●	●	●	●		●	●		●		
MISSOURI		●	●	●			●	●	●	●		●	●				
MONTANA		●	●	●			●	●	●	●					●		
NEBRASKA	●	●	●	●			●		●	●		●				●	
NEVADA	●	●	●	●				●	●	●		●	●			●	
NEW HAMPSHIRE		●	●	●		●	●	●	●	●	●	●	●		●		
NEW JERSEY	●	●	●	●			●	●	●	●	●	●	●		●	●	
NEW MEXICO		●	●	●			●	●	●	●			●		●		●
NEW YORK		●	●	●	●			●	●	●		●	●	●	●	●	●
NORTH CAROLINA		●	●	●	●		●	●	●	●		●			●		●
NORTH DAKOTA		●	●	●			●	●	●	●		●	●		●		
OHIO		●	●	●	●			●	●		●	●	●		●		
OKLAHOMA		●	●	●			●	●	●	●		●	●		●	●	●
OREGON		●	●	●		●		●	●	●		●	●		●	●	
PENNSYLVANIA		●	●	●			●	●	●	●			●				
RHODE ISLAND		●	●	●	●	●	●	●	●	●		●	●		●	●	●
SOUTH CAROLINA		●	●	●			●	●	●	●		●	●		●		
SOUTH DAKOTA		●	●	●				●	●	●		●					
TENNESSEE		●	●	●		●	●	●	●	●		●			●	●	
TEXAS		●	●	●			●	●	●	●	●			●	●	●	●
UTAH		●	●	●				●	●	●		●	●		●		●
VERMONT		●	●	●				●	●	●		●	●				
VIRGINIA		●	●	●				●	●	●	●	●	●				
WASHINGTON		●	●	●		●	●	●	●	●		●	●	●	●		
WEST VIRGINIA		●	●	●				●	●	●		●	●		●		
WISCONSIN		●	●	●			●	●	●	●		●	●		●	●	
WYOMING	●	●	●	●				●	●	●		●			●	●	
FEDERAL		●	●	●	●	●	●	●	●		●		●		●		●

The National Criminal Justice Association (NCJA) has graciously provided this chart to aid the reader's understanding of the UCSA and state drug laws. The chart is taken from NCJA's Guide to Controlled Substances Acts. For a copy of the Guide, contact NCJA, 444 North Capitol Street, N.W., Suite 608, Washington, D.C. 20001, (202) 347-4900.

DRUGS TARGETED FOR ENHANCED PENALTIES UNDER CONTROLLED SUBSTANCES ACTS

JURISDICTION \ DRUG	None	Cocaine	Heroin	LSD	Marijuana	Meth/Amphetamine	Meth-/Mecto-qualone	Phencyclidine (PCP)	OTHER
ALABAMA		•		•	•		•	•	cocaine base, hydromorphone, MDA, MMDA, morphine
ALASKA	•								
ARIZONA	•								
ARKANSAS	•								
CALIFORNIA		•	•			•		•	cocaine base
COLORADO		•			•				
CONNECTICUT		•	•	•	•				methadone
DELAWARE		•	•	•	•	•		•	designer drugs, opium
DISTRICT OF COLUMBIA						•		•	cocaine base, PCP precursors, phenmetrazine
FLORIDA		•	•		•		•	•	morphine. opium
GEORGIA		•	•		•		•		morphine, opium
HAWAII		•	•			•			morphine
IDAHO				•	•				
ILLINOIS		•	•	•	•	•	•	•	pentazocine, peyote
INDIANA	•								
IOWA		•	•	•	•			•	
KANSAS		•	•	•	•	•	•	•	barbituric acid, MDMA, mesaline, psilocybin
KENTUCKY				•				•	
LOUISIANA		•			•	•		•	cocaine base, pentazocine
MAINE		•	•	•	•				
MARYLAND		•	•	•	•	•	•	•	morphone, opium, PCP precursors
MASSACHUSETTS		•	•		•			•	
MICHIGAN	•								
MINNESOTA		•			•	•		•	cocaine base, hallucinogens, narcotics
MISSISSIPPI					•				
MISSOURI		•	•	•	•	•		•	cocaine base, methylphenidate, phenmetrazine
MONTANA		•							opiates
NEBRASKA		•							crack
NEVADA	•								
NEW HAMPSHIRE		•	•	•	•	•		•	
NEW JERSEY		•	•	•	•	•		•	
NEW MEXICO						•		•	
NEW YORK	•								
NORTH CAROLINA		•	•	•	•	•	•		opiates
NORTH DAKOTA		•	•	•				•	cocaine base
OHIO	•								
OKLAHOMA		•	•	•	•	•		•	cocaine base
OREGON	•								
PENNSYLVANIA		•			•	•		•	
RHODE ISLAND		•	•	•	•			•	
SOUTH CAROLINA		•	•		•		•		crack, morphine, opium
SOUTH DAKOTA	•								
TENNESSEE		•	•	•	•	•		•	morhine, hydromorphone, pentazocine, triple ennamine
TEXAS					•				
UTAH					•				
VERMONT	•								
VIRGINIA	•								
WASHINGTON		•	•						
WEST VIRGINIA	•								
WISCONSIN		•	•	•		•		•	counterfeit substances, psilocybin
WYOMING	•								
FEDERAL		•	•	•	•			•	

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COMPARISON OF PENALTIES FOR USE, POSSESSION, SALE—FIRST OFFENSE

This chart sets out the range of penalties for first offenses for the use, the possession, and the sale, manufacturing, delivery, or distribution of controlled substances in all state CSA's and the federal CSA. Because the chart lists only the range of possible penalties for offenses, depending upon the category of drugs involved in an offense, it does not depict specific penalties or ranges of penalties triggered by other factors, such as amount of drug. Generally, enhanced penalties are not covered by this chart. In any case where a statute does not specify penalty provisions for an offense category, a dash appears in that place in the chart. In some instances statutory provisions do not correspond precisely to the format of the chart; in such cases, provisions are placed in the chart category that most closely approximates the statutory intent. This chart is intended to provide information for general comparisons only; state statutes and the state-by-state summaries included in the Guide should be consulted for more detailed information concerning penalty provisions.

State/Schedule	Use Penalties	Possession Penalties	Sale Penalties
Alabama			
flat penalty	——	1-10; $5,000	2-20; $10,000
marijuana	——	0-1; $2,000	——
Alaska			
IA	——	0-5; $50,000	5-20; $50,000
IIA	——	0-5; $50,000	0-10; $50,000
IIIA	——	0-5; $5,000-$50,000	0-10; $50,000
IVA	——	0-5; $5,000-$50,000	0-5; $50,000
VA	——	0-5; $5,000-$50,000	0-5; $50,000
VIA	0-90 days; $1,000	0-5; $1,000-$50,000	0-5; $5,000-$50,000
Arizona			
dangerous drugs	0-5; $1,000-$150,000	0-5; $1,000-$150,000	5½-14; $1,000-$150,000
narcotic drugs	0-5; $2,000-$150,000	0-5; $2,000-$150,000	5½-14; $2,000- $150,000
prescription-only drugs	0-6 mos.; $1,000	0-6 mos.; $1,000	0-1 9/10; $1,000
marijuana	0-5; $750-$150,000	0-5; $750-$150,000	0-14; $750-$150,000
peyote	0-1 9/10; $150,000	0-1 9/10; $150,000	0-1 9/10; $150,000
vapor-releasing substances	0-2½; $150,000	0-2½; $150,000	0-2½; $150,000
precursor chemicals	0-14; $150,000	0-14; $150,000	0-14; $150,000
Arkansas			
I/II narcotics	——	3-10; $10,000	10-40; $25,000-$250,000
I/II non-narcotics	——	3-10; $10,000	5-40; $15,000
III	——	0-1; $1,000	5-40; $15,000
IV	——	0-1; $1,000	3-40; $10,000-$50,000
V	——	0-1; $1,000	3-40; $10,000-$50,000
VI	——	0-1; $1,000	4-30; $15,000-$100,000
California			
flat penalty	See state chart	——	3-7; $50,000
I/II narcotics		16 mos.-3; $20,000	3-5; $20,000
I/II non-narcotics		0-1	2-4
III/IV/V narcotics		16 mos.-3; $20,000	3-5; $20,000
III/IV/V non-narcotics		0-1	2-4
marijuana		0-6 mos., $100-$500	2-4; $100-$20,000
Colorado			
I	1-4; $1,000-$100,000	4-16; $3,000-$750,000	4-16; $3,000-$750,000
II	1-4; $1,000-$100,000	4-16; $3,000-$750,000	4-16; $3,000-$750,000
III	0-2; $5,000	2-8, $2,000-$500,000	2-8; $2,000-$500,000
IV	0-2; $5,000	1-4; $1,000-$100,000	1-4, $1,000-$100,000
V	0-2; $5,000	0-2; $5,000	0-2; $500
marijuana	——	15 days-4; $100-$100,000	2-8; $2,000-$500,000
Connecticut			
flat penalty	0-30 days; $25	——	——
I/II narcotics	——	0-7; $50,000	0-15; $50,000
I/II non-narcotics	——	0-1; $1,000	0-7; $25,000
III	——	0-1; $1,000	0-7; $25,000
IV	——	0-1; $1,000	0-7; $25,000
V	——	0-1; $1,000	0-7; $25,000
marijuana	——	0-5; $1,000-$2,000	0-7; $25,000
other: hallucinogens	——	0-5; $2,000	0-15; $50,000

COMPARISON OF PENALTIES FOR USE, POSSESSION, SALE—FIRST OFFENSE (Cont'd)

State/Schedule	Use Penalties	Possession Penalties	Sale Penalties
Delaware			
I/II narcotis	0-1; $3,000	0-1; $3,000	0-10; $5,000-$50,000
I/II non-narcotics	0-6 mos.; $1,000	0-6 mos.; $1,000	0-5; $1,000-$10,000
III	0-6 mos.; $1,000	0-6 mos.; $1,000	0-5; $1,000-$10,000
IV	0-6 mos.; $1,000	0-6 mos.; $1,000	0-5; $1,000-$10,000
V	0-6 mos.; $1,000	0-6 mos.; $1,000	0-5; $1,000-$10,000
District of Columbia			
flat penalty	——	0-1; $1,000	——
I/II narcotics	——	——	4-15; $100,000
I/II non-narcotics	——	——	20 mos.-5; $50,000
III	——	——	20 mos.-5; $50,000
IV	——	——	0-3; $25,000
V	——	——	0-1; $10,000
other	——	——	4-25; $200,000
Florida			
flat penalty	——	0-5; $5,000	——
I narcotics	——	0-30; $10,000	0-30; $10,000
II narcotics	——	——	0-15; $10,000
I/II non-narcotics	——	——	0-5; $5,000
III	——	——	0-5; $5,000
IV	——	——	0-5; $5,000
V	——	——	0-1; $1,000
marijuana	——	0-1; $1,000	0-5; $5,000
Georgia			
I	——	2-15	5-30
II	——	2-15	5-30
III	——	1-5	1-10
IV	——	1-5	1-10
V	——	1-5	1-10
marijuana	——	0-10; $1,000	1-10
Hawaii			
dangerous drugs	——	0-20; $10,000-$50,000	0-20; $25,000-$50,000
harmful drugs	——	0-20; $2,000-$50,000	0-20; $25,000-$50,000
detrimental drugs	——	0-5; $1,000-$10,000	0-5; $2,000-$10,000
marijuana	——	0-20; $1,000-$50,000	0-20; $2,000-$50,000
Idaho			
I narcotics	——	0-3; $5,000	0-life; $25,000
I non-narcotics	——	0-1; $1,000	0-5; $15,000
II	——	0-3; $5,000	0-life; $25,000
III	——	0-1; $1,000	0-5; $15,000
IV	——	0-1; $1,000	0-3; $10,000
V	——	0-1; $1,000	0-1; $5,000
VI	——	0-1; $1,000	0-1; $5,000
Illinois			
I/II narcotics	——	1-15; $15,000-$200,000	3-30; $200,000-$500,000
I/II non-narcotics	——	1-3; $15,000	2-30; $150,000-$500,000
III	——	1-3, $15,000	2-5; $125,000
IV	——	1-3, $15,000	2-5, $100,000
V	——	1-3; $15,000	2-5; $75,000
marijuana	——	30 days-5; $500-$10,000	6 mos.-7; $500-$100,000

COMPARISON OF PENALTIES FOR USE, POSSESSION, SALE—FIRST OFFENSE (Cont'd)

State/Schedule	Use Penalties	Possession Penalties	Sale Penalties
Indiana			
I/II narcotics	——	1.5-4; $10,000	10-30; $10,000
I/II non-narcotics	——	1.5; $10,000	10; $10,000
III	——	1.5; $10,000	10; $10,000
IV	——	1.5; $10,000	4; $10,000
V	——	1.5; $10,000	1.5; $10,000
marijuana	——	0-1.5; $5,000-$10,000	0-4; $5,000-$10,000
Iowa			
flat penalty	——	0-1; $1,000	——
I/II narcotics	——	——	0-10; $1,000-$50,000
I/II non-narcotics	——	——	0-10; $1,000-$50,000
III	——	——	0-10; $1,000-$50,000
IV	——	——	0-2; $5,000
V	——	——	0-2; $5,000
marijuana	——	0-6 mos.; $1,000	0-10; $1,000-$5,000
Kansas			
narcotics, opiates, methamphetamines	——	3-20; $30,000	3-life; $300,000
depressants, stimulants, hallucinogens, and IV	——	0-1; $2,500	3-life; $300,000
V	——	0-1; $2,500	0-1; $2,500
Kentucky			
I/II narcotics	——	1-5; $3,000-$5,000	5-10; $5,000-$10,000
I/II non-narcotics	——	0-1; $500	1-5; $3,000-$5,000
III	——	0-1; $500	1-5; $3,000-$5,000
IV	——	0-1; $500	1-3; $1,000-$3,000
V	——	0-1; $500	1-3; $1,000-$3,000
marijuana	——	0-1; $200-$500	0-10; $500-$10,000
hashish	——	——	1-5; $10,000
Louisiana			
I narcotics	——	4-10; $5,000	life; $15,000
I non-narcotics	——	0-10; $5,000	5-30; $15,000
II narcotics	——	0-5, $5,000	5-30; $15,000
II non-narcotics	——	0-5, $5,000	0-10; $15,000
III	——	0-5, $5,000	0-10; $15,000
IV	——	0-5; $5,000	0-10; $15,000
V	——	0-5; $5,000	0-5; $5,000
marijuana	——	0-6 mos.; $500	——
Maine			
W	——	0-1; $1,000	0-10; $2,500-$10,000
X	——	0-1; $1,000	0-5; $1,000-$2,500
Y	——	0-6 mos.; $500	0-1; $1,000
Z	——	0-6 mos.; $500	0-1; $1,000
marijuana	——	$200-$400	0-1; $1,000
Maryland			
flat penalty	——	0-4; $25,000	——
I/II narcotics	——	——	0-20; $25,000
I/II non-narcotics	——	——	0-5; $15,000
III	——	——	0-5; $15,000
IV	——	——	0-5; $15,000
V	——	——	0-5; $15,000
marijuana	——	0-1; $1,000	——

COMPARISON OF PENALTIES FOR USE, POSSESSION, SALE—FIRST OFFENSE (Cont'd)

State/Schedule	Use Penalties	Possession Penalties	Sale Penalties
Massachusetts			
A	——	0-2; $2,000	0-10; $1,000-$10,000
B	——	0-1; $1,000	0-10; $1,000-$10,000
C	——	0-1; $1,000	0-5; $500-$5,000
D	——	0-1; $1,000	0-2; $500-$5,000
E	——	0-6 mos.; $500	0-9 mos.; $250-$2,500
marijuana	——	0-6 mos.; $500	——
Michigan			
I/II narcotics	0-1; $2,000	0-life; $25,000	0-life; $25,000
I/II non-narcotics	0-1; $1,000	0-2; $2,000	0-7; $5,000
III	0-1; $1,000	0-2; $2,000	0-7; $5,000
IV	0-1; $1,000	0-2; $2,000	0-4; $2,000
V	0-6 mos.; $500	0-2; $2,000	0-2; $2,000
marijuana	0-90 days; $100	0-1; $1,000	——
other: LSD, peyote, mescaline, dimethltryptamine, psiloci, psilocybin	0-6 mos., $1,000	0-1; $1,000	——
Minnesota			
I/II narcotics	——	0-5; $10,000	0-20; $250,000
I/II non-narcotics	——	0-5; $10,000	0-15; $100,000
III	——	0-5; $10,000	0-15; $100,000
IV	——	0-5; $10,000	0-5, $10,000
V	——	0-1; $3,000	0-1; $3,000
marijuana	——	——	0-5; $10,000
Mississippi			
I	——	0-3; $1,000-$30,000	0-30; $1,000-$1,000,000
II	——	0-3; $1,000-$30,000	0-30; $1,000-$1,000,000
III	——	0-1; $5,000	0-20; $1,000-$250,000
IV	——	0-1; $5,000	0-20; $1,000-$250,000
V	——	0-1; $5,000	0-10; $1,000-$50,000
marijuana	——	0-1; $100-$1,000	0-30; $3,000-$1,000,000
Missouri			
flat penalty	——	0-7; $5,000	5-15; $5,000
marijuana	——	0-1; $1,000	0-7; $5,000
Montana			
flat penalty	——	0-5; $50,000	1-life; $50,000
Nebraska			
flat penalty	3 mos.; $500	0-5; $10,000	——
I/II/III	——	——	0-50; $25,000
IV	——	——	0-5; $10,000
V	——	——	0-5; $10,000
marijuana	——	0-5; $100-$10,000	——
Nevada			
I/II	1-6; $5,000	1-6; $5,000	1-20 or life; $20,000
III/IV	1-6; $5,000	1-6; $5,000	1-10 or life; $10,000
V	0-1; $1,000	0-1; $1,000	1-10 or life; $10,000
New Hampshire			
I-IV	——	0-7; $25,000	0-7; $100,000
V	——	0-3; $15,000	0-3; $25,000
marijuana	——	0-1; $1,000	0-3; $25,000
hashish	——	0-1; $1,000-$5,000	——

COMPARISON OF PENALTIES FOR USE, POSSESSION, SALE—FIRST OFFENSE (Cont'd)

State/Schedule	Use Penalties	Possession Penalties	Sale Penalties
New Jersey			
I/II narcotics	3-5; $25,000	3-5; $25,000	3-10; $50,000-$100,000
I/II non-narcotics	3-5; $25,000	3-5; $25,000	3-5; $15,000
III	3-5; $25,000	3-5; $25,000	3-5; $15,000
IV	3-5; $25,000	3-5; $25,000	3-5; $15,000
V	0-18 mos.; $15,000	0-18 mos.; $15,000	0-18 mos.; $15,000
marijuana	0-18 mos.; $1,000-$15,000	0-18 mos.; $1,000-$15,000	0-5; $7,500-$15,000
New Mexico			
I/II narcotics	——	1-5; $5,000	0-9; $10,000
I/II non-narcotics	——	0-1; $500-$1,000	0-3; $5,000
III	——	0-1; $500-$1,000	0-3; $5,000
IV	——	0-1; $500-$1,000	0-3; $5,000
V	——	——	6 mos.-1; $100-$500
marijuana	——	0-1; $50-$1,000	0-3; $5,000
New York			
I	——	0-1; $1,000	0-7; $5,000
II	——	0-1; $1,000	0-7; $5,000
III	——	0-1; $1,000	0-7; $5,000
IV	——	0-1; $1,000	0-7; $5,000
V	——	0-1; $1,000	0-7; $5,000
marijuana	——	$100	——
North Carolina			
I	——	0-5; $5,000	0-10; fine
II	——	0-2; $2,000	0-10; fine
III	——	0-2; $2,000	0-5; fine
IV	——	0-2; $2,000	0-5; fine
V	——	0-6 mos.; $500	0-5; fine
VI marijuana	——	0-5; $100-$5,000	0-5; fine
North Dakota			
flat penalty	——	0-5; $5,000	——
I/II narcotics	——	——	0-20; $10,000
I/II non-narcotics	——	——	0-10; $10,000
III	——	——	0-10; $10,000
IV	——	——	0-5; $5,000
V	——	——	0-1; $1,000
marijuana	——	0-5; $1,000-$5,000	0-20; $10,000
Ohio			
I	——	1½-5; $2,500	1-10; $2,000
II	——	1½-5; $2,500	1-10; $2,000
III	——	0-60 days; $500	0-60 days; $500
IV	——	0-60 days; $500	0-60 days; $500
V	——	0-60 days; $500	0-60 days; $500
marijuana <100 g.	——	$100	$100
Oklahoma			
I/II narcotics	——	2-10	5-life; $100,000
I/II non-narcotics	——	2-10	2-life; $20,000
III	——	0-1	2-life; $20,000
IV	——	0-1	2-life; $20,000
V	——	0-1	0-5; $1,000
marijuana	——	0-1	——

COMPARISON OF PENALTIES FOR USE, POSSESSION, SALE—FIRST OFFENSE (Cont'd)

State/Schedule	Use Penalties	Possession Penalties	Sale Penalties
Oregon			
I	——	0-10; $100,000	0-20; $100,000
II	——	0-5; $100,000	0-10; $100,000
III	——	0-1; $2,500	0-5; $100,000
IV	——	0-30 days; $500	0-6mos.; $1,000
V	——	$250	0-30 days; $500
marijuana	——	0-10; $500-$100,000	0-10; $100,000
Pennsylvania			
flat penalty	——	0-1; $5,000	——
I/II narcotics	——	——	0-15; $250,000
I/II non-narcotics	——	——	0-5; $15,000
III	——	——	0-5; $15,000
IV	——	——	0-3; $10,000
V	——	——	0-1; $5,000
marijuana	——	0-1; $500-$5,000	——
Rhode Island			
flat penalty	——	0-3; $5,000	——
I/II drug-dependent	——	——	0-30; $100,000
I/II non-drug dependent	——	——	0-life; $500,000
III	——	——	0-20; $40,000
IV	——	——	0-20; $40,000
V	——	——	0-1; $10,000
marijuana	——	0-1; $500	0-30; $100,000
South Carolina			
I/II narcotics	——	0-2; $5,000	0-5; $25,000
I/II non-narcotics	——	0-6 mos.; $1,000	0-5; $5,000
III	——	0-6 mos.; $1,000	0-5; $5,000
IV	——	0-6 mos.; $1,000	0-3; $3,000
V	——	0-6 mos.; $1,000	0-1; $1,000
marijuana	——	0-30 days; $100-$200	——
South Dakota			
flat penalty	——	0-5; $5,000	——
I	——	——	30 days-10; $10,000
II	——	——	30 days-10; $10,000
III	——	——	30 days-5; $5,000
IV	——	——	30 days-5; $2,000
marijuana	——	0-10; $100-$10,000	15 days-10; $1,000-$10,000
Tennessee			
flat penalty	——	0-1; $2,500	——
I	——	——	8-30; $100,000
II	——	——	3-15; $100,000
III	——	——	2-12; $50,000
IV	——	——	2-12; $50,000
V	——	——	1-6; $5,000
VI	——	——	0-10; $2,500-$10,000
VII	——	——	1-6; $1,000
Texas			
group 1	——	2-life; $10,000-$100,000	5-life; $20,000-$250,000
group 2	——	2-life; $10,000-$100,000	2-life; $10,000-$100,000
group 3	——	0-life; $2,000-$100,000	2-life; $10,000-$100,000
group 4	——	0-life; $1,000-$100,000	2-life; $10,000-$100,000
marijuana		0-life; $1,000-$100,000	0-life; $1,000-$100,000

The National Criminal Justice Association (NCJA) has graciously provided this chart to aid the reader's understanding of the UCSA and state drug laws. The chart is taken from NCJA's Guide to Controlled Substances Acts. For a copy of the Guide, contact NCJA, 444 North Capitol Street, N.W., Suite 608, Washington, D.C. 20001, (202) 347-4900.

COMPARISON OF PENALTIES FOR USE, POSSESSION, SALE—FIRST OFFENSE (Cont'd)

State/Schedule	Use Penalties	Possession Penalties	Sale Penalties
Utah			
I/II	——	0-5; $5,000	1-15; $15,000
III	——	0-6 mos.; $1,000	0-5; $10,000
IV	——	0-6 mos.; $1,000	0-5; $10,000
V	——	0-6 mos.; $1,000	0-1; $7,500
marijuana	——	0-5; $1,000-$5,000	0-5; $10,000
Vermont			
hallucinogens	——	0-15; $500,000	0-15; $500,000
depressants, stimulants, narcotics	——	0-20; $500,000	0-20; $500,000
cocaine	——	0-20; $1,000,000	0-20; $1,000,000
heroin	——	0-20; $1,000,000	0-20; $1,000,000
marijuana	——	0-15; $500,000	0-15; $500,000
LSD	——	0-20; $500,000	0-20; $500,000
Virginia			
I/II	——	1-10; $1,000	5-40; $100,000
III	——	0-1; $1,000	0-1; $1,000
IV	——	0-6 mos.; $500	0-1; $1,000
V	——	$500	0-1; $1,000
VI	——	$100	——
marijuana	——	0-10; $500-$1,000	0-30; $1,000-$10,000
Washington			
flat penaltly	——	0-5; $10,000	——
I/II narcotics	——	——	<2 kg.: 0-10; $25,000 ≥2 kg.: 0-10; $100,000 + $50/g. over 2 kg.
I/II non-narcotics	——	——	0-5; $10,000
III	——	——	0-5; $10,000
IV	——	——	0-5; $10,000
V	——	——	0-5; $10,000
marijuana	——	0-5; $1,000-$10,000	——
West Virginia			
flat penalty	——	90 days-6 mos.; $1,000	——
I/II narcotics	——	——	1-15; $25,000
I/II non-narcotics	——	——	1-5; $15,000
III	——	——	1-5; $15,000
VI	——	——	1-3; $10,000
V	——	——	6 mos.-1; $5,000
Wisconsin			
I/II narcotic	——	0-1; $5,000	0-15; $25,000
I/II non-narcotic	——	0-30 days; $500	0-5; $15,000
III	——	0-30 days; $500	0-5; $15,000
IV	——	0-30 days; $500	0-3; $10,000
V	——	0-30 days; $500	0-1; $5,000
Wyoming			
flat penalty	——	0-6 mos.; $750	——
I/II narcotics	0-90 days; $100	——	0-20; $25,000
I/II non-narcotics	0-90 days; $100	——	0-10; $10,000
III	0-90 days; $100	——	0-10; $10,000
IV	——	——	0-2; $2,500
V	——	——	0-1; $1,000
marijuana	——	——	0-6 mos.; $1,000

MODEL ASSET SEIZURE AND FORFEITURE ACT (MASFA) (1991)

IN THIS SECTION: PAGE

INTRODUCTION
TO THE
MODEL ASSET SEIZURE AND FORFEITURE ACT
(MASFA) (1991)

This model state forfeiture legislation is intended to provide procedures for all forfeitures presently done through state drug statutes or state RICO statutes. The model act represents the most advanced expression of social efforts to cope effectively with the financial aspects of economically motivated crime. This legislation blends traditional and modern approaches to forfeiture from both federal and state levels. The core concepts of *in rem* (against the property) forfeiture are incorporated as well as the more advanced procedural advantages of civil *in personam* (against the person) remedies. Each approach serves the common purpose of reaching the financial structure of criminal enterprises. Forfeiture, as incorporated in this model, is a remedy applied to the enterprise and its economic and material base as opposed to assessing criminal punitive sanctions against individuals. Individual conduct has significance only to the extent that it defines the enterprise.

In rem forfeiture has existed federally since 1790. All states have had some form of *in rem* forfeiture. Traditionally *in rem* forfeiture reached only those properties which were contraband or were used as tools of criminal activity. *In rem* forfeitures did not traditionally reach the profits and things of value generated by criminal activity.

Federally, in response to this void, the Organized Crime Control Act of 1970 created *in personam* forfeiture in Racketeer Influenced and Corrupt Organizations (RICO) and Continuing Criminal Enterprise (CCE) legislation; however, it did so only in a criminal context. Procedural deficiencies made the early criminal forfeiture provisions relatively useless. These procedural problems were largely corrected in the Comprehensive Crime Control Act of 1984, which the Department of Justice marked by promulgating a Model Asset Forfeiture Bill in 1985.

States also began to legislate *in personam* civil remedies to attack the economic power of criminal groups. For example, after substantial reconceptualization of the federal *in personam* provisions, the Arizona legislature adopted *in personam* forfeiture provisions in 1978.

Among the numerous significant changes was the rejection of the RICO limitation of *in personam* forfeiture to only criminal actions. Arizona specifically legislated that *in personam* remedies are remedial and not punitive and are supplemental to any criminal sanctions. The individual is not the focus of civil *in personam* forfeiture remedies; the economic power of the enterprise stands before the court through its members.

The Arizona legislature promulgated its *in personam* remedies in the aftermath of Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, (1974). Acting with the benefit of the Supreme Court's ringing endorsement of civil forfeiture in an *in rem* context, in Calero-Toledo v. Pearson Yacht Leasing Co., supra, the Arizona legislature structured civil, remedial forfeitures that could be pursued either *in rem* or *in personam*. Its *in personam* procedures, unfortunately, suffered from many of the same deficiencies as federal RICO and CCE. These difficulties have been addressed piece-meal in a continuing legislative program of evolving civil remedies.

RICO and CCE were procedurally improved by the Comprehensive Crime Control Act of 1984. In 1985-1986 the Arizona legislature re-drafted the 1985 Model Asset Forfeiture Bill for state use. Again, Arizona adapted freely to suit its announced remedial purposes. The new forfeiture procedural improvements became effective in 1986, and were immediately recognized as effective by law enforcement and by the financial industry, which had actively supported their passage. This modern approach filled a deep need as evidenced by the passage of substantially similar provisions by other states. In 1988, Hawaii passed a comprehensive forfeiture statute, based upon Arizona law. In 1989, Louisiana enacted a comprehensive forfeiture statute that is substantially the same as this Model Asset Seizure and Forfeiture Act (MASFA) (1991) which in turn is based on Arizona law. Louisiana had called upon the editors of this model state forfeiture legislation. These same editors had assembled in 1988 after the National Conference of Commissioners on Uniform State Laws (NCCUSL) invited the Department of Justice (DOJ), the National Association of Attorneys General (NAAG), and the National District Attorneys Association (NDAA) to send observers to its ongoing drafting committee on proposed revisions to its 1970 Uniform Controlled Substances Act (UCSA). The UCSA contained rudimentary *in rem* forfeiture provisions, and the observers proposed an Arizona model with some improvements. The NCCUSL drafting committee had substituted the observers' "Arizona" draft for the prior work of the committee and therefore the observers supplied the Arizona model to Louisiana legislators. The Arizona approach reached a new level of refinement in Louisiana, with many improved provisions and procedural protections.

Although in 1990 NCCUSL adopted proposed criminal revisions to the UCSA, the revisions failed to include the drafting committee's recommended forfeiture provisions. The representatives from NDAA, NAAG, and DOJ completed their refinement of the draft for use by the states. This product is the Model Asset Seizure and Forfeiture Act (MASFA) (1991). The refinement process has drawn on comments from the financial industry, from defense counsel, and from commercial lawyers as well as from major governmental agencies concerned with forfeiture matters. The key concepts in the model act have been tested and found effective in Arizona since 1986, have been examined and re-examined from divergent points of view over the two years of their development and have been enacted in various forms in Hawaii, Oregon, Louisiana, and Arkansas.

We as a people deserve to be protected from the predatory reach of financially motivated criminal enterprises. Forfeiture is effective because it seizes the economic strength of these enterprises and redirects it to positive social goals. This model legislation stands ready to serve this purpose in a manner consistent with due process and commercial interests.

Drug traffickers are extremely shrewd, exploiting weaknesses and loopholes in state drug laws. Broad, ambiguous drug laws drafted twenty years ago are no longer a sufficient deterrent to traffickers. New legislative weapons are needed to match the changed face of the enemy . . ..States that do not adopt bold legislative deterrents.... will become "safe havens" for drug activity. No state can afford that risk or that reputation.

William J. Bennett
Former Director
Office of National Drug
Control Policy
State Drug Control Status Report
November, 1990

HIGHLIGHTS

OF THE

MODEL ASSET SEIZURE AND FORFEITURE ACT (MASFA) (1991)

REMOVING THE PROFIT FROM DRUG CRIME

- **Only persons whose interests comply with recording statutes or are perfected against good faith purchasers for value qualify as an owner or interest holder. (§ 1 (3), § 1 (5)). (See pp. 31–32).**

Only owners and interest holders may file claims to the property. Therefore, this definition discourages the common forfeiture avoidance device of titling property in the names of relatives or associates making last minute claims of unrecorded interests.

- **Conduct triggering forfeiture includes acts or omissions occurring in another state as long as the initiating state has jurisdiction. (§ 3 (b)). (See p. 36).**

This provision recognizes the interstate and international scope of drug activity. For example, a drug dealer transacts business in State A and deposits his wealth in State B. State B may bring a forfeiture action to obtain the illegal wealth even though the crime occurred in State A.

- **Enterprise interests are forfeitable: interests affording a source of influence over an enterprise established, controlled or participated in through conduct giving rise to forfeiture. (§ 4 (e)). (See p. 38).**

For example, a drug dealer is the majority stockholder in a corporation. Forfeiture of his stock precludes him from using the corporation to further his illegal activity while he is in prison or out of the country.

- **In personam procedures permit the state to obtain a personal judgment against the dealer which can be satisfied from any of his assets. (§ 13). (See pp. 79–80).**

Personal jurisdiction allows the state to reach illegal assets across state lines. For example, a drug dealer in State A may be ordered to transfer title to a vehicle located in State B. Alternatively, the judgment may be taken to and enforced in State B.

- **Substitute assets may be forfeited up to the value of a claimant or defendant's forfeitable property if forfeitable property: (1) cannot be located; (2) has been transferred to a third party; (3) is beyond the court's jurisdiction; (4) has been substantially diminished in value; (5) has been commingled with other property; or (6) is subject to an exempt interest. (§ 14). (See 82).**

The substitute assets provision helps prevent a drug dealer's escape from forfeiture through use of leased and mortgaged property. For example, if a dealer liens the real property on which his stashhouse is located, the court may order forfeiture of his other assets equal to the value of the liened property.

- **A rebuttable presumption that property is forfeitable exists if the property is acquired during a person's conduct giving rise to forfeiture or within a reasonable time thereafter; and there is no other likely source for the property. (§ 11 (k)). (See p. 68).**

- **A rebuttable presumption that money or a negotiable instrument was proceeds of conduct giving rise to forfeiture or was used or intended to be used to facilitate the conduct exists if the money or negotiable instrument was found in close proximity to contraband or an instrumentality. (§ 11 (j)). (See p. 68).**

These common sense presumptions reflect the economic reality of the drug business. For example, a dealer trafficks in cocaine between 1988 and 1990 and during that time buys a $1,000,000 home and a Jaguar. It is reasonable to presume that the items were purchased with drug proceeds if the state proves the dealer has no other likely source of income.

- **Forfeiture proceeds are deposited into a Special Asset Forfeiture Fund. After payment of exempt interests and expenses, the attorney for the state equitably distributes remaining funds to enforcement or prosecutorial agencies participating in the seizure or forfeiture. (§ 16 (b)). (See pp. 87–88).**

Drug enterprises use complicated, sophisticated techniques to conceal their illegal activity and its profits. Unraveling these enterprises requires expenditures of tremendous amounts of resources over serveral months, even years. Return of proceeds to enforcement and prosecution assures availability of resources to undertake protracted cases. This assurance provides prosecutors and law enforcement officers incentive to pursue forfeiture actions under state law.

PROTECTING LEGITIMATE INTERESTS OF THIRD PARTIES

- **The state must file judicial proceedings within specified time limits or property is released to the owner or interest holder pending further proceedings. (§ 8 (a)). (See pp. 55–56).**

- **An owner may obtain release of most property pending further proceedings by substituting a surety bond or cash equal to the fair market value in lieu of the property. (§ 7 (b)).(See p. 50).**

These protections allow the owner or interest holder use of the property during the forfeiture action.

- **An owner or interest holder may receive a quick hearing, after five days notice to the state, to determine whether probable cause exists for the forfeiture of the property. If the court finds no probable cause, the property is released to the owner or interest holder pending further proceedings. (§ 11 (c)). (See p. 66).**

This provision insures that a judicially determined finding of probable cause supports the seizure.

- **The state may enter into a custodian agreement with an owner or interest holder to maintain the property pending a final judgment. (§ 7 (c) (4)). (See pp. 50–51).**

Custodian agreements also allow an owner or interest holder use of the seized property. Other interests are served as well. They reduce waste and deterioration by ensuring someone will maintain and preserve the value of the property. Law enforcement spends less time on property maintenance and courts less time deciding property management and liability issues.

- **State may file a forfeiture lien upon seizure or the initiation of a civil or criminal proceeding. (§ 8 (b)). (See pp. 55–56).**

- **Removal of residents from real property requires an adversarial judicial determination of probable cause except in exigent circumstances. (§ 6 (b)). (See p. 47).**

These provisions provide added protections concerning displacement of residents. The lien allows the state to establish its interest without excluding people from their property. If the state

deems eviction necessary to seize the property, it must seek an adversarial judicial determination of probable cause, except in an emergency. For example, if a methamphetamine lab is operating on the property, public safety dictates immediate seizure.

- **A regulated interest holder or an individual whose interest the state recognizes as exempt may apply to have seized property sold, leased, rented, or operated to satisfy or preserve a specified interest. The remaining proceeds, after payment of costs, are deposited into an interest-bearing account subject to further proceedings. (§ 7 (e)). (See p. 51).**

- **An owner or interest holder may file, prior to court action, a petition to have the state recognize or agree that an interest is exempt from forfeiture. (§ 9). (See pp. 61–62).**

Commercial interest holders and other innocent parties may use these mechanisms to obtain a rapid exit from the forfeiture action. Expedited determination of legitimate claims benefits all parties. Interest holders know their interests are protected without incurring costly legal expenses. The state expends scarce resources only on claims truly in dispute.

- **A criminal defendant may apply for a probable cause hearing to determine release of property necessary for the defense of the criminal charge. The court holds the hearing if the applicant establishes: (1) he has not had an opportunity to participate in a previous adversarial judicial determination of probable cause; (2) he has access to no other monies adequate to pay for criminal defense counsel; and (3) the property interest is not subject to any claim other than the forfeiture. Property released is exempt from forfeiture if it is paid for defense services actually rendered. (§ 11 (e)). (See p. 67).**

The provision allows defense counsel to accept legal fees after prevailing in the hearing without fear that the state will recapture the money at a later date.

DETAILED SUMMARY
OF
MODEL ASSET SEIZURE AND FORFEITURE ACT (MASFA) (1991)

Section 1. Definitions (See pp. 31–32).

(1) Attorney for the state – authorized investigative and prosecutorial authority.

(2) Conveyance – means of transportation.

mirrors protections of commercial world

(3) Interest holder – party with a secured interest or interest perfected against a good faith purchaser for value. Excludes agents, nominees, and persons not in substantial compliance with statute requiring recordation to perfect interest.

(4) Omission – failure to perform legal duty.

(5) Owner – person, other than an interest holder, who has a property interest. Excludes agents, nominees and persons not in substantial compliance with statutes requiring recordation to perfect interest.

no deduction for business expenses

(6) Proceeds – gross proceeds acquired directly or indirectly from conduct giving rise to forfeiture.

(7) Property – real or personal, tangible or intangible things of value.

special commercial interest category

(8) Regulated interest holder – authorized business under the jurisdiction state and federal regulatory agencies relating to banking, securities, of insurance and real estate.

(9) Seizing agency – state agency which employs the law enforcement officers who seize property for forfeiture.

contrasts with seizure for evidence or safekeeping

(10) Seizure for forfeiture – seizure accompanied by assertion that property is seized for forfeiture.

Section 2. Jurisdiction and venue (See p. 34).

(a) *In rem* and *in personam* jurisdiction

(b) Proceeding may be brought in judicial district where any part of property is located or a civil or criminal proceeding may be maintained for conduct giving rise to forfeiture.

Section 3. Conduct giving rise to forfeiture (See p. 36).

no criminal prosecution is necessary

(a) Act or omission punishable as a felony or by imprisonment for more than one year.

facilitates forfeiture in multistate cases

(b) Act or omission outside the state which is punishable as a felony or by imprisonment for more than one year in that state and state instituting action.

murder, bribery preparatory or inchoate offenses, e.g. conspiracy, attempts

(c) Act or omission committed in furtherance of conduct giving rise to forfeiture and punishable as a felony or by imprisonment for more than one year.

Section 4. Property subject to forfeiture (See p. 38).

(a) Controlled substances, raw materials, controlled substance analogs, counterfeit substances, or imitation substances.

entire tract of real property including appurtenances and improvements is forfeitable

(b) All property, including whole of any lot or tract of land, which is:

(1) Furnished or intended to be furnished in conduct giving rise to forfeiture; or

(2) Used or intended to be used to facilitate the conduct.

(c) All proceeds of conduct giving rise to forfeiture.

(d) All weapons possessed, used or available for use to facilitate conduct giving rise to forfeiture.

enterprise interests are forfeitable e.g. corporate stocks or position as corporate officer

(e) Any interest or right affording a source of influence over an enterprise controlled, conducted or participated in through conduct giving rise to forfeiture.

Section 5. Exemptions (See pp. 41–42).

protects non-negligent owners

(a) Property is exempt from forfeiture if the owner or interest holder:

and interest holders

(1) Acquired property before or during conduct giving rise to forfeiture and:

(A) Did not know and could not reasonably have known of conduct or that it was likely to occur; or

(B) Acted reasonably to prevent conduct.

(2) Acquired property after the conduct and is a good faith purchaser for value.

(b) Despite (a), property is not exempt if:

helps neutralize avoidance device of titling property in names of uninvolved relatives

(1) The owner or interest holder holds a joint or common tenancy with person whose conduct gave rise to forfeiture (option for spousal or residential exemption).

(2) Person who committed conduct had authority to convey property to good faith purchaser for value;

(3) Owner or interest holder is criminally liable for conduct giving rise to forfeiture. E.g. co-conspirators.

(4) Owner or interest holder acquired property with notice of its seizure or with reason to believe it was subject to forfeiture.

Section 6. Seizure of Property (See pp. 47-48).

augments search warrant statutes which have no provisions for seizing property other than as evidence

(a) Court may issue seizure warrant for property if:

(1) Probable cause exists for its forfeiture; or

(2) Property is subject of previous forfeiture order.

(b) The state may seize property without a warrant if there is probable cause to believe property is subject to forfeiture. Eviction of residents of real property requires adversarial judicial determination of probable cause except in exigent circumstances.

removal of residents from real property requires adversarial judicial hearing

(c) Constructive seizure occurs by:

(1) Posting notice on property;

(2) Giving notice pursuant to Section 8.; or

(3) Filing or recording notice, lien or lis pendens in public records.

constructive seizure allows seizure of residence or on-going business without displacing owner or disrupting production of income

(d) The state shall make a reasonable effort to provide notice of seizure to person in possession or control. If no one is in possession or control, state may attach notice to property or notify owner. Notice contains:

(1) Description of seized property;

(2) Date and place of seizure;

(3) Name of seizing agency; and

(4) Address and phone number of person or agency from whom information can be obtained.

(e) A person who in good faith reasonably complies with a court order or law enforcement request is immune from liability for acts of compliance.

(f) Possessory lien is unaffected by seizure.

Section 7. Property management and preservation (See pp. 50–51).

(a) Seized property is not subject to alienation, conveyance, sequestration, attachment or motion for return of evidence.

(1) State may release property if seizure is unnecessary.

(2) State attorney may transfer action to another state or federal agency or attorney for the state.

owner obtains release of property by posting bond which replaces property

(b) Owner may obtain release of property by posting surety bond or cash, which is forfeited in lieu of the property.

(1) Amount equals fair market value of property;

(2) State may refuse to release property if it is contraband, evidence or designed for use in conduct giving rise to forfeiture.

(c) The state may take the following actions with seized property:

(1) Remove property to an appropriate place, designated by appropriate authority;

custodian agreements allow owners use of property; minimize law enforcement role in property maintenance; and reduce court time spent on property management issues

(2) Place property under constructive seizure;

(3) Remove property to an area for safekeeping or deposit it in an interest bearing account;

(4) Provide for an agency or custodian to maintain and operate property to preserve its value. Custodian includes owners, mortgagees, lienholders.

(5) Require agency to remove property to appropriate location for disposition.

(d) Seizing agency conducts written inventory and estimates value of seized property.

property may be sold pending final judgment to satisfy interest of mortgagor, lienholder or regulated interest holder; equity is returned to be litigated

(e) Upon motion by a party, the court may order seized property sold, leased, rented or operated to satisfy or preserve specified interests of the party.

(1) Interest holder receives notice and an opportunity for a hearing if the interest holder:

(A) Is a regulated interest holder who has timely filed a proper claim, or

(B) Has an interest the state recognizes as exempt.

(2) Sale may occur when property is liable to perish, waste, be foreclosed, significantly reduced in value, or when maintenance expenses are disproportionate to the property value.

(3) Court designated third party sells property at commercially reasonable public sale and applies proceeds as follows:

(A) Reasonable expenses of sale or disposal;

(B) Exempt interests in order of priority; and

(C) Balance deposited in interest bearing account pending further proceedings.

Section 8. Commencement of forfeiture proceedings; property release requirements. (See pp. 54–58).

failure to timely initiate forfeiture releases property to owner or interest holder pending further proceedings

(a) (1) If the state fails to timely initiate forfeiture proceedings, property is released to the owner or interest holder pending further proceedings.

(A) State shall file notice of pending forfeiture within 90 days after seizure.

(B) State shall file a judicial forfeiture proceeding within 90 days after notice of pending forfeiture if a proper claim has been timely filed.

allows more time to reach agreement and avoid waste of judicial resources especially where recognition of exemption is inevitable

(2) If a petition for recognition of exemption is filed, the state may file its judicial forfeiture proceeding within 180 days after the notice of pending forfeiture.

However, if a regulated interest holder timely files a proper petition, the state may delay filing a judicial forfeiture proceeding only if it provided the interest holder with a written recognition of exemption within 60 days after the notice of pending forfeiture. The written statement shall recognize the interest of the petitioner to the extent of documented outstanding principal plus interest at the contract rate until paid.

(3) Notice or service shall be given as follows:

(A) By personal service or certified mail, if the interest holder's name and current address are known.

(B) By certified mail, return receipt requested to the address of record if the current address is unknown and the name and address are required to be on record with state agency.

(C) By publication in one issue of a newspaper of general circulation in the country of seizure if the address is unknown and not on record.

(4) Notice of pending forfeiture of real property is effective when it is recorded. Other notice is effective upon the earlier of personal service, publication, or mailing of a written notice.

forfeiture lien permits establishment of state's interest without displacing owner or interest holder

(b) State may file a forfeiture lien upon seizure or the initiation of a civil or criminal proceeding related to the conduct giving rise to forfeiture.

(1) State may file a lien based upon another state's seizure proceeding under a state or federal statute substantially similar to the Act.

(2) Lien notice contains:

(A) name of person and alias, or name of corporation, partnership, trust, or other entity, including nominees owned

entirely or in part or controlled by the person;
(B) description of seized property or criminal or civil proceeding;
(C) amount claimed by lienor;
(D) name of court where proceeding brought; and
(E) case number.

(3) Lien applies to described seized property or named person or entity. A separate lien filed for each named person.

(4) Lien secures amount of potential liability for civil judgment and, if applicable, fair market value of seized property.

(5) Filing and priority of lien shall be in accordance with state law.

(6) Lienor may file an amended lien releasing all or part of the property.

(7) Lienor shall furnish notice to any person named in lien. Lien remains valid despite failure to furnish notice.

trustee furnishes information about beneficiaries whose property is subject to forfeiture

pierces straw or front owner to find true owner

(8) A trustee who has notice that a lien, notice of pending forfeiture or proceeding has been filed against property or a person for whom the trustee holds title shall furnish within 15 days to the state the following information:
(A) Name and address of person or entity for whom property held;
(B) Description of all other property whose title is held for benefit of named person; and
(C) Copy of applicable trust agreement or instrument.

(9) Trustee provision is inapplicable if trustee is acting under a recorded subdivision trust agreement or recorded deed of trust or the information is in public records.

noncompliance subjects trustee to criminal and civil penalties

(10) A trustee who knowingly fails to comply may be sentenced to imprisonment for not less than 2 nor more than five years and fined not less than $10,000 per each day of noncompliance.

(11) A trustee who fails to comply is subject to a civil penalty of $300 per day of noncompliance beginning with the effective date of the notice.

(12) Trustee's duty to comply is not excused by laws declaring information privileged or confidential, except as provided by the U.S. Constitution.

(13) Trustee who furnishes information is immune from liability.

(14) A person who discloses the information except in the proper discharge of official duties is guilty of a misdemeanor.

judgment against trustee becomes lien against property subject to forfeiture

(15) Court may seal record containing disclosed information or permit disclosure in a designated way.

(16) Judgment or order of payment becomes lien against property subject to forfeiture.

Section 9. Recognition of Exemption (See pp. 61–62).

petition for recogtnition of exemption allows rapid exit from forfeiture actions for commercial interests

(a) State may make available an opportunity to file a petition for recognition of exemption.

(1) State shall indicate the opportunity in the notice of pending forfeiture.
(2) Owner or interest holder may file a petition within 30 days after the effective date of the notice of pending forfeiture.
(3) No petition may be filed after commencement of a court action.
(4) Petition shall satisfy the requirements of a claim.
(5) Owner or interest holder may file a claim within 30 days after effective date of notice of pending forfeiture.

simplifies procedures so financial institutions use in house staff instead of referring matters to outside counsel

(b) (1) The state provides seizing agency and petitioner a written recognition of exemption and statement of non–exempt interests within 120 days after effective date of notice of pending of forfeiture.
(2) Owner or interest holder may file a claim within 30 days after effective date of notice of recognition of exemption and statement of non–exempt interests.
(3) State can proceed with judicial action at any time.
(4) If no claim is timely filed, the recognition of exemption and statement of non–exempt interests is final.
(5) No duplicate notice is required if judicial proceeding follows the recognition of exemption process. Recognition of exemption and statement of non–exempt interests is void and considered as rejected offers to compromise.

(c) If no petitioner claim is filed, state shall proceed with application for a forfeiture order.

Section 10. Claims (See p. 64).

timely filed claim forces state to proceed with judicial action

(a) Only an owner or interest holder may file a claim.

(1) Claim mailed to seizing agency and prosecutor by certified mail, return receipt requested;

(2) Claim filed within 30 days after effective notice of pending forfeiture;

(3) No extensions of time for filing.

failure to file claim triggers application for order of forfeiture

(b) Claim shall be signed under penalty of perjury and contain:

(1) Caption of proceedings and identifying number;

(2) Address where claimant will accept mail;

(3) Nature and extent of interest;

(4) Date, identify of transferor, and circumstances of acquisition of interest;

(5) Specific provision of Act which is basis of assertion of exemption;

(6) All essential facts supporting each assertion; and

(7) Specific relief.

Section 11. Judicial proceedings generally (See pp. 66–69).

(a) Provisions apply to *in rem* and *in personam* proceedings.

(b) Court may take actions necessary to secure, maintain, or preserve the availability of property subject to forfeiture e.g., restraining orders, receiverships, custodians, seizure warrants.

quick probable cause hearing to correct error

(c) Owner or interest holder may apply for a quick probable cause hearing within ten days after notice of seizure or lien or actual knowledge of it, whichever is earlier.

(1) Application must comply with requirements for claims.

(2) After five days notice to state, court may order a probable cause hearing if no prior judicial determination of probable cause has been made.

(3) Hearing held within 30 days of order unless extended for good cause.

(4) If the court finds no probable cause or the state doesn't contest the issue, the property is released to the owner or interest holder pending further judicial proceedings.

(d) All applications filed within the 10 day peroid are consolidated into one hearing.

payment of criminal defense costs

(e) A criminal defendant may petition the court for release of property that is necessary for the defense of the criminal charge.

criminal charge can be unrelated to forfeiture proceedings

(1) Petition applies to property seized for forfeiture or that may be seized for forfeiture.
(2) Petition must satisfy the requirement of a claim.
(3) Probable cause hearing held if applicant establishes that:
(A) He had no opportunity to participate in a previous adversarial judicial determination of probable cause.
(B) He has no access to other monies adequate for the payment of defense counsel.
(C) The property is not subject to any claim other than forfeiture.

released funds paid for actual legal services are exempt from forfeiture

(f) If the court finds no probable cause, property is released to applicant. If the state fails to contest the issue, the court may release a reasonable amount of property for payment of defense costs. Property released and paid for legal services actually rendered is exempt.

(g) Convicted criminal defendant is precluded from denying criminal allegations in a forfeiture action.

(h) Claimant bears burden of proving exemption. State does not have to negate exemption.

hearsay admissible to determine probable cause

(i) In making probable cause and reasonable cause determinations, court may consider evidence admissible to determine probable cause at a preliminary hearing or pursuant to search warrant laws.

close proximity presumption for money and negotiable instruments

(j) Money or negotiable instrument found in close proximity to contraband or an instrumentality is rebuttably presumed to be proceeds or used or intended to be used to facilitate the illegal conduct.

rebuttable presumption linking property with drug activity

(k) A rebuttable presumption that property is subject to forfeiture exists if the state establishes:

(1) The person was engaged in conduct giving rise to property forfeiture;
(2) The property was acquired during the conduct or within a reasonable time thereafter; and
(3) There was no other likely source for the property.

tracing proceeds to a specific transaction is unnecessary

(l) State does not have to trace proceeds to any particular transaction.

constructive trustees

(m) A person who acquires property subject to forfeiture is a constructive trustee for the state. Commingled property is forfeited unless owner or interest holder proves:

(1) Commingled property does not contain property subject to forfeiture; or
(2) Interest in commingled property is exempt.

title of forfeited property vests in state at time of conduct

(n) Title to forfeited property and subsequent proceeds vests in state at time of conduct giving rise to forfeiture. Property or proceeds transferred to third parties is forfeited unless the transferee's interest is exempt.

(o) Acquittal or dismissal of a criminal proceeding does not preclude civil proceedings.

stay of civil discovery

(p) Court may stay discovery of the civil proceedings on motion by the state and for good cause shown. Stay is unavailable pending an appeal.

(q) Proceedings governed by Rules of Civil Procedure, unless otherwise provided.

(r) Any party may move to consolidate actions relating to the same property. A motion by the state shall be granted.

Section 12. *In Rem* Proceedings (See pp. 74–76).

(a) Additional requirements for *in rem* actions.

(b) *In rem* actions may be brought in lieu of or in addition to *in personam* actions.

only interests in compliance with recording statutes or perfected against good faith purchasers for value may be asserted

(c) Only an owner or interest holder who has timely filed a proper claim may file an answer to an *in rem* action. For purposes of Section 12, the owner or interest holder is referred to as a claimant.

(d) Answer signed under penalty of perjury and contains:

(1) Caption of proceedings and identifying number;
(2) Address where claimant will accept mail;
(3) Nature and extent of claimant's interest;
(4) Date, identity of transferor, and circumstances of acquisition of property interest;
(5) Specific provision of Act which is basis of assertion of exemption;
(6) All essential facts supporting each assertion; and
(7) Specific relief.

cost bond accompanies answer

(e) Answer filed within 20 days after service of *in rem* complaint and accompanied by bond.

(1) Bond amount equals $2500 or 10% of estimated value of property alleged in complaint, whichever is greater.
(2) Maximum bond is $250,000.
(3) In lieu of bond, claimant may move to proceed in forma pauperis.
(4) Funds placed in interest bearing account pending final disposition.

(f) State and claimant who has timely filed answer may serve discovery requests.

(1) Requests may be filed at time of pleadings or any other time not less than 30 days prior to the hearing.
(2) Responses due 20 days after service.

Depositions may be taken after 15 days of filing and service of complaint. Any party may move for summary judgment after answer or responsive pleading served and not less than 30 days prior to the hearing.

state has initial burden of proving probable cause; claimant proves interest is valid and exempt by a preponderance of the evidence

(g) Hearing held within 60 days after service of the complaint unless continued for good cause.

(1) No jury trial.
(2) State has initial burden of proving probable cause that the property is subject to forfeiture.
(3) Claimant has burden of showing by a preponderance of the evidence that the interest is valid and exempt.

(h) Court orders property interest released to a successful claimant. All other property is forfeited.

Section 13. *In personam* proceedings (See pp. 79–80).

(a) (1) Additional requirements for *in personam* actions.
(2) Court may enter orders to preserve the property subject to forfeiture pursuant to Section 11.
(3) *In personam* actions may be brought in lieu of or in addition to in rem actions.

temporary restraining orders to preserve property

(b) Court may issue a temporary restraining order (TRO) without notice and a hearing if the state establishes:

(1) There is probable cause to believe the property will be subject to forfeiture; and
(2) Notice would jeopardize the availability of the property.

(c) Notice of the TRO and opportunity for a hearing provided all interested parties.

(1) Hearing held at earliest time available under applicable civil rules.
(2) Hearing limited to three issues:
(A) Whether there is a probability state will prevail on issue of forfeiture;
(B) Whether failure to issue the order will result in the property being made unavailable for forfeiture, e.g. concealed, encumbered, destroyed, removed from court jurisdiction; and
(C) Whether the need to preserve the availability of property outweighs hardship on any owner or interest

state bears burden to prove forfeitability by

holder against whom the order is entered.

a preponderance of the evidence in *in personam* actions

(d) Upon entry of a forfeiture judgment, the state seizes all property ordered forfeited which was not previously seized. Court enters appropriate orders to preserve property.

(e) State gives notice of pending forfeiture to owners and interest holders who have not previously been given notice.

subsequent *in rem* action to deal with potential interests of rest of world

(f) Owner or interest holder may file a claim within 30 days after initial notice of pending forfeiture or notice after an *in personam* action, whichever is earlier.

(1) Court holds *in rem* hearing.
(2) No jury trial.

(g) If claimant established exemption, court may amend forfeiture order.

(h) No one may intervene in a criminal action or *in personam* civil action except as provided in (c) of Section 11.

Section 14. Substituted assets and supplemental remedies (See p. 82).

forfeiture of substitute assets

(a) Court shall order forfeiture of a claimant's or *in personam* defendant's other property up to the value of the forfeitable property if the forfeitable property;

(1) Cannot be located;
(2) Has been transferred or conveyed to, sold to, or deposited with a third party;
(3) Is beyond the court's jurisdiction;
(4) Has been substantially diminished in value while not in the custody of the court or the state;
(5) Has been commingled with other property and cannot be divided without difficulty; or
(6) Is subject to the exempt interest of another person.

civil action for rendering property unavailable

(b) State can bring an action against any person with notice or actual knowledge of a lien, notice of pending forfeiture or forfeiture action who renders the property unavailable for forfeiture. Judgment amount equals:

(1) Value of lien not to exceed fair market value of the property; or
(2) If property is alleged to be subject to forfeiture, the fair market value of the property; and
(3) Reasonable investigative expenses and attorney's fees.

Section 15. Judicial disposition of property (See pp. 84–85).

in uncontested forfeitures,

(a) If no proper claims or answers are timely filed, court shall order property forfeited if:

state must prove probable cause

(1) state's application establishes the court's jurisdiction;
(2) proper notice has been given; and
(3) there is probable cause for forfeiture.

(b) After final disposition of claims, court orders that the state has clear title to the forfeited property interest. Title and proceeds vest on commission of conduct giving rise to forfeiture.

allows regulated interest holder to dispose of personal property

(c) If the state has recognized the exempt interest of a regulated interest holder, the court, on the state's application, may release forfeited personal property if:

(1) The interest was acquired in the regular course of businesses as a regulated interest holder;
(2) The amount of encumbrance is readily determinable and the state has reasonably proved the amount; and
(3) The encumbrance is the only exempt interest and the owner's rights have been transferred to the state.

The regulated interest holder sells the property at a commercially reasonable public sale within 10 days, the interest holder tenders to the state the proceeds less reasonable expenses of sale or disposal and the amount of the encumbrance.

allows state to pass good title

(d) After a forfeiture order the state may transfer good and sufficient title to any subsequent purchaser or transferee. The court shall also release a property interest to a successful claimant free of encumbrances and discharge the person's cost bond.

protects state from judgment if acted with reasonable cause

(e) If the state acted with reasonable cause or a reasonable good faith belief an action was proper, the court shall so find. The court shall order that:

(1) A claimant is not entitled to costs or damages; and
(2) The state is not liable because of the seizure, suit, or prosecution.

(f) A claimant who fails to prove that a substantial portion of his interest is exempt shall pay:

(1) Reasonable expenses of a claimant who proves his entire interest is exempt; and
(2) expenses of the state, including reasonable attorney's fees,

Section 16. Allocation of forfeited property, creation of special funds (See pp. 87–88).

(a) When property is forfeited, state may:

(1) Retain it for official use or transfer custody or ownership to a local, state or federal agency. Decision non-reviewable.
(2) Destroy contraband or use it for investigative purposes not less than 20 days after seizure.

(3) Authorize a public or otherwise commercially reasonable sale with proceeds to be deposited in Special Asset Forfeiture Fund.

creates Special Asset Forfeiture Fund

(b) Special Asset Forfeiture Fund is established. The prosecutor shall ensure equitable distribution of forfeited property and fund monies to reflect enforcement or prosecutorial agency's contribution to seizure or forfeiture.

(1) Appropriate office shall administer fund expenditures.

after payment of exempt interests and costs, proceeds are distributed to law enforcement and prosecutorial agencies

(2) Moneys appropriated on a continuing basis and not subject to fiscal and appropriations restraints.

(3) Moneys may not supplant other funds.

(4) Fund subject to public audit.

(5) Money distributed as follows:

(A) Exempt security interest or lien;

(B) Expenses of forfeiture and disposition; and

(C) Balance distributed equitably to law enforcement and prosecutorial agencies.

(c) State may forward controlled substances to Drug Enforcement Agency.

Section 17. Powers of enforcement personnel (See pp. 90–91).

provides prosecutor with fact–finding powers to investigate drug industry comparable to powers of state regulatory agencies

(a) Prosecutor may conduct an investigation of conduct giving rise to forfeiture and is authorized:

(1) To subpoena witnesses;

(2) To compel witnesses' attendance;

(3) To examine witnesses under oath. Witness may be accompanied and represented by counsel; and

(4) To require production of documentary evidence for inspection, reproducing or copying.

Except as provided by this section, prosecutor is subject to same limitations and judicial oversight provided by this Act and state rules of civil procedure.

prosecutor may subpoena and examine witness to investigate conduct giving rise to forfeiture

(b) Prosecutor conducts witness examination before officer authorized to administer oaths.

(1) Testimony taken stenographically or by sound recording device and transcribed.

(2) Prosecutor shall exclude from examination all persons except witness, his counsel, law enforcement officials, officer hearing testimony, and stenographer.

(3) Prior to oral examination, witness advised of his Fifth Amendment privilege against self–incrimination.

(4) Examination conducted consistent with rules governing depositions.

(c) Except as otherwise provided, only a law enforcement official or an agent of the official may review the material or testimony prior to a civil or criminal proceeding without the consent of the witness.

(d) No person shall destroy, conceal or alter material that is the subject of a subpoena with the intent of obstructing compliance with the subpoena.

(e) Acts or omission of prosecutor to enforce Act is prosecutorial and shall not subject the prosecutor or principals to civil liability.

Section 18. Immunity Orders (See p. 93).

(a) If a person is or may be called to produce evidence at a deposition, hearing, trial, or investigation, the court may order the person to produce evidence despite assertion of Fifth Amendment privilege:

(1) Prosecutor shall certify the request for an order in writing.
(2) Court may issue order ex parte or after a hearing.

(b) Prosecutor may request ex parte order if:

(1) production of the evidence is necessary to the public interest; and
(2) person refused or is likely to refuse to produce evidence because of a Fifth Amendment privilege.

(c) A person who refuses to produce evidence based on the privilege against self-incrimination must comply with an order under this section. The court may issue a civil or criminal contempt order to enforce an order under this section.

provides use immunity to individual who may become a defendant in a criminal trial

(d) Evidence produced and the information derived from it may not be used against the person in a subsequent criminal case, except in a prosecution for perjury or failure to comply with the order.

Section 19. Statute of Limitations (See p. 95).

7 year statute of limitations

Seven years after last conduct giving rise to forfeiture or cause of action became known or should have become known. Statute tolled:

(1) when property or defendant is out of state or in confinement; or
(2) during criminal proceedings related to same conduct.

Section 20. Summary forfeiture of controlled substances (See p. 97).

Controlled substances which are contraband or whose owners are unknown are summarily forfeited.

Section 21. Bar to collateral action (See p. 99).

No person may maintain an action concerning the validity of an alleged interest except as provided in this Act.

Section 22. Statutory construction (See p. 101).

act liberally construed to effectuate remedial purposes

Act shall be liberally construed to effectuate its remedial purposes. Civil remedies are supplemental and not mutually exclusive.

Section 23. Uniformity of Application (See p. 103).

(a) Act shall be applied and construed to promote uniformity.
(b) Attorney general may enter into a reciprocal agreement with another attorney general or chief prosecuting attorney to effectuate purposes of the Act.

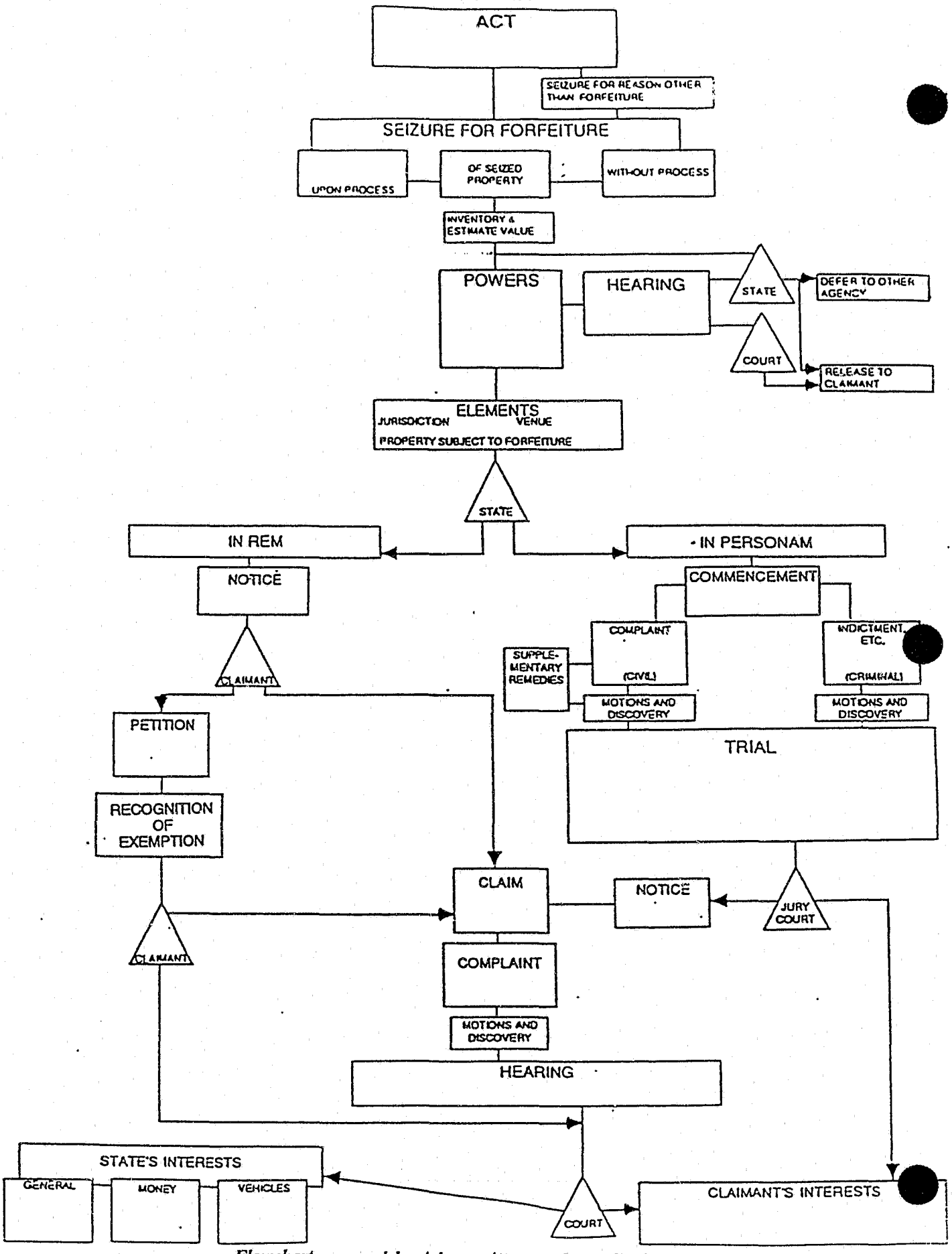
Section 24. Saving provision (See p. 105).

Provisions are severable so the invalidity of one provision does not affect other provisions.

Section 25. Effective date (See p. 107).

Section 26. Short Title. (See p. 109).

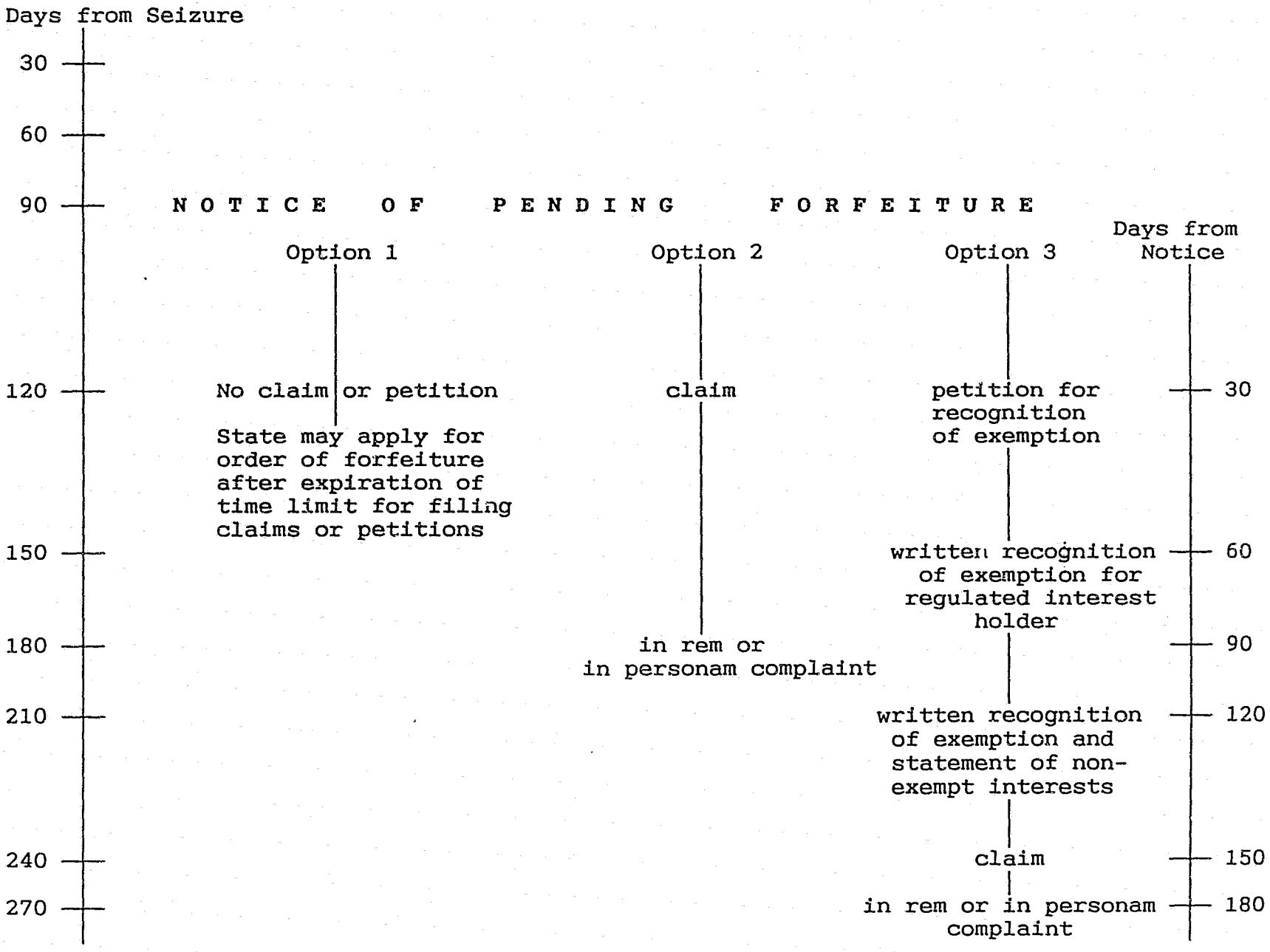
Model Asset Seizure and Forfeiture Act (MASFA) (1991) Flowchart



Flowchart prepared by Arizona Attorney General's Office

Model Asset Seizure and Forfeiture Act (1991)

TIMELINE



	Uniform Controlled Substances Act (UCSA) (1970)*	Federal Law	Model Asset Seizure and Forfeiture Act (MASFA) (1991)
Jurisdiction:	only permits seizure and forfeiture of property physically located in jurisdiction	may seize and forfeit property located anywhere in the U.S	Permits use of civil "long arm" statutes, thus when a court has jurisdiction over a person the court also has jurisdiction of the person's interest in property, wherever located
Venue:	does not permit single hearing for property located in different jurisdictions	provides for single hearing for property located in U.S.	provides for single action when court has jurisdiction
Property subject to forfeiture:	does not permit forfeiture of any proceeds of drug trafficking. Only permits forfeiture of property facilitating sale or receipt of drugs that is a vehicle used for transportation or a container	all property derived from or used to facilitate drug trafficking is forfeitable	same as federal law plus weapons possessed during drug trafficking are forfeitable
Forfeiture of attorney fees:	no exemption because no proceeds are forfeitable	no special exemption: lawyers, like all others, must show money received without knowledge of their being drug proceeds	same as federal law
Return of seized property to pay for an attorney:	no provision	no provision	Defendant entitled to court ruling that there is probable cause that seized assets needed to retain counsel are drug proceeds
Methods of seizure:	all property must be physically taken from owner	– property may be constructively seized and left in the owners' possession – owners may post a bond for their property	same as federal law

*** The UCSA (1990) only contains criminal and administrative provisions.**

Requirement of receipt, inventory and estimate of value for seized property:	no provision	all required	all required
Interests exempt from forfeiture:	owners who establish they did not know or consent to conduct	owner's who establish they did not know, consent or were willfully blind to the conduct	owners who establish they did not know or have reason to know of the conduct or acted reasonably to prevent the conduct. Property is forfeitable even without knowledge if: – the owner gave the drug offender the property and the power to sell it – the property is jointly owned by the offender and the owner
Property management during forfeiture action:	none–provisions exist only after court orders forfeiture	US marshals have broad management authority pre and post seizure to to maintain the value of the property	– cash may be placed in interest bearing accounts – property may be placed with a custodian including the owner – business may continue to be operated to maintain value
Burden of proof:	not defined but state must show property forfeitable and the owner show exemption	state must show probable cause that property is forfeitable, owner then must show by a preponderance that his interest is exempt	same as federal when action is *in rem* i.e., against property, when action is against defendant's interest in property, burden is on state to prove forfeiture by a preponderance of the evidence
Provisions identifying drug proceeds for forfeiture:	drug proceeds not subject to forfeiture	forfeiture of property acquired during or shortly after, period of drug dealing when there are no other likely sources of income	– when state makes showing by standard of proof applicable to proceeding, same as federal law – court may presume that money is drug proceeds when found in close proximity to drugs, paraphernalia, etc.
Civil immunity for persons assisting police in forfeiture cases delivering property, etc:	no provision	no provision	protects persons complying with court orders and requests by police
Time limits to begin action after seizure:	requires only that action be be initiated "promptly"	requires only that action be initiated "promptly" courts have upheld 2 year delays	sets time limits on case initiation, response and hearings; gives owner right to require quick responses from state

Liens to put business and prospective buyers on notice of pending forfeiture:	no provision	some provisions	liens, their contents and effect are provided
Protections for business with liens, mortgages or other exempt interest in seized property:	forfeited property "subject to" valid security interest	proceeds from sale of forfeited property pays off lien, etc., first	– proceeds from sale of forfeited property pays off lien, etc., first – lien holder may ask court for quick sale with equity going to court for forfeiture determination – provisions for state to agree to exempt interest to eliminate need for interest holder to participate in further court proceedings
Courts authority to stay forfeiture action during criminal trial:	no provision	only the government can move for stay	same as federal law
Whether defendant can transfer drug assets prior to seizure:	no provision	defendant loses ownership of property to the government at the time of conduct and has no right to transfer	same as federal law
Procedures for forfeiture process:	none	procedures located in various statutes, administrative rules and court rulings	detailed procedures for seizure, hearings, forfeiture and disposition of property
Authority with power to forfeit when no one claims property:	no provision	federal agencies (DEA, FBI, IRS), may forfeit without court order	no property can be forfeited without court finding that state proved forfeitability
Posting of bond by persons claiming interest in property to cover other claimants or state's costs in disproving claim:	no provision	person posts bond to file claim with federal agency	no bond to file claim – but those who can afford bond must post after state files court action

Provision to counter drug offender using borrowed or leased property in drug transaction or moving or destroying drug assets:	none	permits substituting non-drug assets of defendant when government shows defendant moved, concealed, or destroyed asset	permits substituting non-drug assets of a defendant when drug assets are destroyed, moved or returned to other innocent interest holders as when drug asset was borrowed, mortgaged etc.
Protection for purchaser of forfeited property:	none	none	purchaser receives valid title to be recognized by courts, agencies and governments
Return of forfeiture proceeds back to law enforcement:	no provision	proceeds seized by federal agencies go to federal asset forfeiture fund; proceeds seized by state agencies divided based on their contribution to the investigation and prosecution; proceeds must be used for law enforcement purposes	proceeds divided among participating agencies based on their contribution to the investigation and prosecution; proceeds must used for drug enforcement
Provisions for funding education and treatment:	none	none	assessment against all drug offenders used for education and treatment
Immunity for police when court finds reasonable cause for seizure:	none	yes	yes, no protection when court finds no reasonable cause

TABLE OF CONTENTS
FOR THE

MODEL ASSET SEIZURE AND FORFEITURE ACT (MASFA) (1991)

MODEL ASSET SEIZURE AND FORFEITURE ACT (MASFA) (1991) AND ANALYSIS

§ 1. Definitions.

As used in this [Act]:

(1) "Attorney for the State" means any [appropriate reference, e.g. Attorney General, District Attorney, State's Attorney, County Attorney] authorized to investigate, commence and prosecute an action under this [Act].

(2) "Conveyance" includes any vehicle, trailer, vessel, aircraft or other means of transportation.

(3) "Interest holder" means a secured party within the meaning of [reference to state equivalent of Section 9--105 of the Uniform Commercial Code], a mortgagee, lien creditor, or the beneficiary of a security interest or encumbrance pertaining to an interest in property, whose interest would be perfected against a good faith purchaser for value. A person who holds property the benefit of or as an agent or nominee for another person, or who is not in substantial compliance with any statute requiring an interest in property to be recorded or reflected in public records in order to perfect the interest against a good faith purchaser for value, is not an interest holder.

(4) "Omission" means the failure to perform an act the performance of which is required by law.

(5) "Owner" means a person, other than an interest holder, who has an interest in property. A person who holds property for the benefit of or as an agent or nominee for another person, or who is not in substantial compliance with any statute requiring an interest in property to be recorded or reflected in public records in order to perfect the interest against a good faith purchaser for value, is not an owner.

(6) "Proceeds" means property acquired directly or indirectly from, produced through, realized through, or caused by an act or omission and includes any property of any kind without reduction for expenses incurred for acquisition, maintenance, production or any other purpose.

(7) "Property" means anything of value, and includes any interest in property, including any benefit, privilege, claim or right with respect to anything of value, whether real or personal, tangible or intangible.

(8) "Regulated interest holder" means an interest holder that is a business authorized to do business in this state and is under the jurisdiction of the [reference to appropriate state and federal regulatory agencies relating to banking, securities, insurance and real estate].

(9) "Seizing Agency" means any department or agency of this state or its political subdivisions which regularly employs law enforcement officers, and which employs the law enforcement officer who seizes property for forfeiture, or such other agency as the agency or department may designate by its chief executive officer or their designee.

(10) "Seizure for forfeiture" means seizure of property by a law enforcement officer, including a constructive seizure, accompanied by an assertion by the seizing agency or by an attorney for the state that the property is seized for forfeiture, in accordance with Section 6.

ANALYSIS

"Attorney for the state" invites states to consider which of the various governmental attorneys should be empowered to bring forfeiture actions, such as attorneys general, district/county/state's attorneys, city attorneys and legal representatives of law enforcement agencies.

"Conveyance" simply draws attention to the fact that this act deals with this word in reference to vehicles rather than in reference to a commercial transaction.

"Interest holder" defines a special set of commercial interest holders, whose interest is perfected or would prevail over a good faith purchaser for value. The definition is designed to mirror the same protections in the context of forfeiture as exist in the commercial world.

"Omission" is defined in its penal code sense to prevent an inference that lesser omissions would qualify as conduct giving rise to forfeiture. Omissions to perform an act required only by a sense of moral or ethical propriety explicitly do not constitute conduct giving rise to forfeiture.

"Proceeds" follows federal precedent that does not allow deduction for expenses, making "proceeds" the gross proceeds. 21 U.S.C. § 881 (a) (6). Deductions are designed to promote and encourage business activity. Through the use of deductions the business has more available capital because less income is taxable. Allowing offenders to take deductions for expenses incurred during criminal activity is contrary to the purpose of destroying criminal industries rather than taxing them.

"Property" is deliberately all-inclusive, sweeping in real and personal property, tangible and intangible.

"Seizing agency" invites each state to consider which categories of law enforcement agencies or personnel will be empowered to seize property for forfeiture.

"Seizing for forfeiture" is defined to distinguish seizures for forfeiture from seizures for other purposes, such as safekeeping or evidence, which do not implicate the property rights of the owner. The definition operates with section 6 and requires that a seizure for forfeiture be accompanied by an assertion that the property is subject to forfeiture. If a seizure is made but it is not a seizure for forfeiture, the owner remains free to sell the property.

§ 2. JURISDICTION AND VENUE.

(a) The [reference to court] has jurisdiction under this [Act] over:

(1) all interests in property if the property for which forfeiture is sought is within this state at the time the action is filed; and

(2) the interest of an owner or interest holder in the property if the owner or interest holder is subject to personal jurisdiction in this state.

(b) In addition to the venue provided for under [the appropriate state law] or any other provision of law, a proceeding for forfeiture under this [Act] may be maintained in the [judicial district] in which any part of the property is found or in the [judicial district] in which a civil or criminal action could be maintained against an owner or interest holder for the conduct alleged to give rise to the forfeiture. A claimant or defendant may obtain a change of venue if there exists so great a prejudice against the party that they cannot obtain a fair and impartial trial.

ANALYSIS

(a) Jurisdiction

This subsection is intended to take full advantage of either in rem jurisdiction, as in 28 U.S.C. § 1395, (venue based on the presence of the thing), or in personam jurisdiction, as in 21 U.S.C. § 881 (j) (venue based on criminal case against owner). It is based on minimum contacts with the forum state. It would allow a county prosecutor to consolidate actions against property seized in several counties, states or even countries. In personam jurisdiction underlies the in personam forfeiture procedures in sections 13 and 14. Therefore, proceeds of drug dealing in State A may be forfeited in State B, into which they have been brought, and an in personam defendant may be ordered to surrender title to a load-vehicle van titled in State A to a court in State B, into which his drug enterprise spread, but in which state the van itself had not been used.

(b) Venue

This permissive venue provision allows expeditious adjudication of forfeitures even though items of property or defendants are scattered over several counties/districts within a state. It reflects the same concerns as 18 U.S.C. § 88[illegible] (j). For example, a county prosecutor of a populous or centrally located county, or an attorney general, could litigate forfeiture cases involving property of drug enterprises ranging around the state. Practical considerations of resources, investigative support, expertise and timing of case development will often have major impact on venue selection. Flexibility will tend to encourage efficiently consolidated cases. A consolidated case is less expensive for claimants than a set or series of fragmented cases spread over several counties.

§ 3. CONDUCT GIVING RISE TO FORFEITURE.

Any of the following conduct gives rise to forfeiture:

(a) An act or omission punishable [as a felony] [by confinement for more than one year] under [specified portions of the criminal code, e.g. drugs, organized crime] whether or not there is a prosecution or conviction related to the act or omission.

(b) An act or omission occurring outside this state, which would be punishable [as a felony] [by confinement for more than one year] in the place of occurrence and would be described in subsection (a) of this section if the act or omission occurred in this state, whether or not it is prosecuted in any state.

(c) An act or omission committed in furtherance of any act or omission described in subsection (a) of this section and is punishable [as a felony] [by confinement for more than one year] including any inchoate or preparatory offense, whether or not there is a prosecution or conviction related to the act or omission.

HYPOTHETICAL

A cocaine dealer distributes cocaine in State A. The cocaine dealer also has distribution outlets in State B. In both states distribution of cocaine is a felony punishable by confinement for more than one year. In addition to actual sales of cocaine, the dealer also engages in attempted sales of cocaine which are also felonies. To insure his dominance over his distributors and over competitors in the cocaine market, the dealer uses violence to collect debts and to discourage competition. These acts of violence include assaults, murders and extortionate threats of violence, all of which are felonies.

ANALYSIS

Conduct giving rise to forfeiture is the foundation upon which all forfeiture causes of action rest. Forfeiture occurs only if conduct giving rise to forfeiture has taken place. When conduct giving rise to forfeiture does take place, conduct may give rise to forfeiture even if the conduct occurred outside of the forum state, (assuming proper jurisdiction) as long as it would be subject to prosecution where it occurred and meets the required degree of seriousness (felony/punishable by more than a year in custody). Thus, in the hypothetical, State A could bring a civil forfeiture action based on the drug dealer's conduct in both states. No criminal prosecution is necessary for a forfeiture to occur; however, minimum contacts are required with the forfeiting state for the forfeiture to be sustained. The civil effects of conduct giving rise to forfeiture are distinct from and not dependent upon criminal prosecution or conviction. LaVengeance, 3 U.S. 297 (1796), United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984). Civil forfeiture reaches the tools and proceeds of the trade; criminal prosecution reaches the tradesman.

An inchoate or preparatory offense which is punishable by more than a year in prison gives rise to forfeiture if it is done in furtherance of a violation that has been included in the targeted portions of the criminal code. The draft leaves this selection to the individual states. The selection process will be similar to the process of selecting offenses that trigger state racketeering remedies, so if the state is among the 29 states that have such statutes, that list would be a useful guide. If the state does have a racketeering/profiteering offense, that offense should also be listed, of course, or, alternatively, this entire Act could be engrafted into the civil remedies portion of the state racketeering statutes.

An attempt to sell narcotics, for example, would give rise to forfeiture. If the dealer conspires with others, the conspiracy to sell narcotics would also be conduct giving rise to forfeiture.

Subsection (3) also reaches felony acts that are done in furtherance of a targeted offense even though the act is not a targeted violation of itself. The murders and assaults done as part of the above hypothetical drug conspiracy would be conduct giving rise to forfeiture. If the dealer bribed his distributors in order to buy their silence before judicial proceedings, the bribery would also be conduct giving rise to forfeiture. A formulation that would only reach conduct giving rise that constitutes targeted offenses would ignore the supporting offenses that further the targeted criminal industries. The success of the drug trafficker, for example, depends not only on his ability to sell drugs, but also his ability to launder money, eliminate competition, obstruct investigations and subvert the court process, among other ancillary objectives.

§ 4. PROPERTY SUBJECT TO FORFEITURE.

The following property is subject to seizure and forfeiture:

(a) All controlled substances, raw materials, controlled substance analogs, counterfeit substances, or imitation controlled substances that have been manufactured, distributed, dispensed, possessed, or acquired in violation of the laws of this state.

(b) All property, including the whole of any lot or tract of land and any appurtenances or improvements to real property that is either:

(1) Furnished or intended to be furnished by any person in an exchange that constitutes conduct giving rise to forfeiture.

(2) Used or intended to be used in any manner or part to facilitate conduct giving rise to forfeiture, provided that a conveyance subject to forfeiture solely in connection with conduct in violation of [reference to state laws relating to mere possession of controlled substances] may be forfeited only pursuant to section 13.

(c) All proceeds of any conduct giving rise to forfeiture.

(d) All weapons possessed, used, or available for use in any manner to facilitate conduct giving rise to forfeiture.

(e) Any interest or security in, claim against, or property or contractual right of any kind affording a source of control over any enterprise that a person has established, operated, controlled, conducted, or participated in the conduct of through conduct giving rise to forfeiture.

ANALYSIS

This section of the proposed act creates five separate causes of action for forfeiture, one or more of which the state must allege and show as to each item of property to be forfeited. Each of the five categories of circumstances subject property to forfeiture.

In subsection (a) controlled substance analogs and counterfeit drugs manufactured, sold or possessed in violation of state drug laws are explicitly added to the forfeiture of drugs that are themselves forfeited as contraband or because of their connection to violations of the Act.

The introductory language of subsection (b), "all property" and "including the whole of" real property, incorporates the federal concept of the whole of any lot or tract of land. 21 U.S.C. § 881 (a) (7). This precludes the argument that only the trunk of a car is forfeitable because that was the only portion of the property used to transport contraband. In real property forfeitures the entire tract of land in forfeitable even though the entire property was not dedicated to the illicit use. United States v. Reynolds, 856 F. 2d 675 (4th Cir. 1988).

Assume a drug dealer uses only 40 acres out of a total of 160 acres of farm land to grow marijuana. This marijuana growing plot is located in the center of the ranch. The statute provides for the forfeiture of the entire 160 acres. This provision avoids the absurd result that only the 40 acres is forfeitable thereby leaving the owner or interest holder a piece of property consisting of 120 acres surrounding a 40-acres hole in the middle.

This policy is adopted in 21 U.S.C. § 881 (a) (7), the model for section 4, which provides for the forfeiture of the whole of any lot or tract of land used or intended to be used in any manner or part to facilitate a drug offense. The same policy is contained in 21 U.S.C. § 853 (a) (2) which provides for forfeiture of property of those convicted of a continuing criminal enterprise. Federal courts are unanimous that if property is subject to forfeiture, then the entire tract of land is subject to forfeiture. United States v. The Premises and Real Property at 4492 South Livonia Road, 889 F.2d 1258 (2nd Cir. 1989); United States v. A Parcel of Land with a Building (etc.) at 40 Moon Hill Road, 884 F. 2d 41 (1st. Cir. 1989); United States v. Tax Lot 1500, 861 F. 2d 232 (9th Cir. 1988); United States v. Santoro, 866 F. 2d 1538 (4th Cir. 1989).

This result reflects practical considerations as well as policy considerations. A partitioned lot may not be marketable, and partitioning will often destroy the marketability of both parcels. For example, ingress to the contained lot would be necessary, but would damage the surrounding land's value. It may not be possible as a practical matter. Utilities would also be required, with similar problems. Partitioning may, for example, violate subdivision statutes. In a residential setting, subdivision deed restrictions would generally be implicated, and utility access and hook-ups would often be impossible, illegal or impractical. Subdivisions to create one "hole" is difficult enough, but the method of creating such islands could easily result in many islands within a single parcel, each with the same set of difficulties. Finally, who would want to buy a parcel of land, large or small, surrounded by the land of a drug dealer with every reason to be hostile and bitter towards their new neighbor?

Subsection (b) (2) is the familiar "used or intended to be used" theory found in 21 U.S.C. § 881 (a) (6) and the existing drug-related forfeiture statutes of most states, except that when the state seeks the forfeiture of a conveyance only for a drug possession offense, the state must proceed in personam. The effect of this limitation is to remove the most numerous type of case, the seizure of a vehicle for simple drug possession, from eligibility for the in rem procedure.

The proceeds of targeted violations are forfeited under subsection (c), as in federal law, 21 U.S.C. § 881 (a) (6), 21 U.S.C. § 853 (a) (1) (CCE), 18 U.S.C. § 1963 (a) (1) (RICO). This forfeiture effectuates the policy of money laundering provisions that the proceeds of crime are contraband, a concept that dates to Biblical times. When Judas repented his betrayal of Jesus and returned the thirty pieces of silver that he had been given, the chief priests recognized it as "the price of blood" and not lawful tender. Matthew 27:5-8.

If a dealer makes $100,000 and buys a house, the house is forfeitable as proceeds. United States v. Real Estate at 116 Villa Rella Rd., 675 F. Supp. 645 (S.D. Fla. 1987). If a dealer buys stock which appreciates, the appreciation is also proceeds. Restatement, Restitution, § 205.

Weapons are subject to forfeiture under subsection (d) in the additional circumstances of their being "available for use" to facilitate conduct giving rise to forfeiture, even though there is no actual use or intent to use. The availability of a weapon to facilitate targeted offenses is sufficient to overcome its offender-owner's possessory right in it.

The language of subsection (e) is modified to improve the awkward phrasing of 18 U.S.C. § 1963 (a) (2) (RICO). It reaches enterprise assets of corrupt enterprises, in addition to those actually used or intended for use to facilitate conduct giving rise to forfeiture. For example, in United States v. Cauble, 706 F. 2d 1322 (5th Cir. 1983) cert. denied 104 S. Ct. 996 (1984), a Texas rancher's entire partnership interest in a partnership was forfeited, including land and personal property that was not individually used to import drugs in his massive drug smuggling activity. He had used the enterprise as a whole in his drug smuggling conduct.

§ 5. EXEMPTIONS.

(a) All property, including all interests in property, described in section 4 is subject to forfeiture, except that property that is exempt from forfeiture:

(1) if the owner or interest holder acquired the property before or during the conduct giving rise to its forfeiture, and he:

(i) did not know and could not reasonably have known of the act or omission or that it was likely to occur; or

(ii) acted reasonably to prevent the conduct giving rise to forfeiture; or

(2) if the owner or interest holder acquired the property after the conduct giving rise to its forfeiture, including acquisition of proceeds of conduct giving rise to forfeiture, and he acquired the property in good faith, for value and was not knowingly taking part in an illegal transaction.

(b) Notwithstanding subsection (a) of this section, property is not exempt from forfeiture, even though the owner or interest holder lacked knowledge or reason to know that the conduct giving rise to its forfeiture had occurred or was likely to occur, if:

(1) the owner or interest holder holds the property jointly or in common or [as tenants by the entirety [in community] with a person whose conduct gave rise to its forfeiture, [except for [the otherwise exempt interest of a spouse in real property] [the otherwise exempt interest of a spouse in their principal residence]];

(2) the person whose conduct gave rise to its forfeiture had the authority to convey the property of the person claiming the exemption to a good faith purchaser for value at the time of the conduct;

(3) the owner or interest holder is criminally responsible for the conduct giving rise to its forfeiture, whether or not there is a prosecution or conviction; or

(4) the owner or interest holder acquired the property with notice of its actual or

constructive seizure for forfeiture under section 6 of this [Act], or with reason to believe that it was subject to forfeiture under this [Act].

ANALYSIS

The exemptions are a comprehensive formulation of those interests whose confiscation would, in most cases, cause more commercial disruption than overall benefit to the integrity of the economy. Subsection (a) (1) deals with situations in which the claimant's state of mind with respect to the particular property is relevant. It provides essential protection for legitimate commercial interest holders. It exempts non-negligent owners, carving out the exemption that the U.S. Supreme Court declined to carve out in Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974). It also exempts a claimant who acted knowing of the risk that the property would be used unlawfully but acting reasonably to prevent the unlawful use. Thus, a person who learns that his airplane's lessee has been involved in drug smuggling may avoid forfeiture of the plane based on the lessee's subsequent drug flights by taking whatever steps are reasonable in the circumstances to prevent the illegal use, e.g. notifying authorities, acting to rescind the lease, etc. Subsection (2) exempts good faith purchasers for value. This exemption is a very significant expansions of exemptions available in the traditional forfeiture, under which all intervening interests, including those of a bona fide purchaser, are subject to forfeiture. United States v. Stowell, 133 U.S. 1 (1890).

Subsection (b) negates exemption from forfeiture under selected circumstances in which forfeiture is appropriate without consideration of the intent of the claimant with regard to the conduct giving rise to forfeiture. The claimant's property will remain subject to forfeiture if the claimant:

(1) in personal property cases is, a member of the most common class of potential title holders that could claim lack of knowledge – the spouse or family member. This neutralizes, to a limited extent, the common forfeiture avoidance device of titling vehicles in the names of uninvolved relatives. It recognizes the practical reality that family members generally have reason to know of the conduct. The decision on whether to grant special spousal protection from this rule for all real property or just to a principal residence is left open for legislative consideration;

(2) was so negligent in their entrustment that the person whose conduct gave rise to forfeiture had the power to convey the interest of the claimant;

(3) is a co-conspirator or otherwise criminally responsible for the conduct giving rise to forfeiture; and

(4) is speculating in property subject to forfeiture, or participating, knowingly or with notice, in a transaction that may have the effect of defeating the government's title but for the provision.

An example will illustrate the exemption provision's operation. X is a drug dealer who has moderately prepared himself for a government attempt at the forfeiture of his assets. He has a trans-shipment building, (called a "stash house"), that he has mortgaged, several vans used to transport drugs held in the names of family member nominees, and bank accounts holding proceeds. After seizure, he assigns his interest in the bank accounts to a friend out of state under their mutual agreement to avoid forfeiture. The mortgagee of the stash house passes each condition of exemption, and is exempt. The state will therefore take X's equity interest in the stash house subject to the mortgage. The family members' claims to the vans may succeed on (b) (1) and (b) (2), depending on the facts of

the case, but will founder on the definition of "owner," designed to address nominees. The friend to whom X assigned his bank accounts will fail the test of (b) (4).

The Model Asset Seizure and Forfeiture Act (1991) (MASFA) contains no exemption for attorneys fees. The Sixth Amendment right to counsel of choice protects a person's right to retain the best legal counsel that a person can afford with his or her legitimate assets and there is nothing the government can do to impair or limit that right.

"The forfeiture statute does not prevent a defendant who has nonforfeitable assets from retaining any attorney of his choosing." Caplin & Drysdale, Chartered v. United States, 109 S.Ct. 2652 (1989).

Any attorney who wishes to avoid forfeiture of his fee need only satisfy himself that his fee is paid from legitimate assets. In such cases, the attorney will have nothing to fear from asset forfeiture and the threat of forfeiture cannot impair the attorney/client relationship.

Only with respect to use of drug proceeds to pay attorney's fees or any other form of expense does the spectre of forfeiture arise. Forfeiture in this context does nothing to impair a person's right to counsel of choice under the Sixth Amendment -- a right which is limited to the retention of counsel with legitimate assets.

"Whatever the full extent of the Sixth Amendment's protection of one's right to retain counsel of his choosing, that protection does not go beyond 'the individual's right to spend his own money to obtain the advice and assistance of ... counsel." ... A defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those funds are the only way that defendant will be able to retain the attorney of his choice. A robbery suspect, for example, has no Sixth Amendment right to use funds he has stolen from a bank to retain an attorney to defend him if he is apprehended. The money, though in his possession, is not rightfully his; the government does not violate the Sixth Amendment if it seizes the robbery proceeds, and refuses to permit the defendant to use them to pay for his defense. '[N]o lawyer, in any case, ... has the right to accept stolen property, or ... ransom money, in payment of a fee ... The privilege to practice law is not a license to steal.'" (citations omitted). Id. at 2652-2653.

Just as a trustee who converts trust funds to his personal account has no right to use those funds to pay for his defense, a drug trafficker has no right to use the fruits of crime, which properly belong to the government to pay for his defense.

For that same reason, the seizure and forfeiture of drug proceeds does nothing to impair the presumption of innocence. Every defendant in our society is entitled to the same presumption of innocence, and this presumption does not vary with respect to whether the defendant is indigent or wealthy. Drug traffickers are not entitled to a different or "stronger" presumption of innocence than other defendants accused of crime simply because drug proceeds are available to hire more expensive defense attorneys. They are entitled to the same presumption of innocence as anyone else. It is not this presumption that is affected by seizure and forfeiture; it is the ability to mount a more expensive defense.

Forfeiture acts as a "great equalizer" in that it puts drug traffickers in the same

position as any member of legitimate society who stands accused of a crime.

"'The modern day Jean Valjean must be satisfied with appointed counsel. Yet the drug merchant claims that his possession of huge sums of money ... entitles him to something more. We reject this contention, and any notion of a constitutional right to use the proceeds of crime to finance an expensive defense.'" (citation omitted). Id. at 2655.

It is also untrue that the unrestricted forfeiture of drug proceeds will mean that all -- or even most-- drug defendants will receive appointed counsel. As noted earlier, persons accused of drug crimes who have legitimate assets or income or access to legitimate assets through loans from families, friends, or financial institutions will be entitled to retain the most expensive attorneys that they can afford with those assets. This will include the vast majority of drug defendants in state courts who stand accused of simple possession or minor distribution offenses but who also have legitimate employment or access to legitimate assets. It is only the truly "professional" drug traffickers who have rejected legitimate society and any thought of legitimate employment to devote their life to drug trafficking who will be rendered indigent by the pretrial seizure and restraint of their ill-gotten gains and thus be eligible for appointed counsel. Creating an exemption protecting all drug dealers in order to protect only the worst drug dealers makes no sense at all.

Creating a statutory exemption for drug proceeds used to pay attorney's fees will undermine the important social values served by a strong forfeiture statute. The Supreme Court has identified three such values that are reflected in the MASFA.

"First, the Government has a pecuniary interest in forfeiture that goes beyond merely separating a criminal from his ill-gotten gains; that legitimate interest extends to recovering all forfeitable assets, for such assets are deposited in a Fund that supports law enforcement efforts in a variety of important and useful ways. See 28 U.S.C. 524(c), which establishes the Department of Justice Assets Forfeiture Fund. The sums of money that can be raised for law-enforcement activities this way are substantial, and the Government's interest in using the profits of crime to fund these activities should not be discounted." Id. at 2654.

Similarly, Section 16(b) of the MASFA specifies that forfeited drug proceeds are to be used for drug enforcement activities.

"Second, the statute permits 'rightful owners' of forfeited assets to make claims for forfeited assets before they are retained by the government. See 21 U.S.C. 853(n)(6)(A). The Government's interests in winning undiminished forfeiture thus includes the objective of returning property, in full, to those wrongfully deprived or defrauded of it. Where the Government pursues this restitutionary end, the government's interest in forfeiture is virtually indistinguishable from its interest in returning to a bank the proceeds of a bank robbery; and a forfeiture-defendant's claim of right to use such assets to hire an attorney, instead of having them returned to their rightful owners, is no more persuasive than a bank robber's similar claim." Id.

Section 5 of the MASFA guarantees that all exempt interests, including all those of all innocent lienholders, are protected and will be made whole from any forfeited assets.

"Finally, as we have recognized previously, a major purpose motivating congressional adoption and continued refinement of the [federal] forfeiture provisions has

been the desire to lessen the economic power of organized crime and drug enterprises. See Russell v. United States, 464 U.S. 16, 27–28 (1983). This includes the use of such economic power to retain private counsel. As the Court of Appeals put it: 'Congress has already underscored the compelling public interest in stripping criminals such as Reckmeyer of their undeserved economic power, and part of that undeserved power may be the ability to command high-priced legal talent.' 837 F.2d, at 649." Id. at 2655.

The MASFA serves the same compelling interest of stripping drug traffickers of their undeserved economic basis.

Creating a statutory exemption for attorney's fees would disserve these important social values. First, such an exemption would leave drug traffickers as a "protected class" relative to all other criminals with respect to their abilities to pay their attorneys. Second, an exemption would provide an incentive to other criminals to enter into drug trafficking in order to afford the more expensive attorneys. Third, an exemption serving the interests of such a small segment of the criminal defense bar would tarnish the image of all lawyers by sanctioning their knowing acceptance of "blood money."

Allowing forfeiture of drug proceeds which might be used to pay attorney's fees will not diminish the quality of the defense bar. Certainly, there is nothing in the historical record to suggest that the quality of the defense bar was in any way unacceptable prior to the widespread availability of drug proceeds or that the widespread availability of such proceeds has resulted in a substantial improvement of the defense bar. Indeed, implicit in any such claim is the premise that the continued influx of such proceeds is essential to subsidize the quality of the bar. This premise is unacceptable both to the larger body of attorneys and to the vast majority of the American public.

Section 11(e) and (f) address concerns regarding recapture of fees which surfaced subsequent to the Caplin and Drysdale holding. They provide a procedure for the payment of attorney's fees from seized property in limited circumstances.

§ 6. SEIZURE OF PROPERTY.

(a) Property may be seized for forfeiture by [appropriate person/agencies] upon process issued by any [appropriate court]. The court may issue a seizure warrant on an affidavit under oath demonstrating that probable cause exists for its forfeiture or that the property has been the subject of a previous final judgment of forfeiture in the courts of any state or of the United States. The court may order that the property be seized on such terms and conditions as are reasonable in the discretion of the court. The order may be made on or in connection with a search warrant.

(b) Property may be seized for forfeiture by [appropriate persons/agencies] without process on probable cause to believe that the property is subject to forfeiture under this [Act]. The seizure of inhabited residential real property for forfeiture which is accompanied by removing or excluding its residents shall be done pursuant to an adversarial judicial determination of probable cause, except that this determination may be done ex parte when the attorney for the state has demonstrated exigent circumstances.

(c) Property may be seized constructively by:

(1) Posting notice of seizure for forfeiture or notice of pending forfeiture on the property.

(2) Giving notice pursuant to section 8.

(3) Filing or recording in the public records relating to that type of property notice of seizure for forfeiture, notice of pending forfeiture, a forfeiture lien or a lis pendens. Filings or recordings made pursuant to this subsection are not subject to a filing fee or other charge.

(d) The seizing agency, or the attorney for the state, shall make a reasonable effort to provide notice of the seizure to the person from whose possession or control the property was seized. If no person is in possession or control, the seizing agency may attach the notice to the property or to the place of its seizure or may make a reasonable effort to deliver it to the owner

of the property. The notice shall contain a general description of the property seized, the date and place of seizure, the name of the seizing agency and the address and telephone number of the seizing officer or other person or agency from whom information about the seizure may be obtained.

(e) A person who acts in good faith and in a reasonable manner to comply with an order of the court or a request of a law enforcement officer is not liable to any person on account of acts done in reasonable compliance with the order or request. No liability may attach from the fact that a person declines a law enforcement officer's request to deliver the property.

(f) A possessory lien of a person from whose possession property is seized is not affected by the seizure.

ANALYSIS

The language of Section 6 is adapted from 21 U.S.C. § 881. It has been modified to address two related concerns. First, it provides specific authorization for a seizure warrant, to augment state search warrant statutes. State search warrant statutes generally have no provisions for seizure of property that is not necessarily evidence of a crime. Second, it makes clear that is does not impose a statutory warrant requirement in addition to the requirements imposed by the Fourth Amendment.

A seizure for forfeiture may be made without a warrant, but authorization to seize without a warrant does not include authorization to search. Only where no invasion of a protected privacy interest, i.e. no search, is necessary to accomplish the seizure may the warrantless seizure for forfeiture be made. If a search is necessary, a search warrant is required in the same circumstances that a warrant is required for all searches. G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977); Texas v. Brown, 460 U.S. 730 (1983). The definition of a search here is the same as in Fourth Amendment law.

Subsection (b) contains statutory limitations on forfeiture seizures of inhabited residential real property designed to recognize the special privacy interests involved in such seizures. It assures that no removal or exclusion of residents will occur prior to an adversarial judicial hearing. A constructive seizure, done by filing notices, has no such privacy implication. Seizures of a residence may be done under an ex parte judicial order if the court is satisfied that exigent circumstances exist, e.g. a pending transfer to a bona fide purchaser or an immediate safety hazard such as an operating meth lab.

Subsection (c) encourages constructive seizure, by which the jurisdiction of the court is established without displacing the owner or disrupting the production of income. Constructive seizure is particularly useful in seizures of residences and ongoing businesses. Subsection (d) also provides assurance that the owners and interest holders will learn of the seizure, whether it is a seizure of real or personal property.

Subsections (e) and (f) protect third persons from civil liability or loss due to compliance with court orders or law enforcement officers' requests. If, for example, a bank customer claims that a business transaction was prevented by the seizure of his account, the bank's compliance with the seizure would not support an action for damages. A bank should not be subject to suit by the customer in these circumstances, nor should its possessory lien be affected, for example, when accounts and other collateral are pledged.

§ 7. PROPERTY MANAGEMENT AND PRESERVATION.

(a) Property seized for forfeiture under this [Act] is not subject to alienation, conveyance, sequestration, or attachment, nor is the property subject to a motion or order under [reference to state statute relating to return of property seized as evidence]. The seizing agency or the attorney for the state may authorize the release of the seizure for forfeiture on the property if forfeiture or retention of actual custody is unnecessary, and the attorney for the state may transfer the action to another state or federal agency or attorney for the state by discontinuing forfeiture proceedings in favor of forfeiture proceedings initiated by the other agency or attorney. The property is deemed to be in the custody of the [appropriate court] subject only to the orders and decrees of the court having jurisdiction over the forfeiture proceedings and to the acts of the seizing agency or the attorney for the state pursuant to this [Act].

(b) An owner of property seized pursuant to this [Act] may obtain release of the property by posting with the attorney for the state a surety bond or cash in an amount equal to the full fair market value of the property as determined by the attorney for the state. The state may refuse to release the property if the bond tendered is inadequate or if the property is retained as contraband or as evidence or if it is particularly altered or designed for use in conduct giving rise to forfeiture. If a surety bond or cash is posted and the property is forfeited, the court shall forfeit the surety bond or cash in lieu of the property.

(c) If property is seized under this [Act], the attorney for the state or his designee may, subject to any need to retain the property as evidence, do any of the following:

(1) Remove the property to an appropriate place designated by the [appropriate court, person or agency] or his designee;

(2) Place the property under constructive seizure;

(3) Remove the property to a storage area for safekeeping or, if the property is a negotiable instrument or money, deposit it in an interest bearing account;

(4) Provide for another agency or custodian, including an owner, secured party,

mortgagee, or lienholder, to take custody of the property and service, maintain and operate it as reasonably necessary to maintain its value, in any appropriate location within the jurisdiction of the court; or

(5) Require the [appropriate agency] to take custody of the property and remove it to an appropriate location for disposition in accordance with law.

(d) As soon as practicable after seizure for forfeiture, the seizing agency shall conduct a written inventory and estimate the value of the property seized.

(e) The court may order property which has been seized for forfeiture sold, leased, rented or operated to satisfy a specified interest of any interest holder, or to preserve the interests of any party on motion of such party. Sale may be ordered when the property is liable to perish, to waste, or to be foreclosed or significantly reduced in value, or when the expenses of maintaining the property are disproportionate to its value. The court may enter orders under this subsection after notice to persons known to have an interest in the property, and an opportunity for a hearing, on all of the following conditions:

(1) that the interest holder:

(i) has timely filed a proper claim and is a regulated interest holder; or

(ii) has an interest which the attorney for the state has stipulated is exempt from forfeiture.

(2) that if a sale is necessary, a third party designated by the court shall dispose of the property by commercially reasonable public sale and apply the proceeds to the reasonable expenses incurred in connection with the sale or disposal and then for the satisfaction of exempt interests in the order of their priority.

(3) That the balance of the proceeds, if any, be preserved in the actual or constructive custody of the court, in an interest bearing account, subject to further proceedings under this [Act].

ANALYSIS

Subsection (a) allows the attorney for the state to release the seizure for forfeiture on the property if the forfeiture or retention is unnecessary. It clarifies that a motion for release of property seized as evidence is not applicable. This follows the federal practice. United States v. United States Currency $83,310.78, 851 F. 2d 1231 (9th Cir. 1988).

It also allows transfer of the action to another attorney for the state, or the federal government, for example to consolidate in one county or to allow an office with greater resources to handle it.

Subsection (b) allows an owner of property seized under this section to obtain a release of the property by posting a surety bond or cash in an amount equal to the fair market value of the property. The state may refuse to release the property if it is contraband, evidence of a violation of law or particularly altered or designed for use in illegal activities, e.g. a boat with a secret compartment installed in the hull. If the state prevails in the forfeiture, it obtains the bond amount as a substitute res. This benefits the claimant by allowing his free use and alienation of his property, and also because it prevents deterioration of the property during litigation. It benefits the state because it eliminates the cost of storage, creates an interest bearing and therefore increasing fund rather than deteriorating or depreciating property, and eliminates the discount effect of government sale.

An example illustrates the several benefits. A vehicle is worth $20,000, fair market value, at the time it is seized for forfeiture. Its owner does not bond it out. A year later it has depreciated to $15,000 in value, and has accumulated $500 in maintenance, storage and insurance expenses. Its net proceeds are $14,500. Now, if the owner of a second identical vehicle bonds it out for $20,000 the owner may keep it and use it or sell it for $20,000. The bond is deposited and earns 10 percent interest for one year. There are no expenses. The net proceeds are $22,000. The owner suffers no loss of vehicle use or interest (normal depreciation, if he elects to use the car for one year, is what he foresaw when he bought it). The government nets an additional $7,500, over 35 percent of the original fair market value of the vehicle. The longer the litigation and the more susceptible the property is to depreciation, the greater the benefit shared by the parties.

Subsection (c) sets out the state's powers and duties with respect to seized property. The property can be removed to a place designated by the court, retained as evidence, removed to a storage area for safe keeping or deposited in an interest bearing account.

Paragraph (4) allows for a custodian, including an owner or interest holder, to take custody of the property. Authorized private persons may take custody of the property as well as government agencies. Often, the person most familiar with the property and most willing and able to manage it is the owner, an interest holder, or an agent for one of them. Custodianship agreements with private custodians may also be done on a contract basis for the state. Agreements may be made on a specific case, on a particular class of assets (e.g. vehicles) or on an across-the-board basis. Custodianship agreements greatly reduce and simplify the role of law enforcement officers in property maintenance, prevent unnecessary deprivations of property in the event that the owner prevails, and reduce judicial and administrative time and anxiety expended over property management and liability issues. Without these statutory additions, seizures of ongoing businesses and seizures of wasting assets would have to be done through cumbersome and expensive procedures to the

detriment of all concerned.

Subsection (d) requires a prompt written inventory and estimate of value, for the protection of both owners and the government from misunderstandings or false claims. The estimate here is not an appraisal and contemplates no expertise beyond that of the seizing agent. The resulting figures are subject to substantial revision, but are a necessary starting point for attorneys and the court.

Subsection (e) gives broad judicial authority to order property sold, leased, rented or operated pending forfeiture. It allows an interest holder whose ability to collect is in jeopardy to salvage all that is possible from the situation. Major criminal defendants with substantial assets often rely on illicit income to make payments on vehicles, mortgages, etc. When this income stops, due to arrest, flight or civil suit, creditors face a scramble for available assets. This provision provides a mechanism for all parties to address such situations.

Subsection (e) allows the court to sell property seized for a forfeiture but not yet the subject of a judgment to satisfy a specified interest of any interest holder. However, the interest holder must 1) have properly filed a claim, or 2) have an interest stipulated as exempt from forfeiture. The section contemplates that the interest holder, or a person designated by the court, would then dispose of the property by commercially reasonable/public sale. The proceeds would be first applied to expenses incurred in connection with the sale and then applied to satisfy exempt interests in the order of their priority. If there are any proceeds left over, after satisfying interest holders' interests, the excess proceeds, i.e. the owner's equity, would be returned to the court. This will assure timely foreclosures and prevent waste while protecting owner's equity for the owner or the state.

§ 8. COMMENCEMENT OF FORFEITURE PROCEEDINGS, PROPERTY RELEASE REQUIREMENTS.

(a) Forfeiture proceedings shall be commenced as follows:

(1) If the attorney for the state fails to initiate forfeiture proceedings by notice of pending forfeiture within ninety days against property seized for forfeiture or if the state fails to pursue forfeiture of the property upon which a proper claim has been timely filed by filing a judicial forfeiture proceeding within ninety days after notice of pending forfeiture, the property shall be released on the request of an owner or interest holder to their custody, as custodian for the court, pending further proceedings pursuant to this [Act].

(2) If, after notice of pending forfeiture, a claimant files a petition for recognition of exemption pursuant to section 9 of this [Act], the attorney for the state may delay filing its judicial forfeiture proceeding for a total of one hundred and eighty days after the notice of pending forfeiture except that if a regulated interest holder timely files a proper petition documenting the complete nature and extent of their interest, including all of its contractual terms and its current status, the attorney for the state may delay filing a judicial forfeiture proceeding only if he provides each such petitioner with a written recognition of exemption within sixty days after the effective date of the notice of pending forfeiture, recognizing the interest of such petitioner to the extent of documented outstanding principal plus interest at the contract rate until paid.

(3) Whenever notice of pending forfeiture or service of an in rem complaint or notice of a recognition of exemption and statement of nonexempt interests is required under this [Act], notice or service shall be given in accordance with one of the following:

(i) If the owner's or interest holder's name and current address are known, by either personal service by any person qualified to serve process or by any law enforcement officer or by mailing a copy of the notice by certified mail, return receipt requested, to that address.

(ii) If the owner's or interest holder's name and address are required by law to be on record with the [appropriate reference, e.g. county recorder, secretary of state, the motor vehicle division] or another state or federal agency to perfect an interest in the property, and the owner's or interest holder's current address is not known, by mailing a copy of the notice by certified mail, return receipt requested, to any address of record with any of the described agencies.

(iii) If the owner's or interest holder's address is not known and is not on record as provided in subparagraph (ii) of this paragraph, or the owner or interest holder's interest is not known, by publication in one issue of a newspaper of general circulation in the county in which the seizure occurred.

(4) Notice is effective upon personal service, publication, or the mailing of a written notice, whichever is earlier, except that notice of pending forfeiture of real property is not effective until it is recorded. Notice of pending forfeiture shall include a description of the property, the date and place of seizure, the conduct giving rise to forfeiture or the violation of law alleged, and a summary of procedures and procedural rights applicable to the forfeiture action.

(b) The attorney for the state may file, without a filing fee, a lien for the forfeiture of property upon the initiation of any civil or criminal proceeding relating to conduct giving rise to forfeiture under this [Act] or upon seizure for forfeiture. An attorney for the state may also file a forfeiture lien in this state in connection with a proceeding or seizure for forfeiture in any other state under a state or federal statute substantially similar to the relevant provisions of this [Act]. The filing constitutes notice to any person claiming an interest in the seized property or in property owned by the named person.

(1) The lien notice shall set forth the following:

(i) The name of the person and, in the discretion of the lienor, any alias, or the name of any corporation, partnership, trust, or other entity, including

nominees, that are owned entirely or in part, or controlled by the person.

(ii) The description of the seized property or the criminal or civil proceeding that has been brought relating to conduct giving rise to forfeiture under this [Act], the amount claimed by the lienor, the name of the [reference to court] where the proceeding or action has been brought, and the case number of the proceeding or action if known at the time of filing.

(2) A lien filed pursuant to this subsection applies to the described seized property or to one named person, any aliases, fictitious names, or other names, including the names of any corporation, partnership, trust, or other entity, owned entirely or in part, or controlled by the named person, and any interest in real property owned or controlled by the named person. A separate forfeiture lien shall be filed for each named person.

(3) The notice of lien creates, upon filing, a lien in favor of the lienor as it relates to the seized property or the named person or related entities. The lien secures the amount of potential liability for civil judgment, and, if applicable, the fair market value of seized property relating to all proceedings under this [Act] enforcing the lien. The notice of forfeiture lien referred to in this subsection shall be filed in accordance with the provisions of the laws of this state relating to the type of property that is subject to the lien. The validity and priority of the forfeiture lien shall be determined in accordance with applicable law pertaining to liens. The lienor may amend or release, in whole or in part, a lien filed under this subsection at any time by filing, without a filing fee, an amended lien in accordance with this subsection which identifies the lien amended. The lienor, as soon as practical after filing a lien, shall furnish to any person named in the lien a notice of the filing of the lien. Failure to furnish notice under this subsection shall not invalidate or otherwise affect the lien.

(4) Upon entry of judgment in its favor, the state may proceed to execute on the lien as provided by law.

(5) A trustee, constructive or otherwise, other than a trustee acting under a recorded subdivision trust agreement or a recorded deed of trust, who has notice that a notice of forfeiture lien, or a notice of pending forfeiture, or a civil forfeiture proceeding has been filed against the property or against any person or entity for whom the person holds title or appears as record owner, shall furnish within fifteen days, to the seizing agency or the attorney for the state all of the following information, unless all of the information is of record in the public records giving notice of liens on that type of property:

(i) the name and address of each person or entity for whom the property is held;

(ii) the description of all other property whose legal title is held for the benefit of the named person;

(iii) a copy of the applicable trust agreement or other instrument, if any, under which the trustee or other person holds legal title or appears as record owner of the property.

(6) A trustee with notice who knowingly fails to comply with the provisions of this subsection shall be guilty of violating such provision and may, upon conviction, be sentenced to imprisonment for not less than [two] nor more than [five] years, and shall be fined not less than [ten thousand dollars] per day for each day compliance was not made.

(7) A trustee with notice who fails to comply with paragraph 5 of this subsection is subject to a civil penalty of [three hundred dollars] for each day of noncompliance. The court shall enter judgment ordering payment of [three hundred dollars] for each day of noncompliance from the effective date of the notice until the required information is furnished or the state executes its judgment lien under this section.

(8) To the extent permitted by the Constitution of the United States, the duty to

comply with paragraph 5 of this subsection shall not be excused by any privilege or provision of law of this state or any other state or country which authorizes or directs that testimony or records required to be furnished pursuant to paragraph 5 of this subsection are privileged or confidential or otherwise may not be disclosed.

(9) A trustee who furnishes information pursuant to paragraph 5 of this subsection is immune from civil liability for the release of the information.

(10) An employee of the seizing agency or the attorney for the state who releases the information obtained pursuant to paragraph 5 of this subsection, except in the proper discharge of official duties, is guilty of a [reference to state classification] misdemeanor.

(11) If any information furnished pursuant to paragraph 5 of this subsection is offered in evidence, the court may seal that portion of the record or may order that the information be disclosed in a designated way.

(12) A judgment or an order of payment entered pursuant to this section becomes a judgment lien against the property alleged to be subject to forfeiture.

ANALYSIS

Section 8 specifies a time period in which the state must act to maintain a forfeiture action. Most current state statutes specify no time restrictions. These proposed time limits will require a much stricter standard than permitted under Due Process analysis. The Due Process limits were defined in United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in United States Currency, 461 U.S. 555 (1983). The Court applied a four-factor test borrowed from Barker v. Wingo, 407 U.S. 514 (1972), turning on the length of the pre-hearing delay, the reasons for the delay, the claimant's assertion of the right to a judicial hearing and the prejudice caused to the claimant's case by the delay. Paragraph (1) of subsection (a) clarifies that failure to pursue forfeiture within the statutory time limit is not jurisdictional and therefore does not result in dismissal. Failure to pursue timely forfeiture results only in the release of the property pending further proceedings. Those proceedings may be within the case, if one has been filed, or may be a new case. The proceedings may be commenced at any time within the seven-year statute of limitations set in Section 19.

Paragraph (2) of subsection (a) allows more time for the filing of a judicial action whenever a claimant seeks recognition of an exemption. This allows the parties to engage in informal discovery and arrive at a stipulation, if possible, under Section 9. The intent is to avoid unnecessary expense and judicial resources, especially in the many cases in which documentation of an exemption is inevitable but requires time for the interest holder to assemble the file.

Subparagraphs (i)-(iii) set forth the state's method of providing the notice of pending forfeiture to owners/interest holders address or interest is not known or reasonably ascertainable. Even though it appears that all possible claimants have received personal notice, it is prudent to provide notice by publication as well to avoid any doubt about whether the judgment will bind all subsequent claimants. Paragraph (4) creates a general "mail box rule" for the effective date of notice and of other service of a complaint by the notice method. This conforms to the standard rules in civil practice. This is designed to prevent different due dates for claims, stipulations, answers, motions, etc. By making a single mailing or publication the state may greatly simplify the timekeeping necessary to track multiple claims and/or stipulations.

Subsection (b) allows the attorney for the state to file a lien for forfeiture of property upon the initiation of any proceeding under this Act. The lien secures the amount of potential liability for civil judgment and, if applicable, the fair market value of property seized for forfeiture. The filing of the lien constitutes notice to any person claiming an interest in the seized property or on property owned by the named person. The availability of this lien has the effect of allowing and therefore encouraging the government to leave property, particularly real property, in the hands of its owner during litigation. Subsection (b) (5) requires a trustee with notice of a forfeiture lien or action to provide the name and address of the person for whom the property is held and a copy of the trust agreement. Knowing failure to comply is made a criminal offense.

Paragraphs (7)-(12) of subsection (b) create a civil enforcement mechanism. It is modeled loosely on Florida statutes designed to defeat the use of off-shore company ownership to thwart investigation and forfeiture, § 607.325 Florida Statutes and § 620.192 Florida Statutes as amended by Laws of 1988 Ch. 88-264. This provision is designed to pierce the straw or front owner in order to determine who is the true owner of the

property. The duty of the trustee is to disclose the true owners. This section is not intended or suggested to be universally applicable, but will be useful in states in which land ownership through such devices is sufficiently common to justify this response. States on international borders, states in which criminal proceeds are being laundered, and states with attractive real estate investment potential should consider Florida's success in using this statute. This provision strips from the drug dealer or racketeer another barrier he erects to protect and hide his investments and his operating property. Under the civil sanction, if the information is not supplied, a civil penalty accrues daily. The penalty becomes a judgment lien against the property, so eventually the property comes under the lien amount and passes to the state. Legitimate commercial interest in keeping disclosures from becoming generally public are protected to that the court may preserve them where they are recognized by state law.

§ 9. RECOGNITION OF EXEMPTION.

(a) The attorney for the state may make an opportunity to file a petition for recognition of exemption available in the following manner:

(1) If the attorney for the state makes an opportunity to file a petition for recognition of exemption available, the attorney for the state shall so indicate in the notice of pending forfeiture described in subsection (a) of section 8 of this [Act].

(2) An owner of or an interest holder in the property may elect to file a claim within thirty days after the effective date of the notice of pending forfeiture or a petition for recognition of exemption with the attorney for the state within thirty days after the effective date of the notice, but no petition may be filed after a court action has been commenced by the state. The claim or petition shall comply with the requirements for claims in section 10 of this [Act].

(b) The following shall apply if one or more owners or interest holders timely petition for recognition of exemption:

(1) The attorney for the state shall provide the seizing agency and the petitioning party with a written recognition of exemption and statement of nonexempt interests relating to any or all interests in the property in response to each petitioning party within one hundred and twenty days after the effective date of the notice of pending forfeiture.

(2) An owner of or interest holder in any property declared nonexempt may file a claim as described in section 10 of this [Act] within thirty days after the effective date of the notice of the recognition of exemption and statement of nonexempt interests.

(3) The attorney for the state may elect to proceed as provided herein for judicial forfeiture at any time.

(4) If no petitioning party files a proper claim within thirty days after the effective date of notice of the recognition of exemption and statement of nonexempt interests, the recognition of exemption and statement of nonexempt interests becomes final, and the

attorney for the state shall proceed as provided in sections 15 and 16 of this [Act].

(5) If a judicial forfeiture proceeding follows a notice of pending forfeiture making an opportunity to file a petition for recognition of exemption available:

(i) No duplicate or repetitive notice is required. If a proper claim has been timely filed pursuant to paragraph (2) of this subsection, the claim shall be determined in a judicial forfeiture proceeding after the commencement of such a proceeding under sections 12, 13 and 14 of this [Act].

(ii) The proposed recognition of exemption and statement of nonexempt interests responsive to all petitioning parties who subsequently filed claims are void and will be regarded as rejected offers to compromise.

(c) If no proper petition for recognition of exemption or proper claim is timely filed, the attorney for the state shall proceed as provided in sections 15 and 16 of this [Act].

ANALYSIS

Section 9 allows the attorney for the state to make an opportunity for recognition of exemption from forfeiture available to owners of and interest holders in property seized for forfeiture. An owner or interest holder may elect to either file a claim against the property or a petition for recognition of exemption of the property. Subsection (b) sets forth the procedure and time limitations if, in fact, an owner or interest holder timely petitions for recognition of exemption. Early informal recognition of exemption will allow rapid exit from forfeiture actions for commercial interests, saving them expenses and eliminating uncertainty over their exemption as early as possible. Financial institutions benefit from this provision by being able to eliminate referrals of forfeiture matters to outside counsel. When property that the financial institution has an interest in is seized for forfeiture an in-house clerk routinely responds, saving time and expense. The rare complex case may be referred, if necessary.

Subsection (c) provides the procedure if no proper petitions for exemption are timely filed.

§ 10. CLAIMS.

(a) Only an owner of or interest holder in property seized for forfeiture may file a claim, and shall do so in the manner provided in this section. The claim shall be mailed to the seizing agency and to the attorney for the state by certified mail, return receipt requested, within thirty days after the effective date of notice of pending forfeiture. No extension of time for the filing of a claim shall be granted.

(b) The claim and all supporting documents shall be in affidavit form, signed by the claimant under oath, and sworn to by the affiant before one who has authority to administer the oath, under penalty of perjury or false swearing and shall set forth all of the following:

(1) The caption of the proceedings and identifying number, if any, as set forth on the notice of pending forfeiture or complaint, the name of the claimant, and the name of the attorney for the state who authorized the notice of pending forfeiture or complaint.

(2) The address where the claimant will accept mail.

(3) The nature and extent of the claimant's interest in the property.

(4) The date, the identity of the transferor, and the circumstances of the claimant's acquisition of the interest in the property.

(5) The specific provision of this [Act] relied on in asserting that the property is not subject to forfeiture.

(6) All essential facts supporting each assertion.

(7) The specific relief sought.

ANALYSIS

Section 10 sets forth how an owner of or interest holder in property seized for forfeiture files a claim to assert an interest in property. Subsection (a) states that the claims must be delivered or mailed to the seizing agency and to the attorney for the state. The claim must be signed by the owner or interest holder under penalty of perjury and must set forth the items listed in paragraphs (b) (1)–(7). An unverified claim is not sufficient. United States v. Fifteen Thousand Five Hundred Dollars ($15,500.00) United States Currency, 558 F.2d 1359, 1360 (9th Cir. 1977); accord, United States v. One 1978 Piper Navajo PA–31 Aircraft, 748 F.2d 316 (5th Cir. 1984); United States v. U.S. Currency Amounting to Sum of Thirty Thousand Eight Hundred Dollars ($30,800.00), 555 F. Supp. 280, 283 (E.D.N.Y.), aff'd mem., 742 F.2d 1444 (2nd Cir. 1983).

The failure of the claimant to comply with Section 10 is not a failure that can be cured by subsequent discovery mechanisms. The claim is necessary to alert the government that a person with standing asserts an interest. Failure to file a claim triggers an application for an order of forfeiture under Sections 15 and 16. A timely filed claim forces the government to proceed with judicial action, either in rem or in personam or both.

§ 11. JUDICIAL PROCEEDINGS GENERALLY.

(a) A judicial forfeiture proceeding under this [Act] is subject to the provisions of this section.

(b) The court, on application of the attorney for the state, may enter any restraining order or injunction, require the execution of satisfactory performance bonds, create receiverships, appoint conservators, custodians, appraisers, accountants, or trustees, or take any other action to seize, secure, maintain, or preserve the availability of property subject to forfeiture under this [Act], including a writ of attachment or a warrant for its seizure, whether before or after the filing of a notice of pending forfeiture or complaint.

(c) If property is seized for forfeiture or a forfeiture lien is filed without a previous judicial determination of probable cause or order of forfeiture or a hearing under subsection (c) of section 13 of this [Act], the court, on an application filed by an owner of or interest holder in the property within ten days after notice of its seizure for forfeiture or lien, or actual knowledge of it, whichever is earlier, and after complying with the requirements for claims in section 10 of this [Act], after five days notice to the attorney for the state, may issue an order to show cause to the seizing agency, for a hearing on the sole issue of whether probable cause for forfeiture of the property then exists. The hearing shall be held within thirty days of the order to show cause unless continued for good cause on motion of either party. If the court finds that there is no probable cause for forfeiture of the property, or if the state elects not to contest the issue, the property shall be released to the custody of the applicant, as custodian for the court, or from the lien pending the outcome of a judicial proceeding pursuant to this [Act]. If the court finds that probable cause for the forfeiture of the property exists, the court shall not order the property released.

(d) All applications filed within the ten day period prescribed by subsection (c) of this section shall be consolidated for a single hearing relating to each applicant's interest in the property seized for forfeiture.

(e) A person charged with a criminal offense may apply at any time before final judgment to the court where the forfeiture proceeding is pending for the release of property seized for forfeiture, that is necessary for the defense of the person's criminal charge. The application shall satisfy the requirements under subsection (b) of section 10. The court shall hold a probable cause hearing if the applicant establishes that:

(1) He has not had an opportunity to participate in a previous adversarial judicial determination of probable cause.

(2) He has no access to other monies adequate for the payment of criminal defense counsel.

(3) The interest in property to be released is not subject to any claim other than the forfeiture.

(f) If the court finds that there is no probable cause for forfeiture of the property, the court shall order the property released pursuant to subsection (c) of this section. If the state does not contest the hearing, the court may release a reasonable amount of property for the payment of the applicant's criminal defense costs. Property that has been released by the court and that has been paid for criminal defense services actually rendered is exempt under this [Act].

(g) A defendant convicted in any criminal proceeding is precluded from later denying the essential allegations of the criminal offense of which the defendant was convicted in any proceeding pursuant to this section. For the purposes of this section, a conviction results from a verdict or plea of guilty, including a plea of [reference to other available pleas, e.g. no contest, nolo contendere].

(h) In any proceeding under this [Act], if a claim is based on an exemption provided for in this [Act], the burden of proving the existence of the exemption is on the claimant, and it is not necessary for the state to negate the exemption in any application or complaint.

(i) In hearings and determinations pursuant to this section, the court may receive and

consider, in making any determination of probable cause or reasonable cause, all evidence admissible in determining probable cause at a preliminary hearing or by a judge pursuant to [state statute or rule relating to search warrants] together with inferences therefrom.

(j) The fact that money or a negotiable instrument was found in close proximity to contraband or an instrumentality of conduct giving rise to forfeiture shall give rise to the rebuttable presumption that the money or negotiable instrument was the proceeds of conduct giving rise to forfeiture or was used or intended to be used to facilitate the conduct.

(k) There shall be a rebuttable presumption that any property of a person is subject to forfeiture under this [Act] if the state establishes, by the standard of proof applicable to that proceeding, all of the following:

(1) that the person has engaged in conduct giving rise to forfeiture;

(2) that the property was acquired by the person during that period of the conduct giving rise to forfeiture or within a reasonable time after that period;

(3) that there was no likely source for the property other than the conduct giving rise to forfeiture.

(l) A finding that property is the proceeds of conduct giving rise to forfeiture does not require proof that the property is the proceeds of any particular exchange or transaction.

(m) A person who acquires any property subject to forfeiture is a constructive trustee of the property, and its fruits, for the benefit of the state, to the extent that their interest is not exempt from forfeiture. If property subject to forfeiture has been commingled with other property,the court shall order the forfeiture of the mingled property and of any fruits of the mingled property, to the extent of the property subject to forfeiture, unless an owner or interest holder proves that specified property does not contain property subject to forfeiture, or that their interest in specified property is exempt from forfeiture.

(n) All property declared forfeited under this [Act] vests in this state on the commission of the conduct giving rise to forfeiture together with the proceeds of the property after that time.

Any such property or proceeds subsequently transferred to any person remain subject to forfeiture and thereafter shall be ordered forfeited unless the transferee claims and establishes in a hearing under the provisions of the [Act] that the transferee acquired the property in good faith, for value, and was not knowingly taking part in an illegal transaction, and that the transferee's interest is exempt under section 5 of this [Act].

(o) An acquittal or dismissal in a criminal proceeding shall not preclude civil proceedings under this [Act].

(p) For good cause shown, on motion by the attorney for the state, the court may stay discovery against the criminal defendant and against the state in civil forfeiture proceedings during a criminal trial for a related criminal indictment or information alleging the same conduct, after making provision to prevent loss to any party resulting from the delay. Such a state shall not be available pending an appeal.

(q) Except as otherwise provided by this [Act], all proceedings hereunder shall be governed by the Rules of Civil Procedure.

(r) An action pursuant to this [Act] shall be consolidated with any other action or proceeding pursuant to this [Act] or to [reference to foreclosure and/or trustee sale proceedings] relating to the same property on motion of the attorney for the state, and may be consolidated on motion of an owner or interest holder.

ANALYSIS

This section refers to general procedures in judicial forfeiture proceedings that are applicable to both in rem and in personam actions.

Subsection (b) details procedures that may be ordered by the court to preserve the value of the property. The court may enter its orders at any time, whether before or after the seizure, to seize, secure, maintain, or preserve the property or the availability of property subject to seizure.

Subsection (c) creates a new and additional probable cause hearing that may be demanded by a claimant on five days notice. A quick probable cause hearing is not required by Due Process and is not supplied by federal law. A delay of 18 months between seizure and hearing was approved by the U.S. Supreme Court in United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in U.S. Currency, 461 U.S. 555 (1983). Substantially longer delays have been approved in Circuit Court decisions. The purpose of this statutorily created hearing is to correct manifest error immediately. If no probable cause is found, the property is to be released to the custody of the applicant pending the outcome of forfeiture proceedings.

Either an owner or an interest holder may apply for this hearing. They can apply for this hearing within 10 days of the notice of seizure for forfeiture or lien or knowledge of the seizure or lien. The only issue at this hearing is whether probable cause exists for the forfeiture. Issues as to exemptions, defenses, or the manner of seizure are not relevant. This parallels other probable cause hearings such as grand jury proceedings or preliminary hearing proceedings. If no probable cause is found to exist, the property must be released to the custody of the applicant, or the property shall be released from the forfeiture lien. The release does not deprive the court of jurisdiction.

Subsection (d) provides that all the applicants' interests in property must be consolidated for a single hearing. This is designed to protect against multiple hearings arising from the same seizure for forfeiture or forfeiture lien. Otherwise, a set of claimants could stagger their requests for hearings and force the state to show probable cause in each of many successive hearings.

Subsection (e) allows the release of property under certain circumstances for payment of defense attorney's fees. It exempts property released from its seizure from forfeiture under these provisions. Therefore, a defense attorney who accepts payment after prevailing at the hearing provided for in this section and who provides services in exchange for value is not in jeopardy of having their payment recaptured from them by the government. These provisions are responses to the U.S. Supreme Court's holding in Caplin and Drysdale, which allowed the recapture of already expended funds, holding recapture is appropriate when the recipient had notice that the funds were subject to forfeiture.

It is not necessary that the criminal charge be related to the forfeiture proceedings. The criminal charge could be any criminal charge. The right to counsel in criminal proceedings is the right to counsel in any criminal proceeding, not just related criminal proceedings. The applicant must make an application by complying with the requirements for claims.

The hearing is divided into two stages. The first stage requires the applicant to establish he has had no previous adversarial judicial determination of probable cause, that he has no access to other sources of funds, and that the property is not subject to the claim of another, e.g., the bank he allegedly robbed.

If there has been a non-adversarial finding of probable cause, the person may still apply for a hearing. For example, if a seizure warrant had been issued based upon probable cause, the applicant could request a hearing under subsection (e) as the finding of probable cause for the seizure warrant was nonadversarial. It is only when the applicant has already had an adversarial determination of probable cause that the applicant cannot move for release of funds under this subsection.

If the applicant, does not establish these three preliminary elements, there is no hearing on probable cause and the property is not releasable. If the applicant does establish the preliminary elements, the second stage of the procedure is triggered, which is the probable cause hearing. If no probable cause is found, property can be released to pay for legal services. Under subsection (f), once the property is released and has been paid for legal services actually rendered, that property is not later forfeitable even if the state can subsequently establish probable cause for the property's forfeiture, i.e. that it was the proceeds of drug offenses.

Subsection (g), preclusion, is borrowed from 18 U.S.C. § 1964 (D), but adds the victim estoppel provision of 18 U.S.C. § 3580 (e). See Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 568 (1951). Orders short of conviction may also have a collateral estoppel effect. Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979).

Subsection (h) clarifies that the state need not negate exemptions in its applications or complaints.

Subsection (i) states that the court may receive and consider all evidence generally admissable in such situations in making any determinations of probable cause. This includes hearsay, United States v. One 56-Foot Motor Yacht named the Tahuna, 702 F.2d 1276 (9th Cir. 1983).

Subsection (j) allows the court to presume that any money found in close proximity to contraband, or instrumentalities of conduct giving rise to forfeiture was proceeds of the conduct or was used or intended to be used to facilitate the conduct giving rise to forfeiture. The inference is found in case law and is codified in various state statutes, such as Arizona's A.R.S. § 13-4305 (B).

Subsection (k) creates a rebuttable presumption based on common sense and economic analysis. If, for example, a drug dealer trafficks in cocaine between 1988 and 1990 and acquires an expensive residence, a luxury car and top of the line speedboat during that same period of time, it is presumed that these acquired items have been purchased with drug proceeds if, and only if, there was no other likely source of income. The statute provides that if the state establishes by the standard of proof applicable to that proceeding that 1) the person has engaged in conduct giving rise to forfeiture (most frequently drug dealing), 2) the property was acquired by the person during or soon after the conduct giving rise to forfeiture, and 3) there was no likely source for the property other than the conduct, then a rebuttable presumption exists for forfeiture of the property. This is patterned on 21 U.S.C. § 853 (d), the federal Continuing Criminal Enterprise statute. It

is significant that the federal provision is a criminal provision where the government's proof is beyond a reasonable doubt. This model statute is a civil proceeding.

Subsection (l) codifies the case law that states that tracing proceeds to conduct giving rise to forfeiture is sufficient without tracing to a specific transaction. United States v. $4,255,000, 762 F 2d 895 (11th Cir. 1985).

Subsection (m) imposes a constructive trust on property subject to forfeiture, and draws the consequence in the context of tracing. The same analogy was made with the same result in a drug proceeds forfeiture case, United States v. Banco Cafetero Panama, 797 F. 2d 1154 (2d Cir. 1986.) The constructive trust is a feature of the civil racketeering statutes of Arizona, A.R.S. § 13-2314 (E). The constructive trustee provision is designed to recapture forfeitable property which will be disruptive of legitimate commercial transactions. For example, an arsonist uses arson proceeds to purchase a car from a legitimate dealership. He also buys a mink coat which he gives to his wife. Both the car dealership and the wife are constructive trustees; however, the car dealership is exempt under Section 5. The wife's interest is not exempt because she did not give fair market value for the mink. It does no economic injustice to retrieve "gifts," but if fair market value was exchanged for an item it would be too disruptive to retrieve criminal proceeds in the hands of third parties. In such a case, the arsonist is liable to repay the value of the sold item, which is accomplished through the substitute asset provision of Section 14.

Subsection (n) vests all property declared forfeited to the state at the time of the commission of the conduct giving rise to forfeiture. This is known as the "relation back doctrine" because the government's title relates back to the time of the offense. It is consistently applied in federal law, United States v. Stowell, 133 U.S. 1 (1890) (collecting cases), United States v. $5,644,540 in United States Currency, 799 F 2d 1357 (9th Cir. 1986), and has been added to federal and state statutes. 21 U.S.C. § 881 (h) (added by Pub. L. 98-473, 1984). As the forfeiture analysis is a commercial analysis, the interests of good faith purchasers for value are exempted from forfeiture. Interest holders are protected pursuant to Section 5.

Subsection (o) states that an acquittal or dismissal in a criminal proceeding does not preclude civil proceedings under this act. The reason is based on the differences in the burden of proof as well as the difference in interests litigated in each forum. The prior acquittal of a defendant in a parallel criminal case does not bar his subsequent loss of property in a civil forfeiture case, since it is not a criminal case. United States v. One Assortment of 89 Firearms, 104 S.Ct. 1099 (1984).

Subsection (p) allows a stay of civil forfeiture proceedings. Stays are often sought by the government to prevent civil discovery of its criminal case and by the claimant to prevent civil discovery beyond the shelter of the Fifth Amendment that is provided in the claimant's criminal prosecution. This provision does not require a complete stay of civil proceedings; partial stays often meet all parties needs better than complete stays.

Subsection (q) directs that the rules of civil procedure apply to all proceedings under this Act unless a different procedure is provided for. In rem procedures and a desire for expedition are two primary causes of needed variances from the usual rules of civil procedure.

Subsection (r) allows for consolidation of various forfeiture actions by an owner or interest holder and by the state.

§ 12. IN REM PROCEEDINGS.

(a) A judicial in rem forfeiture proceeding brought by the attorney for the state pursuant to a notice of pending forfeiture or verified complaint for forfeiture is also subject to the provisions of this section. If a forfeiture is authorized by this [Act], it shall be ordered by the court in the in rem action.

(b) An action in rem may be brought by the attorney for the state in addition to, or in lieu of, civil in personam forfeiture procedures. The state may serve the complaint in the manner provided by subsection (3) of section 8 of this [Act], or as provided by the rules of civil procedure.

(c) Only an owner of or an interest holder in the property who has timely filed a proper claim may file an answer in an action in rem. For the purposes of this section, an owner of or interest holder in property who has filed a claim and answer shall be referred to as a claimant.

(d) The answer shall be signed by the owner or interest holder under penalty of false swearing and shall be in accordance with [rule of civil procedure on answers] and shall also set forth all of the following:

(1) the caption of the proceedings and identifying number, if any, as set forth on the notice of pending forfeiture or complaint and the name of the claimant;

(2) the address where the claimant will accept mail;

(3) the nature and extent of the claimant's interest in the property;

(4) the date, the identity of the transferor, and the circumstances of the claimant's acquisition of the interest in the property;

(5) the specific provision of this [Act] relied on in asserting that it is not subject to forfeiture;

(6) all essential facts supporting each assertion;

(7) the specific relief sought.

(e) The answer shall be filed within twenty days after service of the civil in rem complaint and shall be accompanied by a bond to the court in the amount of ten percent of the estimated value of the property as alleged in the complaint, or twenty-five hundred dollars, whichever is greater. In no case shall the amount of the bond be greater than two hundred fifty thousand dollars. Sureties shall be approved by the court upon condition that in the case of forfeiture the claimant shall pay all costs and expenses of the proceedings as provided in section 15 of this [Act]. In lieu of a cost bond, a claimant may under penalty of false swearing move the court to proceed in forma pauperis. Any funds received by the [sheriff, court] as cost bonds shall be placed in an interest-bearing account pending final disposition of the case.

(f) The state and any claimant who has timely answered the complaint may, at the time of filing its pleadings, or at any other time not less than thirty days prior to the hearing, serve discovery requests on any other party, the answers or response to which shall be due within twenty days of service. Discovery may include deposition of any person at any time after the expiration of fifteen days after the filing and service of the complaint. Any party may move for a summary judgment at any time after an answer or responsive pleading is served and not less than thirty days prior to the hearing.

(g) The issue shall be determined by the court alone, and the hearing on the claim shall be held within sixty days after service of the petition unless continued for good cause. The attorney for the state shall have the initial burden of showing the existence of probable cause for forfeiture of the property. If the state shows probable cause, the claimant has the burden of showing by a preponderance of the evidence that the claimant has an interest in the property which is not subject for forfeiture.

(h) If the attorney for the state fails to show the existence of probable cause for forfeiture, or a claimant establishes by a preponderance of the evidence that the claimant has an interest that is exempt under the provisions of section 5 of this [Act], the court shall order the interest in the property returned or conveyed to the claimant. The court shall order all other

property forfeited to this state and conduct further proceedings pursuant to the provisions of section 15 and 16 of this [Act].

ANALYSIS

Subsections (a) and (b) state that if a forfeiture is authorized by law, it must be ordered by a court on an action in rem brought by the state. The in rem action may be brought in addition to or in lieu of in personam civil forfeiture procedures. The state brings the action pursuant to a notice of pending forfeiture or a verified complaint.

Subsection (c) allows only an owner of or an interest holder in the property to file an answer asserting a claim against the property in an in rem action. Subsection (c) interfaces with the definition of owner in section 1. If interests are required to be recorded, then only those interests that are in compliance with the recording statutes can be asserted in forfeiture actions. No protection is given to hidden ownerships for it would only encourage racketeers to put assets in the names of others and disguise their ownership interests. Section (c) also interfaces with the definition of interest holder in Section 1 in that only those interests which would be perfected as against a bona fide purchaser can be asserted in forfeiture actions.

Subsection (d) sets forth what the owner or interest holder's answer must contain. It requires that the answer be signed by the owner or interest holder under penalty of perjury to discourage frivolous claims. It requires the answer to bear the caption of the proceedings to avoid different answer on the same property being assigned separate case numbers and separate judges. It requires the answer to bear the caption of the proceedings to avoid different answers on the same property being assigned separate case numbers and separate judges. It requires the owner or interest holder to state the nature and extent of their acquisition of the interest in the property, the date and circumstances of their acquisition of the interest in the property, and the precise relief sought. This is based on Rule C(6) of the Supplemental Rules for Certain Admiralty and Maritime Claims (28 U.S.C. Appendix F.R.C.P.).

Subsection (e) states that the answer must be filed with the court within 20 days after service of the civil in rem complaint, the common requirement of rules of civil procedure. Subsection (e) also requires that a cost bond must accompany the answer in case the claimant is ordered to pay costs and expenses of the proceeding. Funds received will be placed in an interest bearing account pending final disposition of the case. The hearing must be held by the court without a jury within 60 days after service of the complaint, unless continued for good cause, under subsection (g). Cost bonds are required federally. See 21 C.F.R. § 1316.76. The concept of requiring civil litigants to place bonds to secure their litigation rights is a common one. Losing civil litigants must, for example, post a supersedeas bond in order to appeal. In lieu of a cost bond, a claimant may file an in pauperis bond.

Subsection (f) makes several procedural adjustments that are necessary because of the in rem nature of the proceeding and because of the short time available before the 60 day hearing.

As acknowledged in subsections (g) and (h), forfeiture hearings consist of two portions. The state has the burden of going forward, and must show probable cause for forfeiture. If, and only if, the state succeeds in doing so, the burden of proof shifts to the claimant. The claimant must show, by a preponderance of the evidence, that his interest is not subject to forfeiture. This arrangement has been used federally for 200 years. The probable cause portion applies only in forfeitures which are in rem. In all in personam

forfeitures, the burden is on the state to establish its case by a preponderance of the evidence.

Subsection (h) requires the court to order the seized property to be returned to the claimant if the state does not show the existence of probable cause or if the claimant establishes that his interest is exempt from forfeiture.

§ 13. IN PERSONAM PROCEEDINGS.

(a) (1) A judicial in personam forfeiture proceeding brought by the attorney for the state pursuant to an in personam civil action alleging conduct giving rise to forfeiture is also subject to the provisions of this section. If a forfeiture is authorized by this [Act], it shall be ordered by the court in the in personam action. This action shall be in addition to or in lieu of in rem forfeiture procedures.

(2) In any proceeding pursuant to this section, the court, on application of the attorney for the state, may enter any order authorized by section 11 of this [Act].

(b) The court may issue a temporary restraining order in an action under this section on application of the attorney for the state, without notice or an opportunity for a hearing, if the state demonstrates that:

(1) there is probable cause to believe that in the event of a final judgment, the property involved would be subject to forfeiture under the provisions of this [Act].

(2) provision of notice would jeopardize the availability of the property for forfeiture.

(c) Notice of the issuance of a temporary restraining order and an opportunity for a hearing shall be given to persons known to have an interest in the property. A hearing shall be held at the earliest possible date in accordance with [the applicable civil rule] and shall be limited to the issues of whether:

(1) There is a probability that the state will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, conveyed, alienated, encumbered, further encumbered, disposed of, purchased, received, removed from the jurisdiction of the court, concealed, or otherwise made unavailable for forfeiture.

(2) The need to preserve the availability of property through the entry of the requested order outweighs the hardship on any owner or interest holder against whom the order is to be entered.

(d) On a determination of liability of a person for conduct giving rise to forfeiture under this [Act], the court shall enter a judgment of forfeiture of the property found to be subject to forfeiture described in the complaint and shall also authorize the attorney for the state or his designee or any law enforcement officer to seize all property ordered forfeited which was not previously seized or is not then under seizure. Following the entry of an order declaring the property forfeited, the court, on application of the attorney for the state, may enter any appropriate order to protect the interest of the state in the property ordered forfeited.

(e) Following the entry of an order of forfeiture under subsection (d) of this section, the attorney for the state may give notice of pending forfeiture, in the manner provided in section 8 of this [Act], to all owners and interest holders who have not previously been given notice.

(f) An owner of or interest holder in property that has been ordered forfeited and whose claim is not precluded may file a claim as described in section 10 of this [Act] within thirty days after initial notice of pending forfeiture or after notice under subsection (e) of this section, whichever is earlier. If the state does not recognize the claimed exemption, the attorney for the state shall file a complaint and the court shall hold the hearing and determine the claim without a jury in the manner provided for in rem judicial forfeiture actions in section 12 of this [Act].

(g) In accordance with findings made at the hearing, the court may amend the order of forfeiture if it determines that any claimant has established by a preponderance of the evidence that the claimant has an interest in the property and that the claimant's interest is exempt under the provision of section 5 of this [Act].

(h) Except as provided in subsection (c) of section 11 of this [Act], no person claiming an interest in property subject to forfeiture under this [Act] may intervene in a trial or appeal of a criminal action or in an in personam civil action involving the forfeiture of the property.

ANALYSIS

Subsection (a) provides for civil in personam proceedings. Subsection (b) allows the state to obtain a temporary restraining order, without notice or an opportunity for a hearing, if the state demonstrates that 1) there is probable cause to believe that the property would be subject to forfeiture, and 2) notice of the temporary restraining order would jeopardize the availability of the property for forfeiture. The special statutory treatment of the temporary restraining order in this context arises from the 1984 amendments to the federal Continuing Criminal Enterprise and RICO statutes. There is no need for the government to show irreparable injury.

Subsection (c) requires that notice and opportunity for a hearing must be afforded to persons known to have an interest in the property once the restraining order is entered. The hearing must be held at the earliest possible date, and is limited to the issues of whether failure to enter the order will result in the property being destroyed, conveyed, encumbered, etc., and whether the need to preserve the availability of the property outweighs the hardship on any owner or interest holder.

Under subsection (d), once the court determines the liability of a person for conduct giving rise to forfeiture, the court must enter judgment of forfeiture of the property and must also authorize the state to seize all property ordered forfeited which was not previously seized. The state can also obtain, by application to the court, any appropriate orders to protect the interest of the state in the property ordered forfeited. For example, if the property forfeited is out of state, the court can order the person found to be liable to deliver the property or a deed to the property to the state.

Subsections (e), (f) and (g) detail the procedures subsequent to the in personam finding of liability and order of forfeiture. Essentially, the judgment in personam relating to the defendant's interest is followed by an in rem proceeding to deal with the potential interests of the rest of the world. The statute directs the state to give notice of pending forfeiture to all owners and interest holders who have not previously been given notice. It allows an owner or interest holder to file a claim to the property ordered forfeited if his claim is not precluded. If the claims are not resolved, the attorney for the state shall proceed to file a forfeiture complaint, and the court shall hold a hearing to determine the claim without a jury. The court, in accordance with its findings at the hearing, may amend its order of forfeiture if the claimant establishes that he has an interest and that his interest is exempt from forfeiture. In the in personam proceeding, the only interests forfeited are those of persons who are liable for the conduct giving rise to forfeiture. The subsequent in rem proceeding determines all third party rights. The third party is prevented from intervention by subsection (h), but need not wait for this proceeding to have his interest determined. The third party may move for a quick release hearing pursuant to section 11, or the third party may apply for a stipulation of exemption pursuant to section 9.

Subsection (h) provides that except as provided in section 11 no person claiming an interest in property subject to forfeiture may intervene in a trial or appeal of a criminal action or in an in personam civil action involving forfeiture of the property.

§ 14. SUBSTITUTED ASSETS AND SUPPLEMENTAL REMEDIES.

(a) The court shall order the forfeiture of any other property of a claimant or in personam defendant, up to the value of that claimant's or defendant's property found by the court to be subject to forfeiture under this [Act], if any of the claimant's or defendant's forfeitable property:

(1) Cannot be located.

(2) Has been transferred or conveyed to, sold to, or deposited with a third party.

(3) Is beyond the jurisdiction of the court.

(4) Has been substantially diminished in value while not in the actual physical custody of the court, the seizing agency, the attorney for the state, or their designee.

(5) Has been commingled with other property that cannot be divided without difficulty.

(6) Is subject to any interest of another person which interest is exempt from forfeiture under this [Act].

(b) In addition to any other remedy provided for by law, if a forfeiture lien or notice of pending forfeiture has been filed and notice given pursuant to section 8 of this [Act], or if a complaint alleging conduct giving rise to forfeiture has been filed and notice given pursuant to such section 8 or [applicable rule of civil procedure], the attorney for the state may institute an action in [appropriate reference] court against any person with notice or actual knowledge who destroys, conveys, alienates, encumbers, further encumbers, disposes of, purchases, receives, removes from the jurisdiction of the court, conceals, or otherwise renders unavailable for forfeiture property alleged to be subject to forfeiture in the forfeiture lien, notice of pending forfeiture, or complaint. In such case, the court shall enter a final judgment in an amount equal to the value of the lien not to exceed the fair market value of the property, or, if the property is alleged to be subject to forfeiture, in an amount equal to the fair market value of the property, together with reasonable investigative expenses and attorney's fees. If a civil proceeding under this [Act] is pending in court, the action shall be heard by that court.

ANALYSIS

Subsection (a) allows the court to order the forfeiture of any other property of a claimant or defendant up to the value of the property found by the court to be subject to forfeiture if any of the forfeited property cannot be located, has been transferred, conveyed or sold to a third party, is beyond the jurisdiction of the court, has been substantially diminished in value, has been commingled or is subject to an exempt interest. This provision is modeled on 21 U.S.C. § 853 (p) (Continuing Criminal Enterprise). Its intent is to provide a method of effectuating forfeitures in the face of avoidance methods used by today's sophisticated offenders. For example, assume a stolen car "chop shop" operator liens the real property on which his chop shop is located to insulate it from forfeiture. Under this section, a court could order the forfeiture of other property of the operator equal in value to the liened property. Or if the operator leased cutting and mechanical equipment in order to avoid the consequences of forfeiture, the court could order forfeiture of property of the operator equal in value to the leased equipment. Its net effect is the creation of a publicly enforced tort of using property to empower criminal enterprises, setting the measure of damages as the value of the property used for this purpose.

Subsection (b) allows the state to institute an action, after notice, to recover judgment in an amount equal to the value of the forfeiture lien, or if there is no lien, in an amount not to exceed the fair market value of the property, together with reasonable investigative expenses and attorney fees, if, in fact, property subject to forfeiture is conveyed, alienated, disposed of, or otherwise rendered unavailable for forfeiture.

§ 15. JUDICIAL DISPOSITION OF PROPERTY.

(a) If no proper claims are timely filed in an action in rem, or if no proper answer is timely filed in response to a complaint, the attorney for the state may apply for an order of forfeiture and allocation of forfeited property pursuant to section 16 of this [Act]. Upon a determination by the court that the state's written application established the court's jurisdiction, the giving of proper notice, and facts sufficient to show probable cause for forfeiture, the court shall order the property forfeited to the state.

(b) After final disposition of all claims timely filed in an action in rem, or after final judgment and disposition of all claims timely filed in an action in personam, the court shall enter an order that the state has clear title to the forfeited property interest. Title to the forfeited property interest and its proceeds shall be deemed to have vested in the state on the commission of the conduct giving rise to the forfeiture under this [Act].

(c) If, in his discretion, the attorney for the state has recognized in writing that an interest holder has an interest that is exempt from forfeiture, the court, on application of the attorney for the state, may release or convey forfeited personal property to a regulated interest holder on all of the following conditions:

(1) The interest holder has an interest which was acquired in the regular course of business as a regulated interest holder.

(2) The amount of the interest holder's encumbrance is readily determinable and it has been reasonably established by proof made available by the attorney for the state to the court.

(3) The encumbrance held by the interest holder seeking possession is the only interest exempted from forfeiture and the order forfeiting the property to the state transferred all of the rights of the owner prior to forfeiture, including rights to redemption, to the state.

(4) After the court's release or conveyance, the interest holder shall dispose of

the property by a commercially reasonable public sale, and within ten days of disposition shall tender to the state the amount received at disposition less the amount of the interest holder's encumbrance and reasonable expense incurred by the interest holder in connection with the sale or disposal. For the purposes of this section "commercially reasonable" shall be a sale or disposal that would be commercially reasonable under [state equivalent of uniform commercial code definition].

(d) On order of the court forfeiting the subject property, the state may transfer good and sufficient title to any subsequent purchaser or transferee, and the title shall be recognized by all court, by this state, and by all agencies of and any political subdivision. Likewise on entry of judgment in favor of a person claiming an interest in the property that is subject to proceedings to forfeit property under this [Act], the court shall enter an order that the property or interest in property shall be released or delivered promptly to that person free of liens and encumbrances under this [Act] and that the person's cost bond shall be discharged.

(e) Upon motion by the attorney for the state, if it appears after a hearing that there was reasonable cause for the seizure for forfeiture or for the filing of the notice of pending forfeiture or complaint, the court shall cause a finding to entered that reasonable cause existed, or that any such action was taken under a reasonable good faith belief that it was proper, and the claimant is not entitled to costs or damages, and the person or seizing agency who made the seizure, and the attorney for the state, are not liable to suit or judgment on account of the seizure, suit or prosecution.

(f) The court shall order a claimant who fails to establish that a substantial portion of the claimant's interest is exempt from forfeiture under section 4 of this [Act] to pay the reasonable costs and expenses of any claimant who established that his entire interest is exempt from forfeiture under section 4 of this [Act] and to pay the reasonable costs and expenses of the state for the investigation and prosecution of the matter, including reasonable attorney's fees, in connection with that claimant.

ANALYSIS

Subsection (a) allows the attorney for the state to apply for an order of forfeiture and allocation of forfeited property if no claim or answer is timely filed in an in rem action or if no answer is filed in response to a complaint. The state's application must show jurisdiction, proper notice and sufficient facts to demonstrate probable cause for forfeiture, in order for the court to the property forfeited to the state.

Subsection (b) gives the state title to the forfeited property interest which vests with the state on the commission of the conduct giving rise to forfeiture.

Subsection (c) creates a special disposal provision to accommodate regulated interest holders who would prefer to dispose of the asset themselves. This is often the case with banks and other lenders who have established auctions that may be superior to a sheriff's sale in some instances.

Subsection (d) allows the state to transfer good and sufficient title to any subsequent purchaser or transferee. This provision is extremely important to the state because the ability to pass good title is critical to the price that the state will get for the property. Indeed, real property may not be saleable at all if the title insurance cannot be obtained.

Subsection (e) protects the state from judgment in cases in which it had reasonable cause for the seizure or for the filing of the notice or complaint. In rem seizures inherently impact the interests of persons who are exempt, since the seizure of property is required for judicial jurisdiction and property often has exempt as well as non-exempt interest holders. Forfeiture cases are also particularly susceptible to failure of the evidence at the ultimate hearing because they become old waiting for the completing of the companion criminal case. Drug cases, especially, tend to grow weak with age due to the transient and unstable nature of the witnesses that are available to the government, and due to potential witnesses' fear and intimidation.

Subsection (f) gives the court power to order a claimant who fails to establish that a substantial portion of his interest is exempt from forfeiture to pay reasonable costs incurred by the state or nay other claimant relating to disproving the claim, costs of investigation and costs of prosecution, including attorneys' fees.

§ 16. ALLOCATION OF FORFEITED PROPERTY; CREATION OF SPECIAL FUNDS.

(a) When property is forfeited under this [Act] the attorney for the state may:

(1) Upon agreement with the seizing agency, retain it for official use or transfer the custody or ownership of any forfeited property to any local, state, or federal agency. A decision to distribute the property is not subject to review.

(2) Destroy or use for investigative purposes, any illegal or controlled substances or other contraband, upon the written approval of the attorney for the state, after not less than twenty days after the seizure, provided that materials necessary as evidence shall be preserved.

(3) Authorize a public or otherwise commercially reasonable sale of that which is not required by law to be destroyed and which is not harmful to the public. The proceeds of any sale and any monies forfeited or obtained by judgment or settlement under this section shall be deposited in the Special Asset Forfeiture Fund as established herein until disposed of pursuant to court order.

(b) A Special Asset Forfeiture Fund is hereby established within the [appropriate fiscal depository]. All monies obtained pursuant to this [Act] shall be deposited in the fund. The attorney for the state shall ensure the equitable distribution of any forfeited property, or of monies in the fund created by this subsection, to the appropriate local, state, or federal law enforcement or prosecutorial agency so as to reflect generally the contribution of that agency's participation in any of the activity that led to the seizure or forfeiture of the property or deposit of monies under this subsection. The office of the [appropriate reference, e.g. attorney general, district attorney] shall administer expenditures from the fund. Moneys in the fund are appropriated on a continuing basis and are not subject to [state lapsing and related fiscal and appropriations restraints]. Moneys from the fund may not supplant other local, state, or federal funds. The fund is subject to public audit. Money in the fund shall be distributed in the following order of priority:

(1) For satisfaction of any exempt security interest or lien.

(2) Thereafter, for payment of all proper expenses of the proceedings for forfeiture and disposition, including expenses of seizure, inventory, appraisal, maintenance of custody, preservation of availability, advertising, sale and court costs.

(3) The remaining funds shall be distributed proportionally as described in this subsection.

(c) The attorney for the state may require the appropriate administrative agency to take custody of the property and remove it for disposition in accordance with law, and to forward controlled substances to the United States Drug Enforcement Administration for disposition.

ANALYSIS

Paragraphs (1) – (3) of subsection (a) describe what the state can do with forfeited property. For example, the state can retain it for official use, transfer it, sell it, or destroy it. The state can require another agency to take custody of the property and can dispose of it by sale. Subsection (b) provides for a special assets forfeiture fund into which all moneys obtained under this section must be deposited. The fund is subject to audit and must be distributed as follows: 1) to satisfy any bona fide security interest or lien, 2) for payment of expenses, and 3) the balance distributed proportionally for use by enforcement and prosecutorial agencies enforcing this Act.

Return of income from forfeiture programs to law enforcement has become a major feature of federal "asset sharing," under which state and local agencies may obtain shares of federal forfeiture judgment resulting from cases the state and local officers worked on. Asset sharing has shown great potential for bringing agencies together in cooperative projects and for drawing prosecutors and law enforcement officers together in closer relationships. The result has been better cases based on greater legal oversight. Needless to say, law enforcement is in desperate need of resources for investigation and prosecution, especially in the drug field. A Wharton School of Economics study in 1986 showed that all U.S. drug enforcement expenditures by local, state and federal law enforcement, even including routine patrol expenses, amounted to about 1/10 of the annual income of the illegal U.S. drug industry.

§ 17. POWERS OF ENFORCEMENT PERSONNEL.

(a) An attorney for the state may conduct an investigation of any conduct that gives rise to forfeiture under this [Act]. The attorney for the state is authorized, before the commencement of any proceeding or action under this [Act], to subpoena witnesses, compel their attendance, examine them under oath, and require the production of documentary evidence for inspection, reproducing, or copying with the same powers and limitations and judicial oversight and enforcement and in the manner provided by this [Act] and by[reference to state civil procedure or Fed. R. Civ. P. 45] except as provided by this section. Any person compelled to appear under a demand for oral testimony under this Section may be accompanied, represented, and advised by counsel.

(b) The examination of all witnesses under this section shall be conducted by the attorney for the state before an officer authorized to administer oaths. The testimony shall be taken stenographically or by a sound recording device and shall be transcribed. The attorney for the state shall exclude from the place where the examination is held all persons except the person being examined, his counsel, the officer before whom the testimony is to be taken, law enforcement officials, and any stenographer taking such testimony. Prior to oral examination, the person shall be advised of his right to refuse to answer any questions on the basis of the privilege against self–incrimination. The examination shall be conducted in a manner consistent with the [reference to general statute or court rules dealing with the taking of depositions, e.g. Fed. R. Civ. P. 26(b)].

(c) Except as otherwise provided in this section, no documentary material, or transcripts, or oral testimony, or copies of it, in the possession of the attorney for the state shall be available, prior to the filing of a civil or criminal proceeding or action relating to it, for examination by any individual other than a law enforcement official or agent of such official without the consent of the person who produced the material or transcripts.

(d) No person shall, with intent to avoid, evade, prevent, or obstruct compliance in whole

or in part by any person with any duly served subpoena of the attorney for the state under this section, knowingly remove from any place, conceal, withhold, destroy, mutilate, alter, or by any other means falsify any documentary material that is the subject of a subpoena. A violation of this subsection is [appropriate existing criminal classification]. The attorney for the state shall investigate and prosecute suspected violations of this subsection.

(e) Acts or omissions by the attorneys for the state in the course of their duties in the enforcement of any of the provisions of this [Act], including provision of any legal services prior to charging, complaint or seizure, are prosecutorial and shall not subject the attorneys or their principals to civil liability.

ANALYSIS

Section 17 is intended to provide prosecutors with powers to investigate illegal industries comparable to those of, e.g., state regulatory agencies' powers to investigate regulated industries, etc. One of the most bitter ironies of civil remedies enforcement is that prosecutors do not have the necessary fact-finding powers at their disposal to deal with the illegal drug industry when dozens of regulatory boards and commissions have these powers at their disposal to deal with all aspects of legal industries from cosmetology licenses to utility rates.

§ 18. IMMUNITY ORDERS.

(a) If a person is or may be called to produce evidence at a deposition, hearing or trial under this [Act] or at an investigation brought by the attorney for the state under section 17, the [appropriate court] for the [appropriate judicial district] in which the deposition, hearing, trial, or investigation is or may be held shall, upon certification in writing of a request of the [prosecutorial authority] for the [judicial district], issue an order, ex parte or after a hearing, requiring the person to produce evidence, notwithstanding that person's refusal to do so on the basis of the privilege against self–incrimination.

(b) The [prosecutorial authority] may certify in writing a request for an ex parte order under this section if in their judgment:

(1) The production of the evidence may be necessary to the public interest; and

(2) The person has refused or is likely to refuse to produce evidence on the basis of their privilege against self–incrimination.

(c) If a person refuses, on the basis of their privilege against self–incrimination, to produce evidence in any proceeding described in this [Act], and the presiding officer informs the person of an order issued under this section, the person may not refuse to comply with the order on the basis of their privilege against self–incrimination. If the person refuses to comply with the order, the person may be compelled or punished by the [appropriate court] issuing an order for civil or criminal contempt.

(d) The production of evidence compelled by order issued under this section, and any information directly or indirectly derived from it, may be used against the person in a subsequent criminal case, except in a prosecution for perjury, false swearing, or an offense otherwise involving a failure to comply with the order.

ANALYSIS

This provision was proposed to assure that the appropriate law enforcement authorities would have adequate power to accomplish their lawful objectives.

The immunity provided by this section is use immunity, under which the prosecution for an offense related to the testimony is possible. The prosecutor may not use the immunized testimony or evidence derived directly or indirectly from that testimony against the witness if the witness becomes a defendant in a later criminal trial. Kastigar v. United States, 406 U.S. 441, 453 (1972). This provision is modeled on 18 U.S.C. §§ 6001–6005, enacted as part of the Organized Crime Control Act of 1970, 84 Stat. 926, and the laws of a number of states. It is particularly helpful in investigations with both civil and criminal goals, as immunized testimony may be used in civil cases. United States v. Cappetto, 502 F 2d 1351 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975) (civil RICO gambling context).

§ 19. STATUTE OF LIMITATIONS.

A civil action under this [Act] shall be commenced within seven years after the last conduct giving rise to forfeiture or the cause of action become known or should have become known, excluding any time during which either the property or defendant is out of the state or in confinement, or during which criminal proceedings relating to the same conduct are pending.

ANALYSIS

This section sets the statute of limitations at seven years, consistent with a number of state civil racketeering statutes. The long time period is necessary because of the complexity and geographical diversity of modern criminal enterprises. The money laundering portion of such an investigation alone can take several years because of the difficulty and delay involved in assembling records from foreign countries.

§ 20. SUMMARY FORFEITURE OF CONTROLLED SUBSTANCES.

Controlled substances included in [reference to state controlled substance provisions, e.g. Schedule I of the Uniform Controlled Substances Act] which are contraband and any controlled substance whose owners are unknown are summarily forfeited to the state. The court may include in any judgment under this [Act] an order forfeiting any controlled substance involved in the offense to the extent of the defendant's interest.

ANALYSIS

Section 20 allows for all controlled substances included in Schedule I of the Uniform Controlled Substances Act which are contraband and any controlled substances whose owners are unknown to be summarily forfeited to the state. It is a feature of UCSA and of federal law. 21 U.S.C. § 881 (f), (g) (1).

§ 21. BAR TO COLLATERAL ACTION.

No person claiming an interest in property subject to forfeiture may commence or maintain any action against the state concerning the validity of the alleged interest other than as provided in this [Act].

ANALYSIS

Section 21 states that no person claiming an interest in property subject to forfeiture may commence or maintain any action against the state concerning the validity of the alleged other than as provided in this section. It prevents procedural complexity created by potential claimants electing to file separate laws suits under causes of action such as replevin or trespass.

§ 22. STATUTORY CONSTRUCTION.

The provisions of this [Act] shall be liberally construed to effectuate its remedial purposes. Civil remedies under this [Act] shall be supplemental and not mutually exclusive. They do not preclude and are not precluded by any other provision of law.

This provision sets out the purpose of the legislation.

ANALYSIS

Section 22 states that this Act must be liberally construed to effectuate its remedial purpose. It is modeled on a similar provision in federal RICO. See, United States v. Turkette, 452 U.S. 576 (1981). Many states have general provisions in their state codes to the same effect.

§ 23. UNIFORMITY OF APPLICATION.

(a) The provisions of this [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.

(b) The Attorney General is authorized to enter into reciprocal agreements with the attorney general or chief prosecuting attorney of any state to effectuate the purposes of this [Act].

ANALYSIS

This section expresses the legislative policy of encouraging uniform enforcement. As criminal enterprises are often multi-state, interstate cooperation is essential to effective enforcement. Cooperative agreements may be as simple as sharing resources in individual cases or as formal as long-term joint projects or policies on such things as liens, collections and executions of search or seizure warrants.

§ 24. SAVING PROVISION.

If any provision of this [Act] or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

ANALYSIS

This or other saving language is standard.

§ 25. EFFECTIVE DATE.

This [Act] takes effect on [date or method of calculating date].

ANALYSIS

This is supplied for those states that include such provisions in individual acts.

§ 26. SHORT TITLE.

The provisions of this [Act] shall be known and may be referred to as the "Model Asset Seizure and Forfeiture Act (MASFA) (1991)."

ANALYSIS

This is supplied for those states that utilize short titles.

HISTORY OF FORFEITURE

The concept that property should be forfeited by the owner under certain circumstances has ancient roots. Biblical,[1] Greek[2] and Roman[3] law knew forms of forfeiture. The forfeiture of property is one of the earliest sanctions of Anglo-Saxon law. Three types of forfeiture came to be distinguished: statutory forfeiture, forfeiture consequent to a criminal conviction and attainder, and deodand.

Statutes in England imposed a variety of forfeitures, principally as a means of tax enforcement. In the mid-seventeenth century Parliament enacted the Navigation Acts, the English forfeiture statutes which most impacted the American colonies and which are the forebears of modern statutory forfeiture. The Navigation Acts required that shipping had to be carried on English built, owned, and manned vessels, and provided that violations would result in the forfeiture of both the ships and the goods they carried.[4] Suits for these forfeitures were commenced by civil information. They could be brought against a person (*in personam*) or against the thing to be forfeited (*in rem*). Typically they were brought *in rem* against the vessel and the goods, as the owner could not be located or was beyond the jurisdiction of the court.[5]

Forfeiture consequent to a criminal conviction and attainder was the oldest and best known.[6] It was imposed on traitors and felons, who forfeited all of their personal and real property, not as a result of their conviction but of their attainder, a legislative pronouncement of legal death. Attainder also signified corruption of blood, that is, no descendant could ever trace a line of inheritance through the attained ancestor.

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1 Exodus 21:28 ("If an ox gore a man or woman, that they die: then the ox shall be surely stoned, and his flesh shall not be eaten; but the owner of the ox shall be quit.")

2 See O. Holmes, The Common Law 7 (1881).

3 7 Twelve Tables 1, translated in 1 Scott, The Civil Law 69 (1932) ("If a quadruped causes injury to anyone, let the owner tender him the estimated amount of the damage; and if he is unwilling to accept it, the owner shall. . . surrender the animal that caused the injury.")

4 L. Harper, The English Navigation Laws: A Seventeenth-Century Experiment in Social Engineering 109, 387-414 (1964).

5 See 3 W. Blackstone, Commentaries *262.

6 See generally 4 W. Blackstone, Commentaries *375-89. "Felony" under early English law included any breach of the feudal engagement. M. Radin, Anglo-American Legal History 234 (1936). As such, it resulted in the forfeiture of the feudal estate to the lord. Id. at 240. Chattels went to the king, whose regalian rights included all ownerless property - bona vacantia, which was the term applied to all outlaws' property. Id. See also Avery v. Everett, 100 N.Y. 317, 18 N.E. 148 (1888).

Forfeiture of estate was a natural consequence of a felony in the feudal context. The word "felony" meant, literally, a "faithless act"; it was a breach of the fealty owed to the feudal lord, and ultimately to the king from whom all property rights flowed. The punishment for the breach was generally death,[7] and forfeiture of estate made the necessary reassignment of property convenient. The term "felony" came to be defined as "an offense which occasions a total forfeiture of with lands or goods or both."[8]

The emergence of the merchant class, trade and manufacturing, and the metropolitan social organization that necessarily accompanied them, undermined the feudal foundations of this form of forfeiture. English law still provided, however, for corruption of blood and forfeiture of estate as a consequence for serious felonies and treason at the time of the adoption of the United States Constitution. Later, in 1814, Parliament limited corruption in blood to murder, but forfeiture of estate continued.[9] In 1870, England legislated the abolition corruption of blood and forfeiture of estate for all felonies and treason, but did not eliminate forfeitures consequent to felony conviction, just forfeiture of estate. Other milder *in personam* forfeitures were substituted for various offenses.[10]

Deodands are sometimes spoken of as predecessors of American forfeiture statutes. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680-83 (1974). An instrument of death replaced the slayer's kin as the object of vengeance. At first, the instrument was taken and sold and the proceeds used to buy Masses for the victim. Id. at 681. Throughout the later Middle Ages, the king received the money, which provided a small but steady source of revenue.

In the American colonies, the extent to which English law and practice should be adopted was a matter of diverse opinion.[11] Forfeitures did not follow any uniform practice. For example, while the Crown did not insist on most statutory forfeitures since the proceeds would have gone to the colonial governments, it did insist on the enforcement of the Navigation Acts, which by their terms were applicable to the colonies. See e.g., 12 Car. 2, ch. 18, c.II (1660).

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7 Civil death is a mitigation of this practice.

8 1 J. Bishop, 382-83 (1856 ed.).

9 Kent's Commentaries on American Law 473-74 (1854 ed.).

10 1 J. Bishop, Commentaries on Criminal Law 585 (1892 ed.).

11 1 J. Story, Commentaries on the Constitution of the United States §§ 163-165, 187-197 (Coolety 4th ed. 1873).

The Navigation Acts were enforced in the vice admiralty courts, not generally *in rem*, but *in personam*, and they were tried by the court without a jury.[12] Forfeiture consequent to conviction and attainder was largely abolished in Massachusetts,[13] allowed to fall into disuse in New York,[14] but was fairly widely employed in Pennsylvania,[15] and Virginia.[16]

Following the Revolution, forfeiture consequent to conviction and attainder fell into disrepute. The Constitution itself forbade bills of attainder – legislative, not judicial, determinations of guilt. U.S. Const. art. I,9, cl.3. It also limited corruption of blood and forfeitures of estate for treason to life estates. U.S. Const. art. III, 3, cl.2. In 1790, Congress abolished by statute both corruption of blood and forfeiture of estate as a consequence of federal criminal prosecutions.[17]

A wide variety of statutes, however, continued the practice of declaring specific forfeitures, which could be imposed in criminal and civil proceedings, either *in personam* or *in rem*. How a particular forfeiture was to be treated was a question of legislative intent.[18] So, too, was the time when the forfeiture was to take place, that is, at the time of the offense[19] or at the time of the conviction. The usual forfeiture in the federal courts, however, was patterned after the Navigation Acts, and it was imposed in an *in rem* proceeding. It was also early held that property could be forfeited without a prior criminal conviction[20] and that the time of forfeiture would relate back to the time of the offense even as against a bona fide purchaser for value.[21] *In rem* forfeitures were rationalized by the personification fiction. Personal guilt was not

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12 See generally Wroth, The Massachusetts Vice Admiralty Court and the Federal Admiralty Jurisdiction, 6 Am.J. Legal Hist. 250 (1962).

13 5N. Dane, A General Abridgement and Digest of American Law 4 (1824).

14 J. Goebel & T. Naughton, Law Enforcement in Colonial New York 712–13, 716 (1944).

15 See e.g., Respublica v. Doan, 1 U.S. (1Dall.) 90, 95 (Pa. 1784) (forfeiture following outlawry).

16 A. Scott, Criminal Law in Colonial Virginia 109 (1930).

17 Act of April 30, 1790, ch. 9, § 24, 1 Stat. 112, 117 (1790) codified at 18 U.S.C. § 3563 (1982) (repealed eff. Nov. 1, 1986).

18 United States v. 1960 Bags of Coffee, 12 U.S. (8 Cranch) 398 (1814).

19 Id. The Supreme Court declared as "settled doctrine" in United States v. Stowell, 133 U.S. 1, 16–17 (1890) the rule that forfeiture takes place immediately upon the commission of the offense and the right to the property then vests in the government.

20 The Palmyra, 25 U.S. (12 Wheat.) 1, 15 (1827); see United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984) (neither jeopardy nor collateral estoppel precludes civil in rem forfeiture after criminal acquittal; civil character of proceeding is a question of legislative intent).

21 See supra notes 18 and 19.

implicated. The prosecution was brought not against the owner, but the thing itself, and judgment was rendered against the whole world.

The Civil War brought about a change in the law of forfeiture. Traditional treason prosecutions could not be brought against most Rebels, for they were safely behind Confederate lines. Congress' solution was civil *in rem* forfeiture proceedings[22] which were eventually upheld by the Supreme Court.[23] Constitutional attacks on civil *in rem* forfeitures were turned back again by the Supreme Court[24] when they were used during prohibition to suppress the traffic in illicit alcohol. The constitutional validity of *in rem* civil forfeitures today is settled beyond question.[25] It remains for the new generation of procedurally complete and commercially oriented state statutes, such as this Model Act, to improve on the long tradition of forfeiture.[26]

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22 See generally, J. Randall, The Confiscation of Property During the Civil War (1913).

23 See 3C Warran, The Supreme Court in United States History 38–139 (1922); infra note 32.

24 J.W. Goldsmith, Jr. –Grant Co. v. United States, 254 U.S. 505 (1921).

25 Calero–Toledo v. Pearson Yacht Co., 416 U.S. 663, 680–83 (1974). The United States Supreme Court has upheld all manner of federal forfeitures for 200 years. See United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984) (neither jeopardy nor collateral estoppel prevents *in rem* forfeiture after criminal acquittal); Russello v. United States, 464 U.S. 16 (1983) (RICO *in personam* forfeiture); Calero–Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) (owner's innocence is no defense to forfeiture); United States v. Stowell, 133 U.S. 1,16, 17 (1890) (forfeiture takes place immediately upon the commission of the offense); Origet v. United States, 125 U.S. 240 (1888) (statute providing for forfeiture of misdeclared cargo upon owner's conviction may also be enforced in separate civil *in rem* proceeding); Tyler v. Defriees, 78 U.S. (11 Wall.) 331 (1871) (Civil War Confiscation statutes upheld); Miller v. United States, 78 U.S. (11 Wall.) 268 (1871); McVeigh v. United States, 78 U.S. (11 Well.) 259 (1871); United States v. Brig Malek Adhel, 43 U.S. (2 How.) 210 (1844) (innocence of owner of ship no defense); The Palmyra, 25 U.S. (12 Wheat.) 1, 15 (1827) (no prior criminal conviction of claimant necessary for forfeiture); The Amy Warwick, 1. F. Cas. 808, 811 (D. Mass 1862) (ship lawfully seized as prize of war from "enemy" Richmond, VA. businessmen), aff'd sub. nom. The Prize Cases, 67 U.S. (2 Black) 635 (1863); United States v. LaVengeance, 3 U.S. (3 Dall.) 297 (1796) (no jury required in *in rem* action).

26 The foregoing discussion of forfeiture history closely follows a portion of a draft of Model State Legislation on Sophistication Criminal Activity edited for dissemination to state governments at the request of the National Association of Attorneys General (NAAG) RICO Committee. The draft, in turn, relies extensively on the research and writing of an American Bar Association ad hoc RICO committee, which was made available by the committee to NAAG for the purpose of the model legislation commentary.

TABLE OF CONTENTS
FOR THE
INTRODUCTION TO BASIC CONCEPT OF FORFEITURE

INTRODUCTION*
TO
BASIC CONCEPTS
OF
FORFEITURE

EVIDENCE & DEFENSES

The forfeitability of property depends upon: (l) The scope of the forfeiture statute involved; (2) the kinds of evidence usable to prove forfeiture; and (3) the existence of any defenses. These questions are so interrelated that it is difficult to discuss one, without discussing the others. Nevertheless, we must start somewhere.

Because a knowledge of the evidentiary rules and defenses is fundamental to an understanding of forfeiture, they are discussed first. This provides an overview of the law and facilitates the later use of examples to explain the forfeiture statutes.

A. FORFEITURES ARE CIVIL ACTIONS AGAINST PROPERTY

Unless a forfeiture statute expressly requires a conviction, it is considered a civil action against property, totally independent of any criminal action against anyone.

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See Model Asset Seizure and Forfeiture Act (1991) (MASFA) § 12. *In Rem* Proceedings and § 13. *In personam* proceedings.

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Authorities

S.Ct: Calero-Toledo v. Pearson Yacht Leasing Co., 94 S.Ct. 2080 (1974).

10 Cir: U.S. v. One (1) 1975 Thunderbird, 576 F.2d 834 (1978); Bramble v. Richardson, 498 F.2d 968 (1974).

*** This introduction is a reprinting of Sections of the Drug Enforcement Administration's (DEA) Drug Agents' Guide to Forfeiture of Assets (1987 Revision) with 1990 Supplement. The DEA has graciously agreed to allow use of their Guide to facilitate the reader's understanding of forfeiture in general and the Model Asset Seizure and Forfeiture Act (MASFA) in particular. The following changes have been made to the Guide material: (1) the materials has been reformatted to be consistent with the remainder of the book; (2) references to the MASFA have been inserted; and (3) supplement cases have been inserted into the appropriate sections. For a copy of the DEA Guide, contact Office of Chief Counsel, Drug Enforcement Administration, U.S. Department of Justice, 1405 I Street, N.W., P.O. Box 28356, Washington, D.C. 20038, (202) 307-7634.**

9 Cir:	Wiren v. Eide, 542 F.2d 757 (1976); U.S. v. One 1970 Pontiac GTO, 529.F.2d 65 (1976); U.S. v. One 1967 Ford Mustang, 457 F.2d 931 (1972); U.S. v. One 1967 Buick Riviera, 439 F.2d 92 (1971); U.S. v. Bride, 308 F.2d 470 (1962).
8 Cir:	U.S. v. Rapp, 539 F.2d 1156 (1976); Glup v. U.S., 523 F.2d 557 (1975); Compton v. U.S., 377 F.2d 408 (1967).
6 Cir:	Epps v. Bureau of Alcohol, Tobacco & Firearms, 495 F.2d 1373 (1974).
5 Cir:	U.S. v. 110 Bars of Silver, 508 F.2d 799 (1975); U.S. v. One (l) 1969 Buick Riviera, 493 F.2d 553 (1974); U.S. v. Burch, 294 F.2d l (1961).
AL:	Reeder v. State, 314 So.2d 853 (1975).
CA:	People v. One 1941 Chevrolet Coupe, 231 P.2d 832 (1951).
DC:	$1,407 v. District of Columbia, 242 A.2d 217 (App. 1968).
FL:	Knight v.State, 336 So. 2d 385 (App. 1976)
IL:	People v. Snyder, 52 Ill.App.3d 612 (197); People v. One 1968 Cadillac Auto, 281 N.E.2d 776 (App. 1972).
IA:	McReynolds v. Municipal Court of City of Ottumwa, 207 N.W.2d 792 (1973).
MD:	State v. Greer, 284 A.2d 233 (App. 1971); Prince George's County v. Blue Bird Cab Company, 284 A.2d 203 (App. 1971).
MA:	Com. v. One 1977 Pontiac Grand Prix Auto, 378 N.E.2d 69 (App. 1978).
MI:	People v. One 1973 Pontiac Auto, 269 N.W.2d 537 (App. 1978).
NJ:	State v. One (l) Ford Van, 381 A.2d 387 (App. 1977); Kutner Buick, Inc. v. Strelecki, 267 A.2d 549 (Superior 1970).
NM:	State v. Ozarek, 573 P.2d 209 (1978).
OH:	Sensenbrenner v. Crosby, 306 N.E. 2d 413 (1974).
PA:	Com. v. Landy, 362 A.2d 999 (1976).
SC:	State v. Petty, 241 S.E.2d 561 (1978).
SD:	State v. One 1966 Pontiac Auto, 270 N.W.2d 362 (1978).
TN:	Fuqua v. Armour, 543 S.W.2d 113 (App. 1958).

TX: Mcffee v. State, 318 S.W.2d 113 (App. 1958).

VA: Com. v. One 1970, 2 Dr. H.T. Linc., 186 S.E.2d 279 (1972).

Discussion

To understand this principle it is helpful to distinguish between legal proceedings *in personam* and legal proceedings *in rem*. It is also helpful to distinguish between criminal proceedings and civil proceedings.

1. *In personam v. In Rem*

In personam refers to any legal proceeding directed against an individual, that will determine his personal obligations, rights, duties or liabilities.

In rem refers to any legal proceeding directed solely against property, that will determine the ownership of that property.

The differences between these two types of proceedings are very significant:

a. The defendant in an *in personam* proceeding is a person; the defendant in an *in rem* proceeding is an object, or property.

b. *In personam* proceedings may impose personal obligations or liabilities upon the parties to the action; *in rem* proceedings are limited to determining ownership of property and cannot impose personal obligations on anyone. Freedman v. Alderson, 7 S.Ct. 165 (1886).

c. *In personam* decisions affect only the parties to the proceedings; in rem decisions affect "the whole world" – including unknown claimants. Van Oster v. Kansas, 47 S.Ct. 133 (1926); Gelston v. Hoyt, 3 Wheat. 247 (1818).

d. The power of a court to issue *in personam* decisions depends upon its ability to get personal jurisdiction over the parties; the power of a court to issue *in rem* decisions does not depend upon having jurisdiction over anyone. Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565 (1878).

In short, *in personam* and *in rem* proceedings are distinct legal actions, totally independent of one another. Readers interested in a more detailed analysis of in rem actions should see *Fraser, Actions in rem*, 34 Cornell Law Quarterly 29–49 (1948). And see Shaffer v. Heitner, 97 S.Ct. 2569 (1977).

MD: U.S. v. Miscellaneous Jewelry, 667, F. Supp. 232 (1987), aff'd One 1985 Nissan 300 ZX, etc. v. U.S., 889 F.2d 1317 (4th Cir. 1989), under "Claimants (RE Standing)," infra;

ED MI: Home v. Office of the United States Attorney General, 662 F. Supp. 237 (1987), under "Claimants (RE Standing), infra;

ED WI: U.S. v. Haro, 893 F. 2d 1512 (7th Cir. 1990), under "Rebuttable Presumption (RE Sec. 853(d)," infra.

2. Civil v. Criminal

Law is broadly divided into two categories: civil and criminal. The rules of evidence the rules of procedure, the standards of proof, and the available defenses differ with each category.

Generally, the purposes of civil law are to determine private rights, and to compensate for harm. The purpose of criminal law, on the other, is to punish wrongdoers. But this division, although useful, has never been perfect. Punishment can be, and often has been, imposed in civil proceedings. For example, if you deliberately harm someone, he can sue you in a civil action for his losses (compensation). He can also demand "punitive damages" or smart money." Punitive damages are a civil "fine" intended to punish deliberately harmful conduct. Prosser, Law of Torts, 4th ed. (1971).

Many statutes are "penal" in nature even though they are civil in form. The federal Controlled Substances Act, for example, contains a $25,000 civil penalty for violations of the law by doctors, pharmacies, drug companies and other drug registrants (21 U.S.C. 842). For an excellent discussion of so-called "civil" punishment, see Clark, Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis, 60 Minnesota Law Review 379- 500 (1976).

Forfeiture of otherwise legitimate property is a punishment that can be imposed in either civil or criminal actions.

Authorities

6 Cir: U.S. v. 57,261 Items of Drug Paraphernalia, 895 F.2d 955 (1989); cert, denied, ___U.S. ___ L.Ed.2d ___; 110 S.Ct. 324, under "Drug 'Use' Objects are Not Forfeitable," infra.

7 Cir: U.S. v. Tit's Cocktail Lounge, 873 F.2d 141 (1989), under "Rule 7 Notice Not Required," infra.

9 Cir: U.S. v. Henderson, 844 F.2d 685 (1988). (A civil forfeiture action is civil in nature for purposes of 28 U.S.C. Sec. 1252, regarding appeal to the United States Supreme Court).

SD FL: U.S. One Single Family Residence Located at 2820 Taft Street, etc., 710 F. Supp. 1351 (1989). (A civil forfeiture action will be stayed pending completion of the concurrent criminal forfeiture action upon a showing of good cause. The civil discovery could substantially interfere with a

prejudice the prosecution of the criminal action because civil discovery is much more expansive than criminal discovery.

MA: U.S. v. Parcel of Land and Residence and Improvements Located Thereon a 5 Bell Rock Road' etc., No. 88-1581-Mc. (1989)(unpublished). (A civil *in rem* forfeiture action is independent of a criminal *in personam* forfeiture action for purposes of the Double Jeopardy Clause. However, these actions are related for purposed of exclusion of evidence. Thus, evidence determined excludable in the criminal action is also excludable in the civil action).

ED NC: U.S. v. One 1985 Mercedes Benz, etc., 716 F. Supp. 211 (1989), under Innocence of an Owner is No Defense to Civil Forfeiture," infra.

MD NC: U.S. v. 30.80 Acres, etc., 665 F. Supp. 422 (1987). The shifting burden of proof of 21 U.S.C. Sec. 881 (a)(7) is constitutional because the statute is "not criminal enough" to place the entire burden of proof on the government. Where multiple tracts of land are involved, each tract must have been used to facilitate drug tranactions to be forfeitable. [The Fifth Amendment places the burden of proof in a criminal action on the government, as the defendant has the right against self-incrimination. The phrase "not criminal enough" should be construed as "quasi-criminal." Arguably, any criminal action, however "criminal" triggers Fifth Amendment protections.]

3. Criminal Forfeiture

In ancient times, in England, the property of a convicted felon was forfeited to the King as a form of criminal fine. The proceedings to establish the forfeiture were *in personam* (against the felon) and their success depended upon proving the felon was criminally convicted. See Calero-Toledo v. Pearson Yacht Co., 94 S.Ct. 2080 at 2091 (1974).

In 1790, the first Congress of the United States prohibited these "criminal" forfeitures. (1 Stat. 117, c.9, Sec. 24, now 18 U.S.C. § 3563). As a result, criminal forfeitures were unheard of in the United States for 180 years. In 1970, Congress resurrected the concept by inserting criminal forfeiture provisions in two federal statutes:

> (1) The Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. § 1963); and
> (2) The Controlled Substances Act, Continuing Criminal Enterprise Offense (21 U.S.C. § 848). In 1984, the Congress added a third criminal forfeiture provision (21 U.S.C. § 853) to reach the property of persons convicted of any felony involving controlled substances.

Like their ancient predecessors, these three criminal forfeiture provisions are in personam actions against a criminal defendant, and are absolutely dependent upon convicting the defendant of the substantive offense.

4. Civil Forfeiture

There was a second form of forfeiture recognized in old England. It was an in rem proceeding against property which had been involved in some wrong. The proceedings were totally independent of any criminal action taken against the owner. The Palmyra, 12 Wheat. 1, 6 L.Ed. 531 (1827).

All forfeiture statutes were presumed to be civil, *in rem* proceedings, unless they expressly required a criminal conviction as a condition to forfeiture. In Re Various Items of Personal Property, 51 S.Ct.. 282 (1931).

The American Colonies adopted these civil, *in rem* forfeitures and began applying them to contraband imports and to ships transporting contraband. C.J. Henry Co. v. Moore, 63 S.Ct. 499, 503 (1943); Surrency, The Courts in the American Colonies, 11 Am. Jour. Legal History 253, 261 (1967).

The first Congress of the United States passed civil, *in rem* forfeitures on pirate ships, ships violating the customs laws, and slave ships. See Calero-Toledo v. Pearson Yacht Leasing Co., 94 S.Ct. 2080, at 2092-2093 (1974).

For more than 200 years, Congress has continued to pass civil, *in rem*, forfeiture statutes on a wide range of property:

8 U.S.C. § 1324, Conveyances Transporting "Wetbacks"

15 U.S.C. § 257e, Certain Hampers & Baskets

15 U.S.C. § 1265, Certain Hazardous Substances

18 U.S.C. § 492, Counterfeiting Paraphernalia

18 U.S.C. § 1465, Obscene Materials

18 U.S.C. § 1952, 1953, Wagering Paraphernalia

18 U.S.C. § 2512, Wiretapping Paraphernalia

18 U.S.C. § 3612, Bribe Money

19 U.S.C. § 1305, Obscene Matter

19 U.S.C. § 1497, Undeclared Imports

19 U.S.C. § 1591a, Things Illegally Brought into the Country

19 U.S.C. § 1595, Conveyances for Illegal Imports

21 U.S.C. § 334, Adulterated Food & Drugs

21 U.S.C. § 881, Illicit Drugs & Related Items

22 U.S.C. § 401, War Materials

26 U.S.C. § 5607–5671, Moonshine Paraphernalia

26 U.S.C. § 5685, Firearms & Destructive Devices

26 U.S.C. § 5763, Illicit Tobacco Paraphernalia

26 U.S.C. § 7301–7303, Property Violating the Revenue Laws

31 U.S.C. § 1102, Currency Illegally Exported or Imported

33 U.S.C. § 384, 385, Pirate Vessels

46 U.S.C. § 325, Vessels Violating Their Licenses

49 U.S.C. § 782, Conveyances Transporting Contraband

Because these forfeitures have the effect, if not the purpose, of punishing owners, they have been referred to as "quasi-criminal" in character. Boyd v. U.S., 6 S.Ct. 524 (1886); One 1958 Plymouth Sedan v. Com. of Penn., 85 S.Ct. 1246 (1965); U.S. v. $5,372.85 In Coin & Currency, 91 S.Ct. 1041 (1971); Commonwealth v. Landy, 362 A.2d 999 (PA. 1976). As we shall see, this characterization is relevant only to the application of the "Exclusionary Rule" to forfeitures.

For all other purposes, civil, in rem forfeitures are considered independent civil proceedings. In Re Various Items of Personal Property, 51 S.Ct. 282 (1931).

B. PROBABLE CAUSE IS ENOUGH TO BEGIN A CIVIL FORFEITURE

A preliminary showing of "probable cause" to believe property was used illegally is all that is needed to start a forfeiture action. Proof beyond a reasonable doubt is not required. A prima facie case is not required. The same probable cause standard used to arrest, search or seize is enough to begin a forfeiture.

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See MASFA § 12 (g) State has initial burden of showing probable cause for the forfeiture of the property.

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Authorities

19 U.S.C. § 1615

S.Ct: One Lot of Emerald Cut Stones v. U.S., 93 S.Ct. 489 (1972); of showing Brinegar v. U.S., 69 S.Ct. 1302 (1949); Locke v. U.S., 7 Cranch **cause for the** (US) 339, 3 L.Ed. 364 (1813).

10 Cir: U.S. v. One (1) 1975 Thunderbird, 576 F.2d 834 (1978); Bramble v. Richardson, 498 F.2d 968 (1974); U.S. v. One 1950 Chevrolet, 215 F.2d 482 (1954).

9 Cir: Wiren v. Eide, 542 F.2d 757 (1976); U.S. v. One Twin Engine Beech Airplane, 533 F.2d 1106 (1976); U.S. v. One 1970 Pontiac GTO, 529 F.2d 65 (1976); U.S. v. One 1967 Buick Riviera, 439 F.2d 92 (1971); U.S. v. Andrade, 181 F.2d 42 (1950).

8 Cir: U.S. v. $93,685.61 in U.S. Currency, 730 F.2d 571 (1984); U.S. v. Milham, 590 F.2d 717 (1979); U.S. v. Rapp, 539 F.2d 1156 (1976); U.S. v. One 1972 Toyota Mark II, 505 F.2d 1162 (1974); Compton v. U.S., 377 F.2d 408 (1976); U.S. v. One 1961 Lincoln Continental, 360 F.2d 467 (1966); Ted's Motors v. U.S., 217 F.2d 777 (1954).

7 Cir: U.S. v. Edwards, No. 88-3286 (Sept. 20, 1989). (Sufficient probable cause does not require showing a direct connection between the seized property and the illegal activity, or an actual showing of criminal activity. Rather, probable cause requires only a probability or substantial chance of criminal activity based on the totality of the circumstances. U.S. v. One 1957 Lincoln Premiere, 265 F.2d 734 (1959); U.S. v. One 1949 Pontiac Sedan, 194 F.2d 756 (1952).

6 Cir: U.S. v. Lots 12, 13, 14, and 15, Keeton Heights - etc., 869 F.2d 942 (1989), under "Innocence of an Owner is No Defense to a Civil Forfeiture." 895 F.2d 955 (1989); cert.denied; ___U.S. ___, ___ L.Ed.2d. ___; 110 S.Ct. 324. infra; U.S. v. One 1984 Cadillac, 888 F.2d 1133 (1989). (The substantial connection standard does not apply to a forfeiture under 21 U.S.C. Sec. 881(a)(4). The government need only show probable cause, which is more than mere suspicion, but less than *prima facie* proof). U.S. v. One 1975 Mercedes 280S, 590 F.2d 196 (1978); U.S. v. One 1965 Buick, 392 F.2d 672 (1968); Colonial Finance Co. v. U.S., 210 F.2d 531 (1954).

5 Cir: U.S. v. One 1975 Ford Pickup Truck, 558 F.2d 755 (1977); U.S. v. One 1972 Wood, 19 Foot Custom Boat, 501 F.2d 1327 (1974); U.S. v. One (1) 1971 Chevrolet Corvette, 496 F.2d 210 (1974); Bush v. U.S., 389 F.2d 285 (1968); Rubin v. U.S., 289 F.2d 195 (1961); Associates Investment Co. v. U.S., 220 F.2d 885 (1955); W.E.Dean & Co. v. U.S., 171 F.2d 468 (1948).

3 Cir: U.S. v. One 1977 Lincoln Mark V, 643 F.2d 154 (1981); U.S. v. One 1964 Ford T-Bird, 445 F.2d 1064 (1971); U.S. v. One 1950 Buick Sedan, 231 F.2d 219 (1956).

2 Cir: Commercial Credit Corp v. U.S., 58 F.2d 195 (1932); And see U.S. v. One 1974 Cadillac Eldorado, 575 F.2d 344 (1978).

1 Cir: U.S. v. One 1974 Porsche 911-S, 682 F.2d 283 (1982); U.S. v. Davidson, 50 F.2d 517 (1931); U.S. v. Blackwood, 47 F.2d 849 (1931).

CD CA: U.S. v. Real Property Located at 25,231 Mammoth Circle, etc., 659 F. Supp. 925 (1987), under "Is There a Statutory Warrant Requirement?" infra.

ND IL: U.S. v. 124 East North Avenue, etc., 651 F. Supp. 1350 (1987), under "Real Propety – Facilitation Forfeiture." infra.

ED MI: U.S. v. 11,348 Wyoming, Detroit, Michigan, 705 F. Supp. 352 (1989). (Probable cause in a civil forfeiture action is determined by the substantial connection test. Specifically, the government must show: (1) a reasonable ground for belief that there was an unlawful exchange of controlled substances; and (2) a substantial connection between that exchange and the property tracing the drug proceeds to the property. Probable cause is a reasonable ground for belief of guilt, which is more than mere suspicion but less than *prima facie* proof). The substantial connection test is implied from the legislative history of 21 U.S.C. Sec 881. The actual statute does not expressly include this requirement. Probable cause for civil forfeiture is the same as that for arrests, searches, and seizures. Factors to consider in a probable cause determination include employment status, purchase of real property, and purchase of luxury vehicles. A claimant's connection that he was a successful gambler is not relevant. There is a good discussion of collateral estoppel. [As will be seen further under "Discussion (RE Probable Cause and Standard of Proof)," not all jurisdictions require the substantial connection test for probable cause. Also, some jurisdictions apply a strict probable cause standard for searches, seizures, and arrests.]

ED MT: U.S. v. Thirteen Thousand Dollars, 718 F. Supp. 1441 (1989). The government need not prove full probable cause until time of trial.

WD NY: U.S. v. $37,780 in U.S. Currency, No. CIV-89-743E, Oct. 31, 1989 (unpublished). (Illegally seized property must be returned to its owner even if information later discovered establishes probable cuase for forfeiture). [Most courts hold that independent, untainted evidence can support a forfeiture.]

DC: $1,407.00 v. District of Columbia, 242 A.2d 217 (App. 1968).

GA: (S.D. Brunswick) U.S. v. $87,279 & Cashiers Checks, 546 F.Supp. 1120 (1982).

IL: People v. One 1965 Oldsmobile, 284 N.E. 2d 646 (1972).

MD: Prince George's County v. Blue Bird Cab Company, 284 A.2d 203 (App. 1971).

NJ: State v. McCoy, 367 A.2d 1176 (1976).

NY: U.S. v. Banco Cafetero Intern, 608 F.Supp 1394 (N.Y. S.D. 1985).

PA: Com. v. Landy, 362 A.2d 999 (1976).

SC: State v. Petty, 241 S.E.2d 561 (1978).

TN: Lettner v. Plummer, 559 S.W.2d 785 (1977).

Discussion

In a criminal case, the government must prove the defendant's guilt "beyond a reasonable doubt." In certain exceptional non-criminal cases, a party must prove his cause by "clear, strong and convincing evidence." In the vast majority of civil actions, a party can prove his case by a simple "preponderance of evidence." These three standards of proof are merely legal terms for "almost certainly true," "highly probably true," and simply "probably true." McCormick, Handbook of the Law of Evidence, Sec. 339 (1972); McBaine, Burden of Proof: Degrees of Belief, 32 Calif.L.Rev. 242 (1944).

Proof Beyond A Reasonable doubt	=	Almost Certainly True
Clear-Convincing Evidence	=	Highly Probably True
PREPONDERANCE OF EVIDENCE	=	PROBABLY TRUE

With the exceptions of the States of. Texas and Oklahoma (Amrani-Khaldi v. State, 575 S.W.2d 667, Tex.App. 1978; 63 OKLA. STAT. Sec.2-506G), all federal courts and virtually all state courts use the "**preponderance of evidence,**" or "**probably true,**" test in civil forfeiture proceedings. The government has the initial burden of showing "**probable cause**" to believe the property is forfeitable. If this showing is contested, the court or jury is left to determine which side's evidence is more convincing, or more "**probable**." Nothing more is required. Neither "**proof beyond a reasonable doubt,**" nor "**clear and convincing evidence**" is required to prove a civil forfeiture.

This "**probable cause**" standard of proof in civil forfeiture cases was adopted by the federal government as far back as 1790 when the first Customs Laws were written (1 Stat. 678). It remains unchanged in existing federal forfeiture statutes (19 U.S.C. § 1615).

What is "**probable cause?**" The heart of all definitions of probable cause is "**a reasonable ground for belief of guilt.**" It exists where:

". . . the facts and circumstances within their (the officers) knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." U.S. v. One 1950 Buick Sedan, 231 F.2d 219 (3 Cir. 1956) (citing Brinegar v. U.S.).

The tests for determining probable cause are the same for arrests, searches, and seizures. See DEA's Drug Agents' Guide to Search and Seizure, pages 33–51 (1978), for a detailed discussion of these rules.

Although governments need only show probable cause, they dare not show less. Seizing or keeping property without probable cause is unconstitutional. All seizures of private property must be based upon probable cause to believe that it is forfeitable, or that it is needed as evidence. U.S. v. Premises Known as 608 Taylor Ave., 584 F.2d 1297 (3 Cir. 1978); McClendon v. Rosetti, 460 F.2d 111 (2 Cir. 1972); Fell v. Armour, 355 F.Supp. 1319 (MD TENN. 1972).

Discussion

(Re Probable Cause and Standard of Proof) (p.11)

S.Ct.: Anderson v. Creighton, 483 U.S. 635 (1987); 107 S.Ct., 3034; 97 L.Ed. 2d. 523. (The test to determine if qualified immunity attaches for an illegal search is the objective question whether or not a reasonable officer could have believed that the warrantless search was lawful, in light of clearly established law and the information the searching officer had at the time of the illegal search. The subjective belief of the officer is irrelevant); U.S. v. Villamonte-Marquez, 462 U.S. 579 (1983); 77 L.Ed. 2d 22; 103 S.Ct. 2573; on remand, U.S. v. Villamonte-Marquez, 714 F.2d 428 (5th Cir. 1983). (Under 19 U.S.C. SEc. 1581(a), a customs officer may, without any suspicion of wrongdoing, board for inspection of documents a vessel located in waters providing ready access to the open sea. Such a stop does not violate the Fourth Amendment.) (The Court suggests that while customs officers can stop a vessel in a ship channel without any suspicion of wrongdoing, they cannot so stop a car on a public highway near a border.)

1 Cir: Also see In Re Warrant to Seize One 1988 Chevrolet Monte Carlo, 861 F.2d 307 (1988), under "Is There a Statutory Warrant Requirement? infra.

ED MI: Also see U.S. v. Marks, 703 F.Supp. 623 (1988) under "Innocence of an Owner is No Defense to Civil Forfeiture." infra.

SD NY: Also see U.S. v. $134,752.00 in U.S. Currency, More or Less, 706 F.Supp. 1075 (1989) under "Claimants (RE Standing)." infra.

RI: U.S. v. Property Known as 6 Patricia Drive, etc., 705 F.Supp.710 (1989). (The court follows the First Circuit's three tier system, which imposes increasingly stringent burdens of allegation and proof on the government throughout the forfeiture process. First, the warrant for seizure stage merely requires probable cause for the warrant. A warrantless seizure is allowed only when the seizure immediately follows the event leading to probable cause and there are exigent circumstances. Second, the complaint for forfeiture stage requires that specific facts be alleged supporting a reasonable belief that the specific property is tainted and thus forfeitable. Third, the forfeiture proceeding stage requires the most stringent probable cause connecting the property with illegal drug transactions.

Examples

1. You telephone a drug dealer at his city home and ask him to sell you heroin. After agreeing on an amount and a price, he asks you to meet him at a bar just outside the city where the transaction will take place. You drive to the bar, enter and order a drink. Within twenty minutes, he enters the bar, and the two of you walk to the mens' room to make the exchange. Afterward you place him under arrest for distribution of heroin. His car is parked outside in the bar's parking lot. Transportation of drugs for the purpose of sale subjects a conveyance to forfeiture under both state and federal law. Is his car seizable for forfeiture?

   Yes. Probable cause to believe the car transported the heroin is enough to seize it for forfeiture. To show probable cause, you need only show facts and circumstances which make it "probably true" that the dealer used his car to transport the heroin to the bar. You need not show it is "highly probably true" (clear and convincing evidence), nor "almost certainly true" (proof beyond a reasonable doubt). Here, you have no direct evidence to show the car transported drugs: no one saw heroin in the car, and no one saw the car driven to the bar. But the circumstantial evidence is very strong. How else could the dealer have gotten to the bar? If he had some other means of transportation, why would his car be parked outside? Most reasonable people would conclude it is at least "probably true" that he used the car to transport the heroin. U.S. v. One 1950 Buick Sedan, 231 F.2d 219 (3 Cir. 1956); U.S. v. One 1949 Pontiac Sedan, 194 F.2d 756 (7 Cir. 1952); and U.S. v. One 1975 Linc. Cont., 72 F.R.D. 535 (SD NY 1976).

2. On two occasions you meet with W, at a bar in Minneapolis, Minnesota, where he sells you small amounts of heroin. At the third meeting, W asks you to drive him to a local motel. He explains that his longtime source of drugs is a man from Wisconsin. His source has just been indicted in Wisconsin so he's fled to Minnesota and is living at the motel. Once at the motel, W asks you to wait in the car. Other officers follow W as he enters the motel and goes to M's room. When W leaves the room, he walks directly back to your car and gives you the heroin. You drive W away from the motel and place him under arrest. You obtain a warrant to search M's room. While executing the warrant you find a large amount of money (some of which is government funds), a large amount of heroin,

and a sophisticated torsion balance used for measuring drugs. You arrest M. The motel manager informs you that M has a van with Wisconsin tags parked at the motel. Is the van forfeitable?

Yes. Probable cause to believe M's van transported the heroin is enough to seize it for forfeiture. Although you have no direct evidence to show M transported drugs in his van, there is enough circumstantial evidence to conclude it is "probably true." Clearly, M is an out-of-state drug supplier who is conducting drug sales out of his motel room. Common sense would lead most reasonable people to believe that M used his van to bring the drugs from Wisconsin. The van is seizable for forfeiture. See U.S. v. Milham, 590 F.2d 717 (8 Cir. 1979).

3. You meet with F at his home. He agrees to sell you heroin which he claims to have in his immediate possession. He does not show it to you. Instead, he says the deal cannot take place in his home. He insists you follow him to an apartment across town where the transaction will take place. You agree. Following F's instructions, you drive him to an alley behind a low rent apartment complex. He asks you to accompany him inside to make the deal. You refuse. You demand the sale take place in the alley. F goes into the apartment for several minutes. As he returns, a pink Cadillac suddenly pulls into the alley. F's wife and young children are in the Cadillac. F walks over and leans into the open window of the Cadillac and talks to his family. At one point, he reaches his hand into the car. Finally, F comes back to you, reaches into his pants pocket and gives you the heroin. You place him under arrest. Is the pink Cadillac seizable for forfeiture?

No. You need probable cause to believe the heroin came from the Cadillac before you can seize it for forfeiture. The facts show three possible sources of the drug: (1) F could have obtained it at his home and had it in his possession the entire time; (2) F could have picked up the heroin from the apartment while he was alone inside; and (3) F could have obtained the heroin from the Cadillac when he reached into the car's window. Of these three possibilities, the first seems most likely. F stated that at the start that he had the drugs on him but wanted to make the exchange away from his home. When you arrived at the apartment, he asked you inside to complete the sale.

Why would he ask you inside if he didn't have the drugs? And, it seems unlikely a drug dealer would unnecessarily involve his young children in a drug transaction. To a reasonable mind, the evidence points to F having possession of the heroin before the Cadillac arrived. It is not "probably true" that the drugs came in the car. Therefore, the Cadillac cannot be seized for forfeiture. See U.S. v. One 1974 Cadillac Eldorado, 575 F2d 344 (2 Cir. 1978).

4. You have a warrant to arrest S. He is a local banker who has been indicted as a financier of a large drug ring. You locate S driving his Rolls Royce. You arrest him and impound his car for safekeeping. No contraband if found on S, nor in his car. Within a few days, S's lawyer calls you and asks to make arrangements for return of the Rolls Royce. Angrily, you tell him the car will not be returned because it is possible evidence and might also be forfeitable. Several days later, S's lawyer comes to your office with a release signed by the prosecutor, certifying that the car is not needed as evidence and that the prosecutor's office does

not object to its return. The lawyer also presents evidence that S is the true owner of the car and that the lawyer is authorized to take possession. Although you suspect that S might have bought the car with illegal profits, you have absolutely no evidence to prove it. Probable cause for forfeiture clearly does not exist. Must you return the car? Can you be sued if you refuse?

Yes, to both questions. Seizing or keeping property without probable cause is unconstitutional. All seizures of private property must be based upon probable cause to believe it is forfeitable, or that it is evidence of a crime. Here the car is not evidence. And there is no showing of probable cause to forfeit. Although you legally took temporary custody of the car for safekeeping, you must now return it. Refusal to return it is unlawful. See McClendon v. Rosetti, 460 F.2d Ill (2 Cir. 1972).

Authorities

2 Cir: U.S. v. One 1986 Mercedes Benz, 846 F.2d (1988), under "Authorities (RE Transportation of Drugs for Any Purpose, In Any Amount, Subjects a Vehicle to Federal Forfeiture.)" infra.

5 Cir: U.S. v. One Gates Learjet Serial No. 28004, 861 F.2d 868 (1988). (Probable cause does not exist where the drug trace, 10-to-14/100,000th of an ounce, was not even visible to the naked eye alone and measurable only through sophisticated scientific procedures. Probable cause is based on the totality of the circumstances, not just the quantity of the contraband. However, small amounts of proscribed substances are sufficient to prove probable cause only if: (1) they are recognizable and usable, and (2) there is additional evidence.)

9 Cir: U.S. v. $215,000 in U.S. Currency, 845 F.2d 857 (1988), under "Large Sums at Airports - Dog 'Sniffs'" infra. U.S. v. Dickerson, 857 F.ed 1241 (1988), under "Large Sums at Airports - Dog 'Sniffs'." infra.

ND GA: U.S. v. U.S. Currency Totalling $29,500.00, 677 F. Supp. 1181 (1988); aff'd mem., U.S. v. $29,000.00 in U.S. Currency, 866 F.2d 1423 (11th Cir. 1989). (Probable cause for seizure exists under the following fact pattern: (1) the individual was at an airport and traveling under a false; (2) he gave conflicting information as to the purpose of his trip; (3) he had two prior drug convictions; (4) he was currently under investigation for cocaine trafficking in the city where his plane had originated; and (5) the destination city was a known entry point for cocaine); U.S. v. U.S. Currency Totalling $92,000.00, 707 F. Supp. 540 (1989), under "Large Sums at Airports - Dog 'Sniffs'". infra.

ND IL: U.S. v. One 1982 Buick Regal, etc., 670 F. Supp. 808 (1987). Probable cause for forfeiture exists where: (1) a vehicle was used to travel to the place where the drugs were exchanged; and (2) wiretaps contained discussions of contraband transactions.

MA: U.S. v. One Lot of $99,870 in U.S. Currency, No. 88-0207-N (December 27, 1988)(unpublished). (The following facts support a probable cause finding: (1) a large amount of cash found in carry-on luggage at airport;

(2) cash in small denominations and wrapped in rubberbands; (3) contradicting statements regarding the source of the money (4) no documentation identifying the source of the money; (5) a destination city known to be a drug source (Miami); (6) absence of clothes or toiletries in the luggage; (7) recent arrest and indictment for possession of a controlled substance despite a subsequent *nolle prosequi*; and (8) denial of prior arrest).

ED MO: U.S. v. Three Thousand Five Hundred Fifty Dollars ($3,550.00), 684 F. Supp. 1026 (1988). (Probable cause does not exist for money seized pursuant to an undercover operation where no detials were finalized as to the date, time, place, amount of drugs, or amount of payment).

ED NC: U.S. V. $199,514 in U.S Currency, 681 F. Supp. 1109 (1988), under "Libel Complaint." infra.

ED NY: U.S. v. One 1984 Ford Bronco, 674 F. Supp. 424 (1987). (Probable cause forfeiture exists where a vehicle was used to convey claimant to building in which he delivered a bag of cocaine, and the bag had the fingerprints of an occupant of the vehicle. No drugs were actually found in the vehicle).

ED WI: U.S. v. $111,980 in U.S. Currency, 660 F. Supp. 247 (1987). (The following facts establish probable cause for forfeiture of items found at the crash sit of claimant's single-engine aircraft: (1) a large sum of money; (2) a scale; (3) a notebook with drug and price notations; (4) claimant's unemployment status; (5) claimant's lack of assets; and (6) the DEA agents opinion that these items indicated that the currency was furnished or intended to be furnished for drugs).

C. HEARSAY IS ADMISSIBLE TO ESTABLISH PROBABLE CAUSE

Hearsay evidence is admissible in a forfeiture proceeding to the same extent Judicially that it is admissible in any other "probable cause" hearing. It includes admissions of owners, declarations of persons in control of the property, statements of co-conspirators, and even tips from confidential informants.

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See MASFA § 11. Judicial Proceedings Generally; subsection (i). In determining probable cause or reasonable cause, the court may consider all evidence admissible in determining probable cause at a preliminary hearing or pursuant to search warrant statutes.

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Authorities

S.Ct.: Dobbins Distillery v. U.S., 96 U.S. 395 (1878); and see U.S. v. Harris, 91 S.Ct. 2075 (1971).

10 Cir: Interstate Securities Co. v. U.S., 151 F.2d 224 (1945).

9 Cir: U.S. v. 1982 Yukon Delta Houseboat, et al. 774 F.2d 1432 (1985); Ivers v. U.S., 581 F.2d 1362 (1978); U.S. v. One Twin Engine Beech Airplane, 533 F.2d 1106 (1976); D'Agostino v. U.S., 261 F.2d 154 (1958).

8 Cir: U.S. v. U.S. Currency $31,828, 760 F.2d 228 (1985); U.S. v. One 1972 Toyota Mark II, 505 F.2d 1162 (1974); Ted's Motors v. U.S., 217 F.2d 777 (1954).

6 Cir: U.S. v. One 1975 Mercedes 2805, 590 F.2d 196 (1978).

5 Cir: U.S. v. One 1964 Beechcraft Baron, 691 F.2d 725 (1982); Bush v. U.S., 389 F.2d 485 (1968); Turned – v. Camp, 123 F.2d 840 (1941).

3 Cir: U.S. v. Parcel of Real Property Known as 6109 Grubb Road, etc., 886 F.2d 61 (1989), under "Innocence of an Owner is No Defense to a Civil Forfeiture." infra.

2 Cir: Commercial Credit Corporation v. U.S., 58 F.2d 195 (1932).

1 Cir: U.S. v. One 1974 Porsche 911-S, 682 F.2d 283 (1982).

AL: (CONTRA) Reeder v.State, 314 So.2d 853 (1975).

CA: People v. One 1948 Chevrolet Convertible, 290 P.2d 538 (1955).

FL: U.S. v. One 1977 36-Foot Cigarette Ocean Racer, 624 F.Supp. 290 (1985).

IL: People v. Macias, 234 N.G.2d 783 (1968).

MA: U.S. v. One 1981 Ford F100 Pickup Truck, 577 F.Supp. 221 (1983).

NM: In Re One 1967 Peterbilt Tractor, 506 P.2d 1199 (1973).

PA: (CONTRA) Com. v. Landy, 362 A.2d 999 (1976).

TN: Lettner v. Plummer, 559 S.W.2d 785 (1977).

Discussion

Put simply, "hearsay" is generally something a witness has heard from a source outside of court, which he repeats in court in an effort to prove the truth of what the source said. Rule 801 of the Federal Rules of Evidence (28 U.S.C.) defines hearsay as "a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

The danger of admitting hearsay into evidence is that it frequently is untrustworthy: (1) The true source of the information was probably not under oath when he spoke; (2) the judge and jury cannot evaluate his truthfulness by watching and listening to him speak; and (3) the source is not available in court to be cross-examined about what he said. For these reasons, courts have

traditionally prohibited hearsay, except when it is needed and the circumstances provide some assurance it is trustworthy.

The Federal Rules of Evidence follow this approach. Rule 802 states: "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Probable cause to seize for forfeiture, like probable cause to search and arrest, is frequently based upon hearsay, such as:

1. Admissions of owners;

2. Declarations of persons in control of seized property;

3. Statements of co-conspirators; and

4. Tips from confidential informants.

Sometimes this hearsay is trustworthy enough by itself to establish probable cause; but usually it must be combined with other information to meet the probable cause standard. Aguillar v. Texas, 84 S.Ct. 1509 (1964); Spinelli v. U.S., 89 S.Ct. 584 (1969); Draper v. U.S., 79 S.Ct. 329 (1959). Too often, no one piece of information creates probable cause. Only by adding everything together, including hearsay, is probable cause established. Chief Justice Warren Burger recognized this in Smith v. U.C.:

> Probable cause is the sum total of layers of information and synthesis of what the police have heard, what they know, and what they observe as trained officers. We weigh not individual layers, but the laminated total. 358 F.2d 833 (D.C. Cir. 1966).

If, as we have already discussed, probable cause is all that need be shown to begin a civil forfeiture, and if hearsay is often an inseparable part of that probable cause, then hearsay evidence must be admissible to establish probable cause for forfeiture. Unfortunately, this logical conclusion seems to conflict with the general rule against admitting hearsay in judicial proceedings. Can this conflict be resolved?

There is no conflict if the hearsay fits within one of the traditionally recognized exceptions to the hearsay rules. A listing of these exceptions can be found in Rules 801, 803 and 804 of the Federal Rules of Evidence. A detailed discussion of the application of the hearsay rules to drug law enforcement can be found in DEA's Drug Agents' Guide to the Law of Evidence (1981). For example, if the hearsay consists of "admissions made by an owner or person in control of seized property, there is no conflict. Admissions by party opponents or their agents have always been an exception to the hearsay rules. F.R. Ev. 801(d) (2). Admissions by owners, drivers, leasers, bailees, and so forth, are admissible in civil forfeiture proceedings to establish probable cause. See Dobbins Distillery, Interstate Securities Co., Ivers, One 1972 Toyota Mark II, Ted's Motors, Turner v. Camp, and Commercial Credit Corp., cited above. Also see 55 ALR2d 1272 (1955).

Similarly, if the hearsay consists of statements by a coconspirator made during the course, and in the furtherance, of a criminal conspiracy involving the seized property, there is no conflict. Statements of co-conspirators are another well-recognized exception to the hearsay rules. F.R.Ev. 801(d) (2); U.S. v. One 1975 Ford Ranger XLT, 463 F. Supp. 1389 (ED PA 1979); U.S. v. One 1975 Linc. Cont., 75 F.R.D. 535 (SD NY 1976).

The real conflict arises when the hearsay used to establish probable cause to seize for forfeiture does not fit any recognized exception to the hearsay rules. Hearsay from a previously reliable source can establish probable cause. McCray v. Illinois, 87 S.Ct. 1056 (1967). Yet, this form of hearsay is not a recognized exception to the hearsay rules of evidence. Hearsay from so-called "good-citizen informants" can be used to establish probable cause. Edmondson v. F.B.I., 402 F.2d 809 (10 Cir. 1968); U.S. v. McCrea, 583 F.2d 1083 (9 Cir. 1978); U.S. v. Swihart, 554 F.2d 264 (6 Cir. 1977); U.S. v. Robertson, 560 F.2d 647 (5 Cir. 1977). But again, the traditional evidence rules contain no exception for confidential good-citizen informants. The list goes on.

It seems logical to resolve this conflict by admitting hearsay to establish probable cause for forfeiture. As already noted, the Federal Rules of Evidence exclude hearsay evidence "... except as provided by these rules or other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." (F.R.Ev. 802, underlines added). By Act of Congress, the governments' initial burden of proof in a civil forfeiture action is simply to show "probable cause." 19 U.S.C. 1615. Nothing in this statute, nor in its one-hundred ninety year history, indicates that "probable cause in a forfeiture proceeding is meant to be a unique term of art. The presumption is that when Congress used the term it attributed to it its ordinary and accepted meaning. 2-A Southerland, Statutory Construction, Sec. 45.08 (4th ed. 1973). Probable cause in a civil forfeiture proceeding is the same probable cause standard used to conduct all arrests, searches and seizures. To the extent probable cause can be based upon hearsay, that hearsay must be admissible, by Act of Congress, in a civil forfeiture action. U.S. v. One 1975 Mercedes 280S, 590 F.2d 196 (6 Cir. 1978); U.S. v. One Twin Engine Beech Airplane, 533 F.2d 1106 (9 Cir. 1976); Ted's Motor's v. U.S., 217 F.2d 777 (8 Cir. 1954).

The Evidence Rules do not exist in a vacuum; they must be read in the light of the statutory standard of proof in civil forfeiture proceedings.

Beyond this legal analysis, there are sound reasons for permitting hearsay in civil forfeiture actions. First, one of the purposes behind the hearsay rules is to preserve a defendant's right to confront and cross-examine the source of evidence against him. In criminal cases, this right of confrontation is guaranteed by the Sixth Amendment to the United States Constitution. The Supreme Court has held that this right does not apply to civil forfeiture actions. U.S. v. Zucker, 16 S.Ct. 641 (1896).

Second, the hearsay rules were developed to exclude only untrustworthy hearsay. The rules governing the use of hearsay to establish probable cause already insure that hearsay, either alone or with sufficient corroboration, meets constitutional standards of trustworthiness. Therefore, the spirit of the hearsay rules is not offended by admitting hearsay in a civil forfeiture action.

Examples

5. You, purchase drugs from B and P at a local motel, and immediately place them under arrest and advise them of their Miranda rights. B tells you that he has a car parked outside. He says he loaned the car to P to go from the motel and return with the drugs. You ask him if the car now contains any drugs. He says no. No one saw the car leaving or returning to the motel. P tells you the same story. Will these statements be admissible in a civil forfeiture action to establish probable cause?

Yes. Your testimony of what B and P have said will be hearsay because you will repeat it in court to prove they transported drugs in the car for the purpose of sale. Although hearsay is generally excluded from judicial proceedings, it is admissible to establish probable cause in a civil forfeiture action --particularly if it consists of admissions by the owner or person in control of the property. See Ted's Motors v. U.S., cited above.

6. You receive a phone call from a United States Consul in Mexico. He explains that a Mexican official, with whom he has a close working relationship and who has repeatedly proven to be reliable in prior dealings with the Consul, reported seeing an airplane, registration number N9826Z, land on a semi-deserted road, take on a large number of bulky packages and then take off in the direction of the U.S. border. Armed men, the official said, blockaded the road until the plane could accept its cargo and depart. You check the registration number and determine the plane belongs to Mr. P. In your experience, a plane like P's can hold a cargo of 1400 to 1500 pounds. One of your fellow agents tells you that one of his informants, who has been proven to be repeatedly reliable in the past, has seen P several times within the last month with large quantities of marijuana and money, and that P claimed to the informant that he fetched marijuana once a week from Mexico. You obtain a search warrant for P's ranch and find 1394 pounds of marijuana packaged in red and green butcher paper of the type that is normally found on marijuana coming from Mexico. You also find some Mexican currency. You do not find P's plane. If you locate P's plane, is it subject to forfeiture?

Yes. The most devastating evidence that P's plane smuggled marijuana is the hearsay statement of the Mexican official. Because this official has been shown to be previously reliable and because his statement is based upon his personal observations, it can be considered trustworthy hearsay for the purpose of establishing probable cause. See Aguillar v. Texas and Spinelli v. U.S., cited above. The hearsay of the second informant also meeds constitutional standards of trustworthiness. Hearsay is admissible to establish probable cause in a civil forfeiture proceeding. This hearsay, together with the discovery of marijuana at P's ranch, clearly shows it is at least "probably true" that P's plane smuggled marijuana from Mexico. Therefore, there is probable cause to forfeit the plane. See U.S. v. One Twin Engine Beech Airplane, cited above.

D. THE EXCLUSIONARY RULE APPLIES TO CIVIL FORFEITURES

Evidence obtained in violation of the Fourth Amendment right against unreasonable searches and seizures, or the Fifth Amendment right against self-incrimination, is not admissible to establish probable cause for forfeiture.

Authorities

S.Ct: U.S. v. $5,372.85 In U.S. Coin & Currency, 91 S.Ct. 1041 (1971); One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania, 85 S.Ct. 1246 (1965); Boyd v. U.S., 6 S.Ct. 524 (1886).

9 Cir: U.S. v. One 1977 Mercedes Benz 4SOSL, 708 F2d 444 (1983); U.S. v. One 1970 Pontiac GTO, 529 F.2d 65 (1976).

8 Cir:	U.S. v. $88,500, 671 F.2d 293 (1982) (Below 516 F.Supp. 720); U.S. v. One 1971 Lincoln Continental Mark III, 460 F.2d 273 (1972).
6 Cir:	U.S. v. $22,287 In U.S. Currency, 709 F.2d 442 (1983).
5 Cir:	U.S. v. One 1979 Mercury Cougar, 666 F.2d 228 (1982).
2 Cir:	U.S. v. Physic, 175 F.2d 338 (1949).
DC Cir:	See One 1960 Oldsmobile Convertible Coupe v. U.S., 371 F.2d 958 (1966).
AZ:	Matter of One 1974 Mercedes-Benz, 592 P.2d 383 (App. 1979); Matter of One 1969 Chev. 2-Door, 591 P.2d 1309 (App. 1979).
AK:	Little Rock P.D. v. One 1977 Linc. Cont., 580 S.W.2d 451 (1979).
CA:	People v. Reulman, 396 P.2d 706 (1964).
FL:	In Re 1972 Porsche 2-Dr., 307 So.2d 451 (App. 1975).
IL:	People v. One 1968 Cadillac Auto, 281 N.E. 2d 776 (App. 1972).
NV:	One 1970 Chevrolet Motor Vehicle v. County of Nye, 518 P.2d 38 (1).
NM:	In Re One 1967 Peterbilt Tractor, 506 P.2d 1199 (1973).
NY:	People v. One 1965 Fiat Convertible, 326 N.Y.S.2d 833 (1971).

Discussion

The so-called "Exclusionary Rule" prohibits the Government in a criminal proceeding from using evidence obtained in violation of the Fourth Amendment right against unreasonable searches and seizures, and the Fifth Amendment right against self-incrimination. The rule is meant to deter unlawful conduct:

> ".. the police must obey the law while enforcing the law; . . . in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." Spano v. N.Y., 79 S.Ct. 1202 (1959).

Subject to a few exceptions, the Exclusionary Rule applies to both state and federal criminal proceedings. Seeks v. U.S., 34 S.Ct. 341 (1914); Mapp in. Ohio, 81 S.Ct. 1684 (1961). The rule has a limited application in civil cases. U.S. v. Janis, 96 S.Ct. 30214 (1976).

Although forfeiture actions are generally civil in form, they are "quasi-criminal" in nature. Their purpose is to impose a punishment for the illegal use of property. Therefore, the courts have held that the Exclusionary Rule applies to civil forfeiture actions. Evidence obtained in violation of Fourth and Fifth Amendment rights cannot be relied upon to prove a forfeiture.

A prior determination in a related criminal proceeding as to the admissibility of evidence under the Exclusionary Rule is binding in a civil forfeiture action. It cannot be contested a second time in forfeiture proceedings. Matter of One 1974 Mercedes Benz, 592 P.2d 383 (Ariz.

App. 1979).

If no prior determination has been made, an owner can (and should) move to suppress illegally obtained evidence in the forfeiture action. An owner who neglects to contest the admissibility of illegally obtained evidence at the trial court level cannot raise the matter for the first time during an appeal. U.S. v. One 1971 Lincoln Continental Mark III, 460 F.2d 273 (8 Cir. 1972); One 1970 Chevrolet Motor Vehicle v. County of Nye, 518 P.2d 38 (Nev. 1974).

Examples

7. An anonymous caller tells you that a 1972 black on blue GMC "Blazer-type" vehicle is carrying marijuana from El Centro to Los Angeles, California. You set up a surveillance on the main connecting road and see a vehicle fitting this description. You search it and find large amounts of drugs inside. In criminal proceedings against the driver, the courts rule you lacked probable cause to make the search and they suppress all evidence as to what was found. See U.S. v. Larkin, 510 F.2d 13 (9 Cir. 1974). Is the vehicle subject to civil forfeiture?

   No. The Exclusionary Rule applies to civil forfeitures and the determination in the criminal suppression hearing is binding in a later forfeiture action. Since the information leading up to the search does not amount to probable cause, and the fruits of the search are not admissible, you cannot show probable cause to forfeit the vehicle. See One 1958 Plymouth Sedan v. Comm. of Pennsylvania, 85 S.Ct. 1246 (1965).

E. ONCE PROBABLE CAUSE IS SHOWN, OWNERS MUST STEP FORWARD AND DEFEND THE PROPERTY

A showing of probable cause is enough to declare property forfeited, unless owners come forward and prove, by a preponderance of evidence, that:

1. The property was neither used, nor intended to be used, illegally; or

2. The property fits into an express statutory exception, such as a common carrier or stolen conveyance.

In other words, once probable cause is shown, the burden of proof shifts to the party claiming the property.

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See MASFA § 11(b). The burden of proving the existence of an exemption is on the claimant.

Also see § 12(g). If the state shows probable cause, the claimant must prove by a preponderance of the evidence that the claimant's interest is not subject to forfeiture.

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Authorities

19 U.S.C., § 1615; 21 U.S.C. § 885; U.C.S.A. § 506(a).

Refer to cases cited above under "Probable Cause Is Enough to Begin a Forfeiture." Also See:

3 Cir: U.S. v. $55,518.05 U.S. Currency, 728 F.2d 192 (1984); U.S. v. 1977 Lincoln Mark V, 643 F.2d 154 (1981).

5 Cir: U.S. v. $364,960, 661 F.2d 322, N. 10 (1981).

6 Cir: U.S. v. $83,320, 682 F.2d 573 (1982). U.S. v. $83,320.00 682 F.2d 573 (1982). U.S. v. Lots 12, 13, 14, and 15, Keeton Heights Subdivision, Morgan County Kentucky, 869 F.2d 942 (1989), under "Innocence of an Owner is No Defense to a Civil Forfeiture." infra.

7 Cir: U.S. v. Fleming, 677 F.2d 602 (1982).

8 Cir: One Blue 1977 AMC Jeep CJ-S v. U.S., 783 F.2d 759 (1986).

9 Cir: Baker v. U.S., 722 F.2d 517 (1983).

11 Cir: U.S. v. $4,255,000, etc., 762 F.2d 895 (1985).

AZ: Matter of 1976 Blue Ford Pickup, 586 P.2d 993 (App. 1978).

DE: State v. One 1968 Buick Electra, 301 A.2d 297 (Superior Ct. 1973).

SD FL: U.S. v. One (1) 1984 No. 1 Boat Mfg. Lobster Vessel, 617 F.Supp. 672 (1985); U.S. v. One 1977 36-Foot Cigarette Ocean Racer, 624 F.Supp. 290 (1985); U.S. v. One (1) Defender Lobster Vessel, 606 F.Supp. 32 (1984); U.S. v. One (1) Stapleton Pleasure Vessel, 575 F.Supp. 473 (1983).

ND IL: U.S. v. One Cadillac Eldorado, 535 F.Supp. 65 (1982) (claimant meets burden).

IA: State v. One (l) Certain 1969 Ford Van, 191 N.W.2d 662 (1971).

LA: In Re One 1971 Dodge Charger Auto, 291 So. 2d 872 (App. 1974).

ED MO: U.S. v. $44,000, 596 F.Supp. 1308 (1984).

MO: State v. Kemp, 574 s.w.2d 695 (App. 1978).

NJ: State v. One (l) Ford Van, 363 A.2d 928 (App. 1976); State v. One 1977 Dodge Van, 397 A.2d 733 (County Ct. 1979).

NM: State v. Ozarek, 573 P.2d 209 (1978).

NC: State v. Richardson, 20a S.E.2d 274 (App. 1974).

ED NY: U.S. v. One 1980 Chev. Blazer Auto, 572 F.Supp. 994 (1983); U.S. v. $30,800, 555 F.Supp. 280 (1983); U.S. v. One 1980 BMW 320i, 559

F.Supp. 382 (1983); U.S. v. $20,294, 495 F.Supp. 147 (1980).

SD NY: U.S. v. Banco Cafetero Intern., 608 F.Supp. 1394 (1985); U.S. v. $4,000 in U.S. Currency, 613 F.Supp. 349 (1985).

WD TX: U.S. v. $13,230 in U.S. Currency, No. 84CA-09 5/29/84. (Unreported).

Discussion

Federally, the rules governing the burden of proof in a civil forfeiture action are "written in stone." Since 1799, federal statutes have placed the burden on owners to show their property is not forfeitable, once the Government has shown probable cause for the seizure. See Rubin v. U.S., 289 F.2d 195, 200 (5 Cir. 1961). The current federal statute relating to virtually all civil forfeitures is 19 U.S.C. § 1615:

> "In all suits or actions brought for forfeiture . . . where the property is claimed by any person, the burden of proof shall lie upon such claimant . . . . Provided, that probable cause shall be first shown for the institution of such suit or action . . . ."

The forfeiture section of the Controlled Substances Act (21 U.S.C. § 881 (d)) and the Contraband Seizure Act (49 U.S.C. § 784) incorporate this standard by reference. In addition, several sections of the Controlled Substances Act expressly repeat that the burden of proof is on an owner to defend his property. See Sections 881(a) (4) (B), 881(a) (6) and 885 (a) (l).

Faced with a showing of probable cause, federal courts must enter a judgment of forfeiture against the property if the owner fails to appear (F.R.Civ.P., 28 U.S.C., Rule 56, Summary Judgment). See U.S. v. One 1975 Mercedes 2805, 590 F.2d 196 (6 Cir. 1978).

Although placing the burden of proof on an owner after a simple showing of probable cause may seem harsh, it is not unconstitutional. U.S. v. One 1970 Pontiac GTO, 529 F.2d 65 (9 Cir. 1976).

The burden of proof in state civil forfeiture actions is basically the same, particularly in states which have enacted the Uniform Controlled Substances Act, Sections 505 and 506.

Examples

8. You arrest Mr. S on charges of distributing heroin. At the time of arrest, he is alone, driving his new $24,000 Porsche. During a lawful search incident to arrest, several tablets of methamphetamine are found on the floor of the car just under his seat. Transportation of illegally acquired drugs for any purpose, in any amount, subjects a conveyance to federal forfeiture. 21 U.S.C. § 881(a) (4). You seize the car. S fails to appear in the civil forfeiture proceedings. Is his Porsche forfeitable?

   Yes. Possession of a controlled substance, such as methamphetamine, without a valid prescription is illegal under both state (U.C.S.A. § 401c) and federal (21 U.S.C. § 844) law. S is the owner and sole occupant of the car, and the pills were within his reach. Legally, S is presumed to be in possession of the pills. See DEA's Drug Agents' Guide to Offenses and Penalties Under the Controlled Substances Act, (1979), for a detailed discussion of "presumptions" in drug cases. In addition, it seems probable that S has no valid prescription for the pills. They

were not in the prescription bottle, and their location on the floor under his seat is highly suspicious. It seems "probably true" that S illegally possessed and transported methamphetamine in his Porsche. Once probable cause is shown for forfeiture, an owner must step forward and prove the innocence of the property. If he fails to do so, the property must be declared forfeited.

9. Using the same facts as in the last example, suppose S appears in the forfeiture proceeding and calls three witnesses in defense of his car. His girlfriend G testified that she borrowed S's car the day before is arrest and she dropped her purse on the floor. She thought she had picked them all up, but she must have missed a few under the seat. Her doctor, a respected physician, testifies that he prescribed methamphetamine for G because she is overweight. G's pharmacist identifies the pills found in S's Porsche as the same brand of methamphetamine he dispensed to G under her doctor's prescription. Everyone's eyes focus on G – she is obviously fat. The court accepts all this testimony as credible. Is the Porsche forfeitable?

No. S has come forward with enough credible evidence to prove that the drugs found in his Porsche were lawfully prescribed for his girlfriend, that she dropped them by accident, and that he did not know they were there. It is no longer "probably true" that S illegally possessed and transported illicitly acquired drugs in his car. See In Re One 1971 Dodge Charger Automobile, 291 So. 2d 872 (LA.App. 1974).

F. NON-DEFENSES

In a civil forfeiture action, the key questions for the court are not the good faith or guilty knowledge of the owner. The questions to be answered focus almost exclusively on the use made of the property, and whether that use required forfeiture under the statute. Did the car transport drugs? Were the chemicals, glassware and equipment intended for use to make PCP? Was the money exchanged for illicit drugs? With rare exceptions, disproving the illegal use of the property or proving it comes within some statutory exceptions, are the only two defenses to a civil forfeiture.

1. Innocence of an Owner is No Defense to Civil Forfeiture

Owners who are innocent of any criminal involvement and who are totally ignorant of the illegal use made of their property are protected from forfeiture by many state statutes and by several state constitutions. Both conditions must be met to prevent forfeiture; innocence, by itself, is no defense. Federally, neither an owner's innocence, nor his ignorance, is a defense. The United States Constitution permits the forfeiture of illegally used property regardless of the innocence or ignorance of its owner.

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See MASFA § 5. Exemptions.

(a) Property is exempt from forfeiture if:

(1) the owner or interest holder acquired the property before or during the conduct giving rise to its forfeiture, and he:

(i) did not know and could not reasonably have known of the act or omission or that it was likely to occur; or
(ii) acted reasonably to prevent the conduct giving rise to forfeiture; or

(2) if the owner or interest holder acquired the property after the conduct giving rise to its forfeiture, including acquisition of proceeds of conduct giving rise to forfeiture, and he acquired the property in good faith, for value and was not knowingly taking part in an illegal transaction.

(b) Even if the owner or interest holder lacked knowledge or reason to know, the property is forfeitable if:
(1) the owner or interest holder holds the property jointly with the person whose conduct gave rise to its forfeiture;
(2) the wrong-doer had authority to convey the property to a good faith purchaser for value at the time of the conduct;
(3) the owner or interest holder is a co-conspirator or otherwise criminally responsible for the conduct giving rise to forfeiture; or
(4) the owner or interest holder acquired the property with notice of its actual or constructive seizure for forfeiture or with reason to believe it was subject to forfeiture.

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Authorities

S.Ct: Calero-Toledo v. Pearson Yacht Leasing Co. 94 S.Ct. 2080 (1974) (and other Supreme Court cases cited therein).

11 Cir: U.S. v. Four Parcels of Real Property on Lake Forest Circle, etc., 870 F.2d 586 (1989), under "Intervenors (RE Standing). infra; U.S. v. One 1980 Bertram 58 Motor Yacht, 876 F.2d 884 (1989). (An innocent owner must prove: (1) that he was uninvolved in and unaware of the illegal activity which is the basis of the forfeiture; and (2) that he did everything that reasonably could be expected of him to do to prevent the activity. Thus, a failure to ask for identification or to conduct any inquires precludes the use of this defense. (Under the Sec. 881(a)(4) intended for use Sec., an owner's intention to alter a yacht to better accommodate the transportation of drugs results in forfeiture. [The Eleventh circuit's interpretation of the innocent ownership defense is very narrow and represents the majority view. The first prong is subjective, and the second prong is objective].

10 Cir: Eggleston v. State of Colorado, 873 F.2d 242 (1989) under "Forfeiture Occurs at the Moment of Illegal Use." infra.

9 Cir: U.S. v. 1980 Red Ferrari etc., 827 F.2d 477 (1987). (Claimant alleging innocent ownership has the burden of proving the absence of actual knowledge of the act or omission to act leading to forfeiture. The burden is no on the government to show that claimant had actual knowledge); 9 Cir: U.S. v. One 1972 Chevrolet Blazer, 563 F.2d 1386 (1977); U.S. v. One 1967 Ford Mustang, 457 F.2d 931 (1972); U.S. v. One 1967 Cadillac Coupe Eldorado, 415 F.2d 647 (1969); U.S. v. Bride, 308 F.2d 470 (1962); U.S. v. Andrade, 181 F.2d 42 (1950).

8 Cir: One Blue 1977 AMC Jeep CJ-5 v. U.S., 783 F.2d 759 (1986); U.S. v. One 1976 Lincoln Continental Mark IV, 584 F.2d 266 (1978); U.S. v. One 1973 Buick Riviera, 560 F.2d 897 (1977); U.S. v. One 1972 Toyota Mark II, 505 F.2d 1162 (1974); U.S. v. One 1971 Lincoln Continental Mark III, 460 F.2d 273 (1972).

7 Cir: U.S. v. One 1958 Pontiac Coupe, 298 F.2d 421 (1962).

6 Cir: U.S. v. Lots 12, 13, 14, and 15, Keeton Heights, etc., 869 F.2d 942 (1989). The innocent owner defense merely requires proof that the proscribed act was committed "without the knowledge or consent of that owner." A claimant need not meet the Calero-Toledo standard that "he has done all that he would reasonably be expected to do to prevent the proscribed use of his property." (Although the burden of proving the inncoent owner defense is on the claimant, the government must demand such proof. When a claimant timely files a verified claim asserting the innocent owner defense, and the government does not argue the absence of genuine factual issue as to that claimant's innocence, summary judgment may not be entered as to that claimant's innocence). (Mere intent to use the property for felonious use is sufficient to subject that property to forfeiture under 21 U.S.C. Sec. 881(a)(7). After the government proves probable cause to institute a forfeiture suit, the burden of proof then shifts to defendant to show that he lacks the prescribed intent); U.S. v. Premises Known as 526 Liscum Drive, etc., 866 F.2d 213 (1988). infra. U.S. v. One 1975 Mercedes 2805, 590 F.2d 196 (1978); U.S. v. One 1961 Cadillac, 337 F.2d 730 (1964).

5 Cir: U.S. v. One 1977 Jeep, 639 F.2d 212 (1981); U.S. v. One 1975 Ford Pickup Truck, 558 F.2d 755 (1977); U.S. v. One 1969 Plymouth Fury, 476 F.2d 960 (1973); U.S. v. One 1970 Buick Riviera, 463 F.2d 1168 (1972); General Finance Corp. of Florida v. U.S., 333 F.2d 681 (1964); U.S. v. One 1957 Oldsmobile, 256 F.2d 931 (1958); Associates Investment Co. v. U.S., 220 F.2d 885 (1955); U.S.v. One 1952 Model Ford Sedan, 213 F.2d 252 (1954); U.S. v. Gramling, 180 F.2d 498 (1950).

4 Cir: U.S. v. Santoro, 866 F.2d 1538 (1989). (The beneficial trust theory can be used to protect an innocent owner. In this case, a husband conveyed his one-half interest in real property to his wife and children. The wife then used the property in violation of Sec. 881(a)(7). The Fourth Circuit forfeited the wife's interest, but held that the one-half interest of the children was preserved by a beneficial trust despite the wife's actions). [The beneficial or constructive trust theory is a basis of innocent ownership used as an alternative to the tenancy by the entireties theory. Boty, however, are legal fictions. The trust theory can also be used when the

property is not martial property, and for personal as well as real property]. U.S. v. One 1971 Mercedes Benz, 542 F.2d 912 (1976); The Pilot, 43 F.2d 491 (1930).

3 Cir: U.S. v. Parcel of Real Property Known as 6109 Grubb Raod, etc., 886 F.2d 618 (1989). Hearsay evidence introduced to determine probable cause is not admissible or any purpose regarding the merits of the case, including the innocent owner defense. The innocent owner defense in the "knowledge or consent" phrase of 21 U.S.C. Sec. 881(a)(7) consists of two, independent defenses. Innocent ownership can be proven by the preponderance of the evidence that the illegal use of property occurred either: (1) without knowledge, or (2) without consent. In an innocent ownership claim, claimant must first prove the "no knowledge" defense. If he cannot, claimant must prove the "no consent" defense. One difficulty is that in the "no consent" defense process, knowledge of the criminal activity will be relevant. The "no consent" issue assumes knowledge. Sec. 881 is not so punitive in nature as to amount to a criminal provision. Thus, the prohibitions against double jeopardy and cruel and unusual punishment do not apply. [The court was extremely concerned about the effect of forfeiture on real property held as a tenancy by the entireties where one spouse claimed innocent ownership. The court stated that tenancy by the entireties where one spouse claimed innocent ownership. The court stated that it was unrealistic to demand that an innocent owner seek partition of the entireties property to maintain that defense. The court also noted that once innocent ownership is established, a court must determine the extent of that interest, which is difficult in the case of entireties property.] Minor children of an owner lack standing to contest a forfeiture. [Grubb Road represents the minority view. The majority rule is that the burden of proof is on the alleged innocent owner to show both no knowledge and no consent. As pointed out by the dissent, the majority appears to rule out any affirmative duty to act.] The Julia Davis, 72 F.2d 370 (1974).

2 Cir: U.S. v. Pacific Finance Corp., 110 F.2d 732 (1940).

1 Cir: U.S. v. Pole No. 3172, etc., 852 F.2d 636 (1988). (The claim of a record owner cannot be dismissed merely for failure to appear at a disposition. U.S. v. One Clipper Bow Ketch Nisku, 548 F.2d 8 (1977).

DC Cir: U.S. ex rel Walter E. Heller & Co. v. Mellon, 40 F.2d 808 (1930).

AZ: In Re One 1965 Ford Mustang, 463 P.2d 827 (1970); Matter of 1972 Chevrolet Monte Carlo, 573 P.2d 535 (App. 1977); Matter of 1976 Blue Ford Pickup, 586 P.2d 993 (App. 1978).

CO: U.S. v. One 1977 Chevrolet Pickup, 503 F.Supp. 1027 (1980).

SD FL: U.S. v. $280,500.00 etc., 655 F. Supp. 1487 (1986). (The mother of the driver of a seized vehicle is not an innocent owner, despite being one of the registered owners, because it was unlikely that she did not know of her son's five-year probated sentence involving 1,200 pounds of marijuana. (A vehicle is forfeitable when the manner in which the marijuana was embedded in the vehicle indicated that large amounts of marijuana had been transported, regardless of the actual amount in the vehicle). Drug detector

dogs can help sustain probable cause, especially when one alerts on a suitcase containing money which had been used by an undercover DEA agent to purchase drugs). U.S. v. Gulfstream West, etc., 710 F. Supp. 792 (1989), under "All Facilitation Monies Significantly Connected to any Drug Offense are Subject to Federal Forfeiture." infra; U.S. v. One (1) 1981 65 Skokum Motor Sailor Ketch, 717 F. Supp. 1546 (1989). (A relevant factor in determining the defense of innocent ownership is the circumstances surrounding a claimant's purchase of the defendant res. A claimant must exercise due care and reasonableness when purchasing a defendant res. Further, a claimant must exercise due care and take all reasonable steps necessary to ensure that the property was not used to convey narcotics. Innocent ownership is precluded by failure to adequately explain the presence of hidden compartments inside defendant vessel); U.S. v. One Parcel of Real Estate at 11,885 S.W. 46th Street, etc., 715 F. Supp. 355 (1989). (This case includes a discussion about how state law determines ownership interests. The state courts are split as to which time frame to use to determine an innocent owner's ownership interest. Some state courts hold that the relevant time inquiry is before commission of the crime, which is before the government's ownership interest arises. If there are multiple owners, the government's later intervention does not affect the ownership interest). (Other state courts, as in Florida, hold that the appropriate time frame is after commission of the crime. Under this view, the government's interest has vested and affects the interest of multiple owners). (A tenancy by the entirety is legal fiction creating a unique estate in property held jointly by spouses. A tenancy by the entirety requires unity of possession, interest, time, title, and marriage. Loss of any one unity automatically converts a tenancy by the entireties into a tenancy in common). Since, under Florida law, ownership interests are determined after commission of a crime, a tenancy by the entireties is destroyed when the crime is committed. The unities of title, time, marriage, and possession are destroyed when the crime is committed. The unities of title, time, marriage, and possession are destroyed. Thus, a tenancy by the entireties between spouses is statutorily converted into a tenancy in common as between the government and the innocent party, each having one-half interest in the whole). [There are often difficulties when interpreting the effect of two legal fictions; namely, the relation back doctrine and a tenancy by the entireties. When these two legal fictions are construed together, the relation back doctrine must be modified. Forfeiture of real property does not occur at the moment a crime is committed. Rather forfeiture of real property occurs either before or, as under Florida law, after commission of a crime]. The court's analysis is confusing. First, the proper interest to be decided is that of the federal government. The court here incorrectly decides the interest of the innocent owner. (The court confuses the government with an innocent owner. Second, the correct time frame is, as here, before commission of the crime under the relation back theory. Consequently, the government's interest relates back to before commission of the crime and is superior. The third question is whether or not a third party is innocent owner. If so, the government will recognize an innocent party's claim). (In jurisdictions holding that forfeiture of real property occurs before commission of a crime, a tenancy by the entireties held by a guilty and an innocent spouse is theoretically preserved. This is the majority view. In jurisdictions where forfeiture of real property occurs after commission of a crime, a tenancy by the entireties held by a guilty and an innocent spouses

is statutorily converted into a tenancy in common belonging to the government and the innocent spouses, each having a one-half interest in the whole.]; U.S. v. One Parcel of Real Estate Located at 10,691 S.W. 58th Street, etc., 683 F. Supp. 1370 (1987). (In this case, a bonding company secured its bail bond with realty later subjected to forfeiture. The defendant then fled the jurisdiction. The standard for innocent ownership of the bonding company is whether or not the bonding company acts as a reasonable, prudent agency under similar circumstances. Specifically, a bonding agency must make inquiries as to the status of the property and take such other steps as are necessary to protect its interest). U.S. v. One Single Family Residence with Outbuildings Located at 15,621 S.W. 209th Avenue, etc., 699 F. Supp. 1531 (1988). (An Innocent owner is one who: (1) was unaware of the illegal use of the property; but (2) would have taken the appropriate steps to prevent such activity had he had facts giving rise to a reasonable suspicion of such activity. (Although forfeiture relates back to the time of the illegal act, the interest of an innocent owner is never forfeited). (Property held as a tenancy by the entireties is not forfeitable by the criminal conduct of one spouse if the other spouse qualifies as an innocent owner. The innocent spouse retains the property in its entirety). [A fundamental difficulty with this court's expression of the innocent owner test is that the second prong is purely hypothetical. Most such tests are objective, subjective, or both; but they are rarely hypothetical. Another problem is that this court seems to act on the premise that the absence of an innocent owner is an element in determining the forfeitability of property. The court does not use innocent ownership as an actual defense. Further, if the presence of an innocent owner means that the property is not forfeitable, then theoretically, the property remains as a tenancy by the entireties. However, in effect the court apparently conveys the property from the criminal spouse to the innocent owner spouse. This most unusual court action is consistent with the court's premise that the presence of an innocent owner makes the entire property not forfeitable as to that innocent owner]. U.S. v. One Single Family Residence Located at 2901 S.W. 118th Court, etc., 683 F. Supp. 783 (1988). (Innocent ownership is determined by a "knew or should have known" standard of reasonableness. The Sixth Amendment right to bail is not violated by forfeiture of assets pledged as security for bail bond. [Also see U.S. v. Caplin & Drysdale Chartered, ___U.S.___ (1989); 109 S.Ct. 2646; ___L.Ed.2d___; and U.S. v. Monsanto, ___U.S.___ (1989); 109 S.Ct. 2657 L.Ed. 2d ___ under "Attorney Assignments," infra.

GA: Garner v. State, 175 SE2d = 133 (App. 1970).

ND IN: U.S. v. Real Property Known as 19,026 Oakmont South Drive, etc., 715 F. Supp. 233 (1989). (A spouse is not an innocent owner when two witnesses testified that they had seen or used cocaine in her house while she was present).

IL: People v. One 1965 Oldsmobile, 284 N.E. 2d 646 (1972); 1957 Chevrolet v. Div. of Narc. Control of Dept. of Public Safety, 189 N.E.2d 347 (1963).

LA: U.S. v. South 23.19 Acres of Land, 694 F. Supp. 1252 (1988). (An innocent owner spouse with a one-half, unidivided interest in community

property is entitled to one-half of the proceeds from the sale of the property. The government has the right to divide community property to prevent drug traffickers from insulating unlawfully gained property). (contra) State v. 1971 Green GMC Van, 354 So. 2d 479 (1977).

MD: State v. Greer, 284 A.2d 233 (App. 1971); Prince George's County v. Blue Bird Cab Company, 284 A.2d 203 (App. 1971).

ED MI: U.S. v. Marks, 703 F. Supp. 623 (1988). (An innocent spouse's interest in property held under a tenancy by the entireties is protected from the government's civil forfeiture claim against the guilty spouse. The guilty spouse's interest in the tenancy by the entireties may be civilly forfeited to the government. The result is that the innocent spouses takes all. The innocent spouse's interest is the equivalent of an undivided life estate in the entire propety. The civil forfeiture statute, 21 U.S.C. Sec. 881, and the criminal forfeiture statute, 21 U.S.C. Sec. 853, were applied concurrently under the same proponderance of the evidence standard of proof). [The court rejected the government's argument that the tenancy by the entireties was converted into a joint tenancy as between the innocent spouse and the government. The court was concerned that the government, as co-tenant, could force the sale of the property and cause an innocent spouse to become homeless.]

ED MO E.Div: U.S. v. One Brown 1978 Mercedes Benz, 657 F. Supp. 316 (1987); aff'd mem., One Brown Mercedes Benz, 837 F.2d 479 (8th Cir. 1987). (The innocent owner defense is not availabe when an owner makes no allegation and offers no proof that she had done all that reasonably could be expected to prevent the illegal use of the property.)

WD NC: U.S. v. 1.678 Acres of Land, etc., 671 F.Supp. 413 (1987). (If there is a reasonable belieft that the record owner of real property knows that the realty is the proceeds of controlled substance transactions, then the record owner is not an innocent owner. The clerk of the court, not a judicial officer, can issue a seizure warrant for real property.); U.S. v. One 1985 Mercedes Benz, etc., 716 F. Supp. 211 (1989). (An innocent owner defense is precluded when that person was aware of the criminal activity; i.e. a passenger in his car was smoking marijuana, and he himself possessed marijuana. The federal government is entitled to summary judgement based on claimant's guilty plea to a state offense for marijuana possession.)

NJ: U.S. v. One 1980 Chev. Corvette, 564 F.Supp. 347 (1983); Kutner Buick, Inc. v. Strelecki, 267 A.2d 549 (Superior 1970).

ED NY: U.S. v. Premises Known as 171-02 Liberty Avenue, etc., 710 F.Supp. 46 (1989). (An innocent owner is one who: (1) was aware of illegal drug activity on his property; but (2) had not consented to such activity and was unable to prevent them.). U.S. v. One 1980 BMW 320i, 559 F.Supp. 382 (1983).

SD NY: U.S. v. Property Known as 303 West 116th Street, etc., 710 F.Supp. 502 (1989). (An owner with a prior conviction for the sale of narcotics on his

property is not an innocent owner with respect to his brother's subsequent drug activities on the same property. The rationale is that the owner is collaterally estopped from asserting his innocence or lack of knowledge of drug activities on the property.)

OR: Blackshear v. State, 521 P.2d 1320 (App. 1974).

ED PA: Devito v. U.S. Dept. of Justice, etc., 520 F.Supp. 127 (1981) (Calero-Toledo dicta protects innocent owner).

WD PA: U.S. v. Parcel of Real Property, 3201 Caughey Road, etc., 715 F.Supp. 131 (1989). (The test for innocent ownership is whether or not the claimant had actual knowledge of or consented to the criminal conduct. The fact that real property is held as tenancy by the entireties is not relevant to determining innocent ownership. The burden of proof is on the claimant. [As a practical matter, courts are more lenient in establishing innocent ownership when a tenancy by the entireties is involved. Also, if innocent ownership is proven, then the fact that real property is held as tenancy by the entireties is not relevant to deciding the distribution of ownership interests.]; U.S. v. Property Known as 708-710 West 9th Street, etc., 715 F.Supp. 1323 (1989), under "All Facilitation Moneys Significantly Connected to Any Drug Offense are Subject to Federal Forfeiture." infra.

SD: State v. One 1966 Pontiac Auto., 270 N.W.2d 362 (1978).

ED TN U.S. v. Real Property in Sevier County, Tennessee, 703 F.Supp. 1306 (1988), under "All Facilitation Moneys Significantly Connected to Any Drug Offense are Subject to Federal Forfeiture." infra.

SD TX: U.S. v. Real Property Located at 2011 Calumet, etc., 699 F. Supp. 108 (1988). (When an owner's agent has notice of possible illegal conduct regarding the owner's leased property, the owner's duty to prevent the illegal use of the property increases. Notice of potentially suspicious facts, such as frequent raids and unauthorized structural alterations resembling fortification, triggers an affirmative duty to act. Thus, a landlord cannot ignore numerous indications that his leased premises were being used a crack house. A landlord cannot escape accountability to his community by refusing to investigate suspicious facts and allegations of illegal use.) [It is possible that a negligence standard of knew or should have known may apply in such cases. In any event, this court relies on an affirmative duty to act, which probably means a reporting requirement.]

TX: State v. Cherry, 387 S.W.2d 149 (App. 1965).

Discussion

The word "innocence" has been loosely used to describe five degrees of an owner's "fault" as to the illegal use of his property:

(l) The owner was NOT CONVICTED of any related crime, but was involved in the illegal use.

(2) The owner was NOT INVOLVED in the illegal use, but was aware of it.

(3) The owner was IGNORANT of the illegal use, but was negligent in lending his property.

(4) The owner was NOT NEGLIGENT in lending his property, but could have done more to prevent its illegal use.

(5) The owner HAD DONE EVERYTHING REASONABLY POSSIBLE TO PREVENT THE ILLEGAL USE of his property. (A very high standard of care).

It is important to distinguish between these levels of fault, because the relief available to an owner under the forfeiture laws depends upon it. For convenience, this Guide uses the word "innocence" to refer to level (2): lack of involvement, but with an awareness of the illegal use.

a. Lack of Conviction or Involvement (Innocence) Is never a Defense.

Virtually every jurisdiction, state and federal, rejects the lack of involvement or lack of conviction of an owner as a defense to civil forfeiture. Because civil forfeitures are independent of criminal proceedings, it makes no difference whether anyone is convicted of a crime related to the seized property.

> "It is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate . . . . The forfeiture is no part of the punishment for the criminal offense." Various Items of Personal Property v. U.S., 51 S.Ct. 282, 284 (1931).

This has been the rule for more than two-hundred years. Only once has the Supreme Court of the United States even hinted that an owner's criminal involvement might be required to civilly forfeit property. In 1971, in U.S. v. U.S. Coin & Currency, 91 S.Ct. 1041, the Court noted:

> ". . . when the forfeiture statutes are viewed in their entirety, it is manifest that they are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise."

For several years this statement caused some confusion as to whether the High Court intended to change the traditional rule. In 1974, in Calero-Toledo v. Pearson Yacht Leasing Co., 94 S.Ct. 2080, 2094, the Court reaffirmed the old rules by emphasizing that the lack `of involvement of an owner is still no defense to civil forfeiture:

> ". . . Coin & Currency did not overrule prior decisions that sustained application to innocents of forfeiture statutes . . . not limited in application to persons significantly involved in a criminal enterprise."

With the exception of the State of Louisiana, no court recognizes an owner's innocence (lack of involvement or conviction) as a defense. State v. One 1971 Green GMC Van, 354 So.2d 479 (La. 1977).

b. Ignorance, Accompanied by Negligence

Too often, an owner will lend his property under circumstances which should reasonably lead him to suspect it might be used illegally. The borrower might be a known drug violator; he might have a record for trafficking in drugs; or the owner might know of the borrower's involvement with drugs. In such cases, the owner is technically ignorant of any illegal use the borrower makes of his property: the owner does not know, with any probability, that it will be illegally used. But, this ignorance is accompanied by a certain degree of negligence, or fault, on the part of the owner. See U.S. v. One Defender Lobster Vessel, 606 F.Supp. 32 (SD FLA. 1984).

No state or federal constitutional provision prohibits the civil forfeiture of property belonging to an ignorant, but negligent owner. One reason given by courts for forfeiting the property of negligent owners is that it will encourage others to be more careful about lending their property to drug violators:

> "The purpose of the statutes is to curb the narcotic traffic, and the public interest to be protected against the drugs and its victims outweighs the loss suffered by those whose confidence in others proves to be misplaced." People v. One 1948 Chevrolet Convertible Coupe, 290 P.2d 538, 541 (Cal. 1955).

The United States Supreme Court recently repeated this reasoning in the Pearson Yacht case:

> "To the extent that such forfeiture provisions are applied to . . . (owners) . . . who are innocent of any wrongdoing, confiscation may have the desirable effect of inducing them to exercise greater care in transferring possession of their property." 94 S.Ct. 2094.

Although there is no constitutional objection to forfeiting the property of negligent owners, most state forfeiture statutes exempt innocent, ignorant, negligent vehicle owners from their coverage. For example, UCSA § 505(a) (4) (ii) provides:

> "no conveyance is subject to forfeiture . . . by reason of any act or omission established by the owner thereof to have been committed . . . without his knowledge or consent;"

Given the widespread use of cars, and the dependence upon them which has developed in our society, these states have determined not to punish a car owner for negligence in lending his property. Statutory exceptions to forfeiture are discussed in detail later in this Guide.

Only a handful of state courts have interpreted their state constitutions as protecting negligent owners. See In Re One 1965 Ford Mustang, 463 P.2d 827 (Ariz. 1970).

With few exceptions, federal statutes do not exempt the property of negligent owners from forfeiture, even if the owners are innocent and ignorant of the illegal use.

c. The Innocent, Ignorant, Non-Negligent Owner

The traditional view holds that nothing in the Federal Constitution, nor in the constitutions of most states, prohibits the forfeiture of property belonging to an innocent, ignorant, non-negligent owner. Governments are free to forfeit everyone's interests in illegally used property, including lessors (landlords and rental companies), secured parties (banks, credit unions and other lienors), and bailors (lenders of property). The Palmyra, 12 Wheat 1, 6 L.Ed. 531 (1827); U.S. v. Brig Malek Adhel, 2 How. 210, 11 L.Ed. 239 (1844); Dobbins Distillery v. U.S., 96 U.S. 395, 24 L.Ed. 637 (1878); Goldsmith-Grant Co. v. U.S., 41 S.Ct. 189 (1921); Van Oster v. Kansas, 47 S.Ct. 133 (1926); and Pearson Yacht, cited above.

The reasoning behind this rule seems to be that some uses of property pose such a serious threat to the community that extremely harsh measures are required as a deterrent.

> "In the eternal struggle that exists between the avarice, enterprise and combinations of individuals on the one hand, and the power charged with the administration of the laws on the other, severe laws are rendered necessary to enable the executive to carry into effect the measure of policy adopted by the legislature." U.S. v. 1960 Bags of Coffee, 8 Cranch 398, 405, 3 L.Ed. 602 (1814).

Although the vast majority of counts dutifully follow the traditional rule, judges frequently feel the need to question the wisdom of severely punishing non-negligent property owners:

> "The laws relating to forfeitures do cause one who is raised in the traditions of the Anglo-American principles of justice and who is committed to the constitutional principles of due process and just compensation to search closely for a constitutional violation." U.S. v. One 1961 Cadillac, 207 F.Supp. 693, 698 (ED TENN. 1962).

To relieve non-negligent owners from the full burden of forfeiture, the executive and legislative branches have developed procedures for "pardoning" property. These procedures are discussed in detail in the "Remission" Chapter of this Guide.

d. Judicial Rebellion to Forfeiture

In spite of the ancient rules, and in spite of the executive branch's pardoning power, there have always been judges and juries that refuse to follow the law. Unable to accept the harshness of forfeiting a non-negligent person's property, and unwilling to accept the pardon decisions of the executive branches of government, they have either defied or "bent" the law to prevent forfeiture. For example, juries in the American colonies often rebelled against the King's laws by refusing to declare the property of a non-negligent owner to be forfeitable. Readers interested in the history of American forfeiture law, including a discussion of courts that have defied the doctrine, should refer to Maxeiner, Bane of American Forfeiture Law - Banished At Last?, 62 Cornell Law Review 768 - 802 (1977).

Since 1970, the number of courts willing to ignore the ancient forfeiture laws has significantly increased. In the early seventies, both state and federal courts began to hold that civil forfeiture statutes violate the Just Compensation Clauses of the federal and state constitutions. See Mcffeehan v. U.S., 438 F.2d 739 (6 Cir. 1971); In Re One 1965 Ford Mustang, 463 P.2d 827 (ARIZ. 1970); Suhomlin v. U.S., F.Supp. 650 (D MD. 1972); and U.S. v. One 1971 Ford Truck, 346 F.Supp. 613 (CD CAL 1972). As mentioned. earlier, in 1971, the United States Supreme Court gave some encouragement to these courts when it hinted in the Coin & Currency

case that the forfeiture statutes were designed to impose a penalty only upon people "significantly involved in a criminal enterprise."

This conflict between traditional forfeiture doctrine and those courts' intent on protecting non-negligent owners came to a head in 1974 in the case of Calero-Toledo v. Pearson Yacht Leasing Co., 94 S.Ct. 2080. The Pearson Yacht Company was in the business of leasing expensive pleasure yachts in the United States and Puerto Rico. It leased a $19,800 yacht to two Puerto Rican residents. An express prohibition against use of the yacht for unlawful purposes was included in the lease. Puerto Rican authorities later seized the yacht from the lessees because one illegally possessed marijuana cigarette was found on board. Eventually, the yacht was forfeited to the Commonwealth. Pearson Yacht Company sued the Puerto Rican authorities. A Three-Judge United States District Court ruled that the forfeiture was unconstitutional, because the yacht company did not know that its property would be used for an illegal purpose and it was without fault in renting the yacht. The judges disregarded traditional forfeiture law, preferring to follow what they believed was a new trend toward protecting innocent, ignorant, non-negligent owners.

On appeal, the United States Supreme Court reversed the decision and declared the yacht forfeitable. Justices Stewart and Douglas dissented. They believed "that the forfeiture of property belonging to an innocent and non-negligent owner violates . . . (the Constitution)," But, the majority of Justices stood by the old rules, repeating that civil forfeiture statutes can be applied to innocent, ignorant, non-negligent owners, such as the Pearson Yacht Company. In its opinion, the Court did speculate that forfeiture might be unconstitutional if an owner " . proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the prescribed use of his property . . . ." (Level 5) But, the Court found that the yacht company did not show it met this very standard of care, and, hence, the language quoted in the previous sentence has become widely known as the "Calero- Toledo dicta."

At first, every lower court accepted the Calero-Toledo decision. For example, the United States Court of Appeals for the Ninth Circuit refused relief to an innocent, ignorant, apparently non-negligent owner in U.S. v. One 1972 Mercedes-Benz 250, 545 F.2d 1233 (1976). But, just one year later, the same court effectively reversed itself in U.S. v. One 1972 Chevrolet Blazer, 563 F.2d 1386 (1977). It "re-read" the Calero-Toledo case to protect non- negligent owners, and it held that owners are entitled to a judicial hearing to prove their lack of negligence. To reach this result, the Ninth Circuit was forced to ignore the facts and the holding of the Calero-Toledo case, which clearly denied relief to a non-negligent lessor. It also had to elevate the speculative language (dicta) in the Calero-Toledo case to a concrete legal doctrine.

Officials responsible for federal forfeitures within the Ninth Circuit (Alaska, Arizona, Calif., Hawaii, Idaho, Montana, Nevada, Oregon, and Washington), should be aware they are governed by special rules not applicable to other jurisdictions. The power of pardon (remission) granted exclusively to the Executive Branch (19 U.S.C. § 1618) has been assumed by the federal courts in these states. Moreover, federal judges in these states grant relief to an owner based simply upon the owner's ignorance of the illegal use of his property. They are not requiring an owner to prove he met the highest standard of care in lending his property (Level 5). Nor are they demanding an owner prove his lack of negligence (Level 4). See U.S. v. One 1971 VW Sedan, CD CAL, CV 78-3255-MML, December 6, 1979).

If the Pearson Yacht Company could revive its claim and bring it before federal courts within the Ninth Circuit, it would today be granted relief that it was denied just a few years ago by the United States Supreme Court. Historically, the judicial rebellion against the forfeiture doctrine is alive and well in the federal courts within the Ninth Circuit.

In the years since the Calero-Toledo case in 1974, a great number of Federal Courts have applied the "Calero-Toledo dicta" as the test to determine whether "innocent" parties should be protected from the harshness of forfeiture.

Authorities

1 Cir:	U.S. v. One Pontiac LeMans, etc., 621 F.2d 444 (1980); U.S. v. $6,700, 615 F.2d 1 (1980).
10 Cir:	U.S. v. One 1957 Rockwell Aero Com., etc., 671 F.2d 414 (1982).
8 Cir:	U.S. v. One Rockwell Intern. Commander, 754 F.2d 284 (1985); U.S. v. One 1973 Buick Riviera Auto., 560 F.2d 897 (1977).
5 Cir:	U.S. v. One Boeing 707 Aircraft, 750 F.2d 1280 (1985) (relief denied – negligent owner); U.S. v. $47,875 in U.S. Currency, 746 F.2d 291 (1984) (relief denied – "did not do all they reasonably could have done" to protect loan); U.S. v. One 1977 Jeep, 639 F.2d 212 (1981); U.S. v. One 1951 Douglas DC-6 Aircraft, et al., 667 F.2d 502 (1981); U.S. v. One 1975 Ford F100 Pickup Truck, etc., 558 F.2d 775 (1977).
4 Cir:	U.S. v. One 1966 Beechcraft Aircraft Model King Air, 777 F.2d 947 (1985) (relief denied – lease of aircraft "handled in a most casual unbusinesslike manner"); U.S. v. One 1971 Mercedes Benz, etc., 542 F.2d 912 (1976).
2 Cir:	U.S. v. Thirteen (13) Gambling Devices, 559 F.2d 201 (1977); U.S. v. One 1974 Cadillac Eldorado, 548 F.2d 421 (1977).
DE:	Carpenter v. Andrus, 485 F.Supp. 320 (1980).
MD FL:	U.S. v. (1) 30 Foot 1982 Morgan, 597 F.Supp. 589 (1984).
SD FL:	U.S. v. One (l) Blue Lobster Vessel, 639 F.Supp. 865 (1986) (lists six factors to test reasonable actions by lessor of vessel); U.S. v. One Homemade Vessel Named Barracuda, 625 F.Supp. 893 (1986); U.S. v. One 1977 36 Foot Cigarette Ocean Racer, 624 F.Supp. 290 (1985).
HW:	U.S. v. Four (4) Pinball Machines, 429 F.supp. 1002 (1977).
ED MI:	U.S. v. One 1983 Pontiac Gran Prix, 604 F.Supp. 893 (1984).
SD NY:	U.S. v. One Mercedes-Benz 380 SEL, 604 F.Supp. 1307 (1984).
PA:	U.S. v. One 1976 Chevrolet Corvette, 477 F.Supp. 32 (1979).
ED PA:	U.S. v. One 1981 Datsun 280 ZX, 644 F.Supp. 1280 (1986) (Parent found "innocent" of daughter's violation); U.S. v. Devito, 520 F.Supp. 127 (1981).
WD PA:	U.S. v. 1982 Datsun 200 SX, 627 F.Supp. 62 (1985), affirmed, 3 Cir. 782 F.2d 1032 (1/21/86); U.S. v. One 1976 Lincoln Mark IV, 462 F.Supp. 1383 (1979).

WD TN: U.S. v. One 1951 Douglas DC-6 Aircraft, 475 F.Supp. 1056 (1979) (affirmed by 5 Cir. – see above).

Examples

10. B asks his girlfriend G to lend him $200. B admits he wants the money to buy marijuana. G wants no part of the drugs, but does agree to lend him the money. The same day, B is arrested as he is about to buy some pot. Money intended for exchange for illicit drugs is subject to civil forfeiture in at least nine states (Idaho, Ill., Ky., Md., Mass., Minn., NM, Tenn. and Va.) and under federal law (21 U.S.C. § 881(a) (6)). Criminal charges against B are dropped for reasons other than lack of evidence. B and G demand the return of their $200. Must you return the money?

    No. Innocence of an owner is no defense to civil forfeiture. Neither the lack of conviction of B, nor lack of involvement of G, is a defense. The money is forfeitable. And, since both were aware of its intended illegal use, the money will not be "pardoned" by an executive official.

11. S, a minor, was arrested for possession of drugs. He took advantage of the youthful–first offender provisions of the Controlled Substances Act(s) and avoided a conviction. F, his father, now tries to pressure S not to use drugs, but F knows that S is still a drug abuser. F lets S use the family car – a Buick – to go on a trip. S is lawfully arrested transporting 234 pounds of marijuana in the car. While the criminal charges against his son are pending, F demands you return his car. Is it forfeitable?

    Yes, under federal law. Transportation of illicit drugs, in any amount, for any purpose, subjects a conveyance to federal forfeiture. Neither the federal Constitution, nor federal statutes, protects an innocent, ignorant owner such as F. And, since F was negligent in lending his car to S – he knew S was a drug abuser with a prior arrest – F's Buick cannot qualify for a federal "pardon" (remission). See U.S. v. One 1973 Buick Riviera Auto., 560 F.2d 897 (8– Cir. 1977); U.S. v. One 1976 Linc. Cont. Mark IV, 584 F.2d 266 (8 Cir. 1978); and U.S. in. One 1976 Buick Skylark, 453 F.Supp. 639 (D C0L0. 1978). Also see a contra case of U.S. in. One 1979 Datsun 280 ZX, 720 F.2d 453 (8 Cir. 1983).

2. Dismissal of Criminal Charges is No Defense to Civil Forfeiture

When both a criminal action and a civil forfeiture arise out of the same wrongful conduct, dismissal of the criminal charges – even with prejudice – does not affect the forfeiture.

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See MASFA § 11. Judicial Proceedings Generally. Subsection (o). An acquittal or dismissal in a criminal proceeding shall not preclude civil forfeiture proceedings.

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Authorities

10 Cir: Bramble in. Richardson, 498 F.2d 968 (1974).

5 Cir: U.S. v. One (l) 1969 Buick Riviera, 493 F.2d 553 (1974).

4 Cir: U.S. in. One 1971 Mercedes Benz, 542 F.2d 912 (1976).

1 Cir: U.S. in. One Clipper Bow Ketch Nisku, 548 F.2d 8 (1977).

SD NY: U.S. v. 20 Strings Sea Pearls, 34 F.2d 142 (1929).

3. Acquittal is No Defense to Civil Forfeiture

We have seen that neither the innocence of an owner, nor the dismissal of related criminal charges, has any effect on a civil forfeiture. This is so because a civil forfeiture and a criminal penalty are separate, distinct legal sanctions. Each is independent of the other. It follows that an acquittal of criminal charges does not affect the government's right to pursue a civil forfeiture.

Authorities

S.Ct: U.S. in. One Assortment of 89 Firearms, 104 S.Ct. 1099 (1984); One Lot Emerald Cut Stones And One Ring in. U.S., 93 S.Ct. 489 (1972); Helinering in. Mitchell, 58 S.Ct. 630 (1938).

Ct.Cl: Doherty in. U.S., 500 F.2d 540 (1974).

10 Cir: (Contra) Lowther in. U.S., 480 F.2d 1031 (1973) (of highly questionable validity after the 1972 decision in One Lot Emerald Cut Stones, Etc., above).

9 Cir: U.S. in. Kismetoglu, 476 F.2d 269 (1973); U.S. in. Gramer, 191 F.2d 741 (1951).

8 Cir: One Blue 1977 AMC Jeep CJ-5 in. U.S., 783 F.2d 759 (1986); Glup v. U.S., 523 F.2d 557 (1975).

6 Cir: Epps v. Bureau of Alcohol, Tobacco & Firearms, 375 F.Supp 345, affirmed 495 F.2d 1373 (1973); Mcxeehan v. U.S., 438 F.2d 739 (1971); U.S. v. One 1935 Model Pontiac S. Automobile, 105 F.2d 149 (1939).

5 Cir: U.S. v. One (1) 1969 Buick Riviera Auto, 493 F.2d 553 (1974); U.S. v. Burch, 294 F.2d 1 (1961).

4 Cir: U.S. v. One 1953 Oldsmobile 98 4-Door Sedan, 222 F.2d 668 (1955).

3 Cir: U.S. v. One 1964 Ford Thunderbird, 445 F.2d 1064 (1971); U.S. v. One Dodge Sedan, 113 F.2d 552 (1940).

2 Cir: U.S. v. Physic, 175 F.2d 338 (1949).

1 Cir: Murray & Sorenson, Inc. v. U.S., 207 F.2d 1 (1953).

ND CA: Weinstein v. Mueller, 563 F.Supp. 923 (1982).

CO: U.S. v. One 1977 Chevrolet Pickup, 503 F.Supp. 1027 (1980).

FL: Knight v. State, 336 So.2d 385 (App. 1976).

NJ: State v. McCoy, 367 A.2d 1176 (App. 1976).

Discussion

Anglo-American law has a tradition of providing adverse parties a "day in court" to settle their disputes. It also has a tradition of limiting them to just "one day in court," so to speak. Once an issue between certain parties has been finally decided, those same parties cannot litigate the same issue again. The goal is to prevent needless repetition and harassment. Our legal system has developed at least two principles designed to limit parties to "just one bite at the apple":

(1) The doctrine of Collateral Estoppel; and

(2) the constitutional doctrine of Double Jeopardy.

If both a criminal proceeding and a civil forfeiture action stem from the same wrongful conduct, is the Government violating these principles by giving itself two separate chances at "punishing" an owner?

a. Collateral Estoppel

According to the United States Supreme Court:

> "'Collateral estoppel' is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." Ashe v. Swenson, 90 S.Ct. 1189 (1970).

The application of this rule to civil forfeiture actions was first considered by the Supreme Court in 1818 in Gelston v. Hoyt, 16 U.S. (3 Wheat.) 246. After some initial confusion (see Coffey v. U.S., 6 S.Ct. 437 (1886)), it has now become well settled that collateral estoppel is no defense in a civil forfeiture action, although an owner has been acquitted in a related criminal proceeding, or the criminal charges against him have been dismissed. There are three distinct reasons for this view.

First, the issues in a criminal proceeding and in a civil forfeiture action are not identical. Civil forfeiture statutes focus almost exclusively on the use made of property; the criminal state of mind of an owner is irrelevant. Criminal statutes, on the other hand, require the Government to prove prohibited use of conduct combined with an illegal intent. Since the issues in the two proceedings are not the same, the doctrine of collateral estoppel does not apply. An acquittal or dismissal in a criminal case might simply be based upon a lack of criminal intent; it does not necessarily decide the question of the prohibited use of property.

Second, the burdens of proof in a criminal proceeding and in a civil forfeiture action are not identical. In a civil forfeiture action, the Government need only prove its case by a preponderance of evidence (the "probably true" test). In a criminal proceeding, the Government must prove its case beyond a reasonable doubt (the "almost certainly true" test). Acquittal or dismissal in a criminal proceeding may simply mean the Government fell short of the higher burden of proof; it does not necessarily decide whether the evidence satisfies the "probably true" or preponderance test. Therefore, the doctrine of collateral estoppel does not apply.

Third, the parties to a criminal proceeding and to a civil forfeiture action are not identical. The defendant in a civil forfeiture action is the property – not the defendant in a related criminal case. Since the parties are not the same, again, the doctrine of collateral estoppel does not apply.

Authorities

S.Ct: U.S. v. One Assortment of 89 Firearms, 104 S.Ct. 1009 (1984).

US Claims Ct: Golder v. U.S. v. General Electric Credit Corporation of Tennessee and Federal Insurance Company, 15 Cl.Ct., 513 (1988), under "Constitutional Forfeitures Can be Reviewed by the Courts." infra.

8 Cir: U.S. v. Maull, 855 F.2d 514 (1988). (The dismissal of a civil forfeiture action is not *res judicata* as to a subsequent criminal proceeding.)

6 Cir: U.S. v. Smith, 730 F.2d 1052 (1984).

ED MI: U.S. v. 11,348 Wyoming, Detroit, Michigan, 705 F.Supp. 352 (1989), under "Probable Cause is Enough to Begin a Civil Forfeiture." supra.

WD MI: U.S. v. Schmalfeldt, 657 F.Supp. 385 (1987). (Collateral estoppel and double jeopardy do not apply where civil proceedings have merely been initiated at the administrative level, no hearings have been held, and no judgment has been rendered. Where a forfeiture complaint has been filed and then withdrawn without any adjudication of the forfeiture issue, collateral estoppel and double jeopardy cannot successfully be argued.) (Dicta suggests that an initial criminal forfeiture under 21 U.S.C. Sec. 853 would not bar a subsequent civil forfeiture under 21 U.S.C. Sec. 881. The

Criminal forfeiture is an in personam proceeding against the property, whereas the civil forfeiture is an in rem proceeding against the individual. This case provides an extensive history of forfeiture law.) [Collateral estoppel refers to identity of issues. Thus, the type of jurisdiction, be it in personam or in rem, should be irrelevant to determining the applicability of collateral estoppel.]

b. Double Jeopardy

The Fifth Amendment to the United States Constitution provides that no citizen of the United States shall "twice be put in jeopardy of life or limb" for the same criminal offense. It is designed to protect a citizen from two criminal prosecutions by the same Government for the same offense.

It does not prohibit one criminal prosecution and one civil penalty for the same offense.

"(Civil) forfeiture is not barred by the Double Jeopardy Clause of the Fifth Amendment because it involves neither two criminal trials nor two criminal punishments. Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense." One Lot Emerald Cut Stones v. U.S., 93 S.Ct. at 492 (quoting from Helvering v. Mitchell). Also see 89 Firearms, cited infra and supra.).

Authorities

S.Ct: U.S. v. Halper, __ U.S. __ (1989); 104 L.Ed.2d 487; 109 S.Ct. 1892. (The Double Jeopardy Clause of the Fifth Amendment protects against three abuses; namely, (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. A civil penalty serving a retributive or deterrent purpose constitutes punishment, whereas one serving a remedial purpose does not constitute punishmet.) (Under the Double Jeopardy Clause, a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil santion. This is true to the extent that the civil santion may not fairly be characterized as remedial, but only as a deterrent or retribution. Remedial santions include compensating the government for costs, reasonable liquidated damages, and ordinary fixed-penalty-plus-double damages. However, a civil sanction of more than $130,000 where the government's expenses were $16,000 constitutes punishment.) (The government may not criminally prosecute a defendant, impose a criminal penalty, and then bring a separate civil action based on the same conduct and obtain a judgment that is not rationally related to the goal of making the government whole.) [The Supreme Court's decision focuses on the assessment of a penalty in a civil proceeding against the same individual who had been previously convicted in a criminal case for the same acts. Indeed, the Court acknowledged that its decision was for the rare case "where a fixed penalty provision subjects a prolific but small-time offender to a sanctions overwhelmingly disproportionate to the damage he has caused." 104 L.Ed.2d at 504. In contrast, a civil forfeiture under 21 U.S.C. 881 is an *in*

rem action against property that was used to facilitate illegal drug transaction, or against assets that represent the proceeds of illegal drug transactions. An *in rem* action is directly solely against property, is to determine the ownership of that property, and cannot impose personal obligations on anyone. See pages 3–9 of the Drug Agents' Guide.]

1 Cir: U.S. v. A Parcel of Land With A Building Located Thereon at 40 Moon Hill Road, etc., 884 F.2d 41 (1989). (The doctrine of double jeopardy does not apply to a 21 U.S.C. Sec. 881 civil forfeiture proceeding. First, double jeoparady does not apply to suits by separate soverigns, even if both are criminal suits for the same offense. Second, forfeiture of the entire property is a justifiable remedy of the government's injury and not a punishment. Third, the enormous cost of the government's drug war justifies a recovery in excess of the strict value of property actually used to grow illegal substances. Accordingly, the entire tract of land may be forfeited even if only a part of that land was used to grow illegal substances.

2 Cir: U.S. v. The Premises and Real Property at 4492 South Livonia Road, etc., 889 F.2d 1258 (1989), under "Pre–Seizure Notice or Hearing are Not Required." infra.

3 Cir: Also see U.S. v. Parcel of Real Property Known as 6109 Grubb Road, 886 F.2d 618 (1989), under "Innocence of an Owner is No Defense to a Civil Forfeiture." supra.

4 Cir: Also see In the Case of One 1985 Nissan 300 ZX, etc., 889 F.2d 1317 (1989), under "Claimants (RE Standing)." infra.

CD CA: U.S. V. 1985 BMW 635 CSI, 677 F.Supp. 1039 (1987). (A Statute authorizing the forfeiture of vehicles used to transport controlled substances is civil. As such, the Eighth Amendment prohibition against cruel, unusual, or disproportional punishment does not apply. A vehicle used to transport drugs is subject to forfeiture no matter how small the amount of drugs found. A claimant cannot pay a monetary claim in lieu of forfeiture.) [The same rationale regarding the applicability of the Fifth Amendment's Double Jeopardy Clause is relevant to an Eighth Amendment challenge.]

WD MI: U.S. v. Schmalfeldt, 657 F.Supp. 385 (1987), under "Collateral Estoppel." supra.

MA: U.S. v. A Parcel of Land and Buildings Located Thereon at 40 Moon Hill Road, etc., 884 F.2d 41 (1988), under "Collateral Estoppel." supra.

4. Entrapment is no Defense to Civil Forfeiture

Entrapment is a factual defense unique to criminal prosecutions. Thus far, no court has allowed the defense in a civil forfeiture action.

Authorities (See)

S.Ct: U.S. v. One Assortment of 89 Firearms, 104 S.Ct. 1099 (1984); Hampton v. U.S., 98 S.Ct. 1646 (1976); U.S. v. Russell, 93 S.Ct. 1637 (1973).

9 Cir: U.S. v. One 1974 Jeep, 536 F.2d 1285 (1976).

6 Cir: U.S. v. $50,000 U.S. Currency, 757 F.2d 103 (1985).

5 Cir: U.S. v. One (1) 1972 Wood, 19 Ft. Custom Boat, 501 F.2d 1327 (1974).

4 Cir: Weathersbee v. U.S., 263 F.zd 324 (1958).

CD CA: U.S. v. One 1973 Pace Arrow M300 Motor Home, 379 F.Supp. 223 (1974).

ND IL: U.S. v. One 1977 Pontiac Grand Prix, 483 F.Supp. 247 (1962).

D MS: U.S. v. One 1960 Ford Convertible, 209 F.Supp. 247 (1962).

TX: McKee v.State, 318 S.W.2d 113 (App. 1958).

WD LA: U.S. v. One Dodge Roadster, 25 F.2d 912 (1927).

Discussion

Every crime consists of two kinds of elements: (a) some forbidden act or conduct; and (b) some criminal state of mind. Unless both are present, there is no crime.

Entrapment occurs when an innocent person, who does not have the required criminal state of mind, is pushed by Government agents into doing a forbidden act. The crime is not complete if the defendant was entrapped; he may have done a forbidden act, but he lacked the necessary criminal intent. Since 1932, the Supreme Court of the United States has followed a two-part test for entrapment:

1. WAS THERE INDUCEMENT by the Government agents?
   - if not, then there was no entrapment.
2. If there was Government inducement, WAS THE DEFENDANT PREDISPOSED to commit the offense?
   - if he was predisposed, then there was no entrapment.
   - if he was not predisposed, then he was entrapped.

As this test suggests, entrapment is a criminal defense, concerned exclusively with the defendant's criminal intent. A civil forfeiture action, on the other hand, is a noncriminal proceeding, concerned almost exclusively with the use made of property. Criminal intent of an owner or claimant is virtually irrelevant in a civil forfeiture action.

Therefore, it seems logical to conclude that entrapment is not a defense to civil forfeiture.

Example

12. You are called by Customs agents who have discovered 350 grams of cocaine in incoming foreign mail. You arrange for a controlled delivery of the package. You send a pickup notice to P, the addressee. P arrives at the post office in his jeep. P takes delivery of the package and starts to drive away. You stop and arrest him. You also seize the package, and his jeep, for forfeiture. P tries to defend against forfeiture by arguing that you entrapped him into using his vehicle to drive to the post office to pick up the drugs. Will he be successful with this defense?

    No. First, the entrapment defense should logically be confined to criminal cases. It has no place in a civil forfeiture proceeding. Second, even if the doctrine applies to civil forfeiture, you did not entrap P. Your notice letter did induce him to come to the post office, but he was already predisposed to come there in a vehicle to pick up the drugs. See U.S. v. One 1974 Jeep, cited above.

5. Illegal Seizure is No Defense to Civil Forfeiture

There is an important difference between illegally obtaining evidence to prove a forfeiture, and illegally obtaining possession of the forfeitable property. Under the Exclusionary Rule, illegally obtained evidence cannot be used to prove property is forfeitable. On the other hand, if enough legally obtained evidence exists to prove property is forfeitable, the fact that the property is illegally seized is no defense. The mere fact of illegal seizure, standing alone, does not immunize property from forfeiture.

Authorities

S.Ct: U.S. v. Jeffers, 72 S.Ct. 93 (1951); Trupiano v. U.S., 68 S.Ct. 1229 (1948); Maul v. U.S., 47 S.Ct. 735 (1927).

9 Cir: U.S. v. One 1977 Mercedes Benz 450SL, 708 F.2d 444 (1983); U.S. v. One (1) 1971 Harley-Davidson Motorcycle, 508 F.2d 351 (1974); John Bacall Imports, Ltd. v. U.S., 41Z F.2d 586 (1969).

8 Cir: U.S. v. U.S. Currency $31,828, 760 F.2d 228 (1985).

6 Cir: U.S. v. $22,287 in U.S. Currency, 709 F.2d 442 (1983); Bourke v. U.S., 44 F.2d 371 (1930).

5 Cir: U.S. v. Monkey, 725 F.2d 1007 (1984); U.S. v. Carey, 272 F.2d 492 (1959); Grogan v. U.S., 261 F.2d 86 (1958).

4 Cir: U.S. v. One 1956 Ford Tudor Sedan, 253 F.2d 725 (1958).

3 Cir: U.S. v. $1,058 In U.S. Currency, 323 F.2d 211 (1963).

2 Cir: U.S. v. Eight Boxes, 105 F.2d 896 (1939); The Underwriter, 13 F.2d 433 (1926).

1 Cir: Berkowitz v. U.S., 340 F.2d 168 (1965); Interbartolo v. U.S., 303 F.2d 34 (1962); U.S. v. One 1975 Pontiac Lemans, 651 F.2d 444 (1980).

DC Cir: Welsh v. U.S., 220 F.2d 200 (1955).

ND IL: U.S. v. $38,394, 498 F.Supp. 1325 (1980) (no other probable cause than results of illegal seizure).

GA: Blackmon v. B.P.O.E., 208 S.E.2d 483 (1974).

IL: People v. Mota, 327 N.E.2d 419 (App. 1975).

ED MI: U.S. v. $22,287, 520 F.Supp. 675 (1981) (appeal case above).

MN: City of Duluth v. Cerveny, 16 N.W.2d 779 (1944).

NJ: Farley v. $168,400.97, 259 A.2d 201 (1969) (contains an especially scholarly discussion of law on this issue).

PA: Com. v. Fassnacht, 369 A.2d 800 (1977) (CONTRA).

TN: Fuqua v. Armour, 543 S.W.2d 64 (1976).

WI: State v. Voshart, 159 N.W.2d 1 (1968).

Discussion

To understand this principle, it is helpful to distinguish between two activities: (a) obtaining evidence needed to prove a forfeiture; and (b) obtaining possession of the forfeitable property. It is also helpful to distinguish between two kinds of forfeitable property: (a) contraband per se; and (b) derivative contraband.

Contraband per se is property the mere possession of which is virtually always unlawful. Examples include: heroin (21 U.S.C. §§ 812, 881f); "moonshine" whiskey (26 U.S.C. §§ 5686, 7302); sawed-off shotguns (26 U.S.C. § 5861d); Molotov cocktails (26 U.S.C. § 5845); and counterfeit money (18 U.S.C. § 492).

Derivative contraband is property which is almost always lawful to possess, but which becomes forfeitable because of its unlawful use, or intended use. Examples include: cars, boats, planes, chemical equipment, and money.

a. Contraband Per Se Is Never Protected

Illegally obtaining evidence regarding contraband per se, or illegally seizing contraband per se, is no defense to the civil forfeiture of such property. Illegally seized heroin, bombs, counterfeit money, and so forth, will be excluded as evidence in a criminal proceeding, but will never be returned to its "owner." And, the Government will never compensate anyone for its seizure and destruction. Contraband per se is always forfeited to the Government. U.S. v. Jeffers,

72 S.Ct. 93 (1951) (illegally imported cocaine).

b. Unlawfully Obtained Evidence of Derivative Contraband

To forfeit derivative contraband, the Government must produce evidence of illegal use, or intended illegal use. This evidence is essential because derivative contraband is "everyday" property.

We have seen that the Exclusionary Rule applies to civil forfeiture. Evidence obtained in violation of Fourth or Fifth Amendment rights cannot be relied upon to prove a civil forfeiture. It follows that if the evidence needed to prove derivative contraband is forfeitable, and is obtained unlawfully, forfeiture will be denied and the property returned. And, this is true regardless of how possession of the derivative contraband was obtained.

Review Example 7, page 23. In that case, agents illegally searched a vehicle and found drugs. The results of the search were suppressed, and there was not enough independent evidence to prove the illegal use of the car. Therefore, the vehicle escaped forfeiture.

c. Lawfully Obtained Evidence of Derivative Contraband

If the illegal use, or intended illegal use, of derivative contraband can be shown by lawfully obtained evidence, the property is forfeitable, regardless of how possession of the property is acquired. As far back as 1815, the United States Supreme Court held that the power to enforce a civil forfeiture is not lost merely because possession of the property is unlawfully acquired. The Ship Richmond v. U.S., 9 Cranch 102, 3L ed 670.

For an exhaustive list of state and federal cases recognizing this traditional rule, see Annotation, 8 ALR 3d 473 (1966).

There is an analogy between this rule and an unlawful arrest. If the Government has lawfully obtained evidence that X committed a crime, the mere fact the Government unlawfully obtains custody of X is no defense. As long as there is independent proof of the crime, an illegal arrest, seizure, kidnapping, etc., of the defendant is no bar to his conviction. Ker v. Illinois, 7 S.Ct. 225 (1886); Frisbie v. Collins, 72 S.Ct. 509 (1952).

Several courts have erroneously suggested that the Supreme Court's decision in One 1958 Plymouth Sedan v. Pennsylvania, 85 S.Ct. 1246 (1965) has changed this longstanding rule. See Melendez v. Shultz, 356 F.Supp. 1205 (Dhass. 1973). The Plymouth Sedan case merely held that illegally obtained evidence cannot be relied upon to forfeit derivative contraband. It had nothing to do with cases where the illegal use of derivative contraband can be shown by evidence lawfully obtained independently of an illegal seizure. The court was careful in making this distinction:

> "In both the Boyd . . . situation and here the essential question is whether evidence . . . the obtaining of which violates the Fourth Amendment may be relied upon to sustain a forfeiture . Boyd holds that it may not."
>
> * * *
>
> "And it is conceded here that the Commonwealth could not establish an illegal use without using the evidence resulting from the search which is challenged as having been in violation of the Constitution." 85 S.Ct. at 1249–1250.

The old rule is still good law: the mere illegal seizure does not immunize property from forfeiture.

Readers interested in a more detailed discussion of this issue should refer to LaFave, Search and Seizure: A Treatise on the Fourth Amendment, Vol. 1, Ch. 1, Sec. 1.5(a) (West 1978).

WARNING: Although an illegal seizure will not, by itself, immunize property from civil forfeiture, it might subject the seizing agents, and the seizing agency, to civil liability for damages. Do not plan to illegally seize forfeitable property.

Examples

13. You develop probable cause to believe J has heroin stored in a motel room. The manager of the motel tells you the occupants are away for the day. You go to the room and knock on the door. No one answers. You get a key from the manager and search the room. You find a large quantity of heroin on a shelf. In criminal proceedings against J, the results of the search are suppressed because your warrantless entry of the room was unlawful. Can J defeat the civil forfeiture of the heroin?

    No. Heroin is contraband per se. It is virtually always illegal to possess. Contraband per se is subject to summary forfeiture, regardless of how it was acquired by the Government. The illegal search and seizure is no defense to civil forfeiture (see U.S. v. Jeffers, cited above).

14. You receive an anonymous tip that a Negro male, wearing a fake fur coat and a wide-brimmed hat, is selling phenmetrazine in front of a certain fast food restaurant. You drive to the restaurant and arrest a suspect matching this description. On his person you find $3,900 in cash, many packages of PCP, and a notebook clearly showing the money is proceeds of PCP sales. Remember, proceeds of drug transactions are forfeitable under federal law (21 U.S.C. § 881(a)(6)) and in at least nine states. In criminal proceedings against the defendant, the court rules you lacked probable cause to make the arrest and, therefore, the seizure of evidence incident to arrest was unlawful. See Nance v. U.S., 377 A.2d 384 (D.C. 1977). Can you subject the seized money to civil forfeiture?

    No. Money is derivative contraband. To forfeit derivative contraband you must have evidence of its illegal use. All the evidence you have has been suppressed. Without other evidence that the money is proceeds, it cannot be civilly forfeited. (See Berkowitz v. U.S., cited above).

15. The owner of a rented farm tells you he has seen his tenants assembling large amounts of glassware, equipment and chemical products on his property. He has a small piece of paper with the names of chemicals he has seen stored at his farm: piperidine, bromobenzene, magnesium, sodium, bisulfate, cyclohexanone, and hydrochloric acid. A chemist tells you these are all the materials needed to make PCP. The owner gives you a copy of his lease. You recognize one of the tenants as a felon, twice convicted for illegally manufacturing PCP and methamphetamine. You are convinced the owner is a good citizen with no motive but to help law enforcement. Without obtaining a search warrant, you raid the farm and seize a

fully operating PCP lab. If the courts should find that your warrantless search and seizure of the lab site was unlawful, will you still be able to forfeit the laboratory?

Yes. Although the seizure of the lab might have been unlawful, you have enough evidence independent of the seizure to establish probable cause to believe there was a lab at the farm and it was intended for use to make PCP. The lab is forfeitable. The illegal entry and seizure, by itself, is no defense (see Trupiano v. U.S., cited above).

FORFEITABLE PROPERTY

To be forfeitable, property must fall within the provisions of a forfeiture statute. Each provision of each statute forms a kind of "pigeonhole." Unless property "fits" squarely into one of these pigeonholes, it will escape forfeiture.

THERE CAN BE NO FORFEITURE WITHOUT A FORFEITURE STATUTE.

Authorities

S.Ct: U.S. v. Lane Motor Co., 199 F.2d 495 (10 Cir. 1952), affirmed 73 S.Ct. 459 (1953).

5 Cir: U.S. v. D.K.G. Appaloosas, Inc., 829 F.2d 532 (1987); cert. denied, One 1984 Lincoln Mark VII Two-Door v. U.S., 485 U.S. 976 (1988); __ U.S. __; 99 L.Ed.2d 481; 108 S.Ct. 1270. (The government and a claimant can enter into a plea agreement which precludes forfeiture of the property. The ex post facto clause does not apply to 21 U.S. C. Sec. 881(a)(6) forfeitures.) [In the event of a plea agreement, it is important that there be coordination between the U.S. Attorney's Office and the seizing agency. This will prevent an administrative forfeiture concurrent with returning the property as part of a plea agreement.]

3 Cir: U.S. v. Charles D. Kaier Co., 61 F.2d 160 (1932).

MD LA: U.S. v. Modicut, 483 F.Supp. 70 (1979).

ND TX: King v. U.S., 292 F.Supp. 767' (1968) (Rifle used to assassinate John F. Kennedy).

FL: Baker v. State, 343 So.2d 622 (App. 1977).

NC: State v. McKinney, 244 S.E.2d 455 (App. 1978).

A. SCHEDULE I DRUGS ARE ALWAYS FORFEITABLE AS CONTRABAND PER SE

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See MASFA § 4. Property subject to forfeiture. Subsection (a). All controlled substances are subject to forfeiture.

See also § 20. Summary forfeiture of controlled substances. Schedule I and other specified substances are contraband and summarily forfeited to the state.

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Authorities

21 U.S.C. § 881(f) and (g); UCSA § 505(f) and (g).

Discussion

Both federal and state law classify all controlled substances into five control groups called "Schedules." Schedule I contains drugs which present the greatest danger to the public. Schedule V contains the least dangerous of controlled drugs. The controls and the penalties for violations vary with the Schedules. Three basic factors are used to determine which Schedule a drug belongs:

(1) Its potential for abuse,

(2) Its medical use, and

(3) Its likelihood of causing dependence.

Drugs with a high potential for abuse, with no currently accepted medical use, and with a severe likelihood of causing dependence or serious risk of harm (all three conditions must be met) are in Schedule I. This includes natural opiates, opium derivatives and hallucinogens, such as heroin, marijuana, LSD and Mescaline. 21 U.S.C. § 812; UCSA §§ 201–212.

Because Schedule I drugs are virtually always illegal to possess – except in research – they fall within the definition of "Contraband per se." For this reason, Schedule I drugs are virtually always forfeitable. State and Federal law are identical on this issue (except on October 27, 1986, Public Law 99–570 included Schedule II drugs as "contraband" for forfeiture purposes):

> "All controlled substances in Schedule I ("or II" – Federal only) that are possessed, transferred, sold or offered for sale in violation of the provisions of this title shall be deemed contraband and seized and summarily forfeited . . . ." 21 U.S.C. § 881(f); USCA § 505(f).

Note under Federal law that Schedule I or II drugs are "summarily" forfeited; no special forfeiture proceedings or forfeiture paperwork are required. And, as we have already seen, an illegal seizure of contraband per se, including Schedule I drugs, is no defense to forfeiture. See U.S. v. Gordon, 638 F.2d 886 (5 Cir. 1981) where defendant stole marijuana at destruction site and was convicted for theft of government property.

B. NON-SCHEDULE I OR II DRUGS ARE DERIVATIVE CONTRABAND

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See MASFA § 4(a) and § 20.

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Authorities

21 U.S.C. § 881(a) (1); UCSA § 505(a) (l).

Discussion

One characteristic of Schedule I drugs sets them apart from all others: they lack any legitimate medical uses.

Other controlled substances, such as morphine, codeine, amphetamine, methaqualone, librium and valium, have currently accepted medical uses. They are produced and prescribed for legitimate purposes. To civilly forfeit non-Schedule I drugs under state law, and non-Schedule I or II drugs under Federal law:

YOU MUST PROVE THEY HAVE BEEN ILLEGALLY

MANUFACTURED,

DISTRIBUTED,

DISPENSED, or

ACQUIRED.

Non-Schedule I drugs under state law, and non-Schedule I or II drugs under Federal law are, at best, "derivative contraband."

Example

16. Acting in an undercover capacity, you buy tablets of Dilaudid from Miss L. Dilaudid is a synthetic opiate prescribed for severe pain, particularly in terminal cancer patients. It is a Schedule II narcotic. After several more purchases, you gain L's confidence and ask about her supplier. She says it's a local pharmacist who has been in business for 39 years. She says she can get as much as she wants. You place an order with L for 425 more tablets, illegally worth $4,000. L goes to K's pharmacy and returns with the Dilaudid in a large prescription container in a brown paper bag. You seize the Dilaudid and arrest L. Are the seized Dilaudid tablets forfeitable?

    Yes. As of October 27, 1986, the Dilaudid is forfeitable as a Schedule II contraband drug, and under state law as derivative contraband if you can show probable cause to believe they have been illegally manufactured, distributed,

dispensed, or acquired. Here, it is not only probable, it seems almost certainly true that K illegally distributed and L illegally acquired the tablets. Therefore, they are subject to forfeiture. (See U.S. v. Kershman, 555 F.2d 198, 8 Cir. 1977).

NOTE. If the pharmacist is criminally convicted of illegally distributing drugs to Miss L, both state and federal governments have the power to seize his entire stock of controlled substances and to revoke his controlled substances registration. Once his registration is revoked, all his seized drugs are subject to forfeiture. 21 U.S.C. § 824, § 881(a) (8); UCSA 304.

C. EQUIPMENT, PRODUCTS & RAW MATERIALS

All raw materials, products, and equipment of any kind which are used, or intended for use, in illegally manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance are subject to civil forfeiture. 21 U.S.C. § 881(a) (2); UCSA § 505(a) (2).

Common examples of this type of property include: glassware, chemicals, cutting materials, scales, pumps, strobe lights, and radios.

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See MASFA § 4 (b). All property, including the whole of any lot or tract of land, used or intended to be used in any manner or part to facilitate conduct giving rise to forfeiture is forfeitable.

***

1. Anything Tangible Can Be Included, Except Land, Buildings, Money and Conveyances

Discussion

Neither 21 U.S.C. § 881(a) (2), nor UCSA § 505(a) (2) defines the terms "raw materials, products, and equipment." And, we have not found any reported cases interpreting the meaning of these terms as used in these statutes. Therefore, courts are likely to interpret them according to their ordinary, or dictionary meaning. See 2-A, Southerland, Statutory Construction, Sec. 45.08 (4th ed. 1973).

Webster's Third New International Dictionary (G. & C. Merriam Co. 1976) defines them as:

> (RAW) MATERIALS: ". . . the basic matter . . . from which the whole or the greater part of something . . . is made; . . . apparatus (as tools or other articles) necessary for doing or making something.

* * *

PRODUCT: ". . . something produced by physical labor . . .; something produced naturally . . .; a substance produced from one or more other substances as a result of chemical change. . . ."

* * *

EQUIPMENT: ". . . the physical resources serving to equip a person or thing; the implements (as machinery or tools) used in an operation or activity . . .; all the fixed assets other than land and buildings of a business enterprise . . .;

SYN: equipment, apparatus, machinery, paraphernalia, outfit, tackle, gear, material can signify, in common, all the things used in a given work or useful in affecting a given end."

On their face, these definitions are broad enough to apply to all tangible things (other than land or buildings) needed for any particular purpose. It seems highly probable that Congress intended this broad interpretation, because it flanked these terms in the statute with the words "All" and "of any kind."

What little legislative history exists on the issue is consistent with this conclusion. Section 881, on which UCSA § 505 is patterned, is a combination and extension of prior forfeiture laws. It is modeled after 26 U.S.C. § 7301, a provision of the internal revenue laws providing for the forfeiture of:

"(a) Taxable articles . . .;
(b) Raw materials – All property found in the possession of any person intending to manufacture the same into . . . (taxable articles);
(c) Equipment – All property whatsoever . . . intended to be used in the making of . . . (taxable articles);
(d) Packages – All property used as a container for . . . property described in subsection (a) and (b) . . .; and,
(e) Conveyances . . . ."

Much of the substantive language of Section 881 was cannibalized from 26 U.S.C. § 4706 (the old Harrison Narcotics Act), 49 U.S.C. § 782 (the Contraband Seizure Act) and 21 U.S.C. § 334(a) (2) (the Drug Abuse Control Amendments of 1965). The scope of these provisions was considerably expanded. For example, the Contraband Seizure Act provided for the forfeiture of conveyances used to transport contraband, but did not reach conveyances intended for use to transport contraband.

Section 881 was expanded to cover both use and intended use. See Drug Abuse Control Amendments – 1970: Hearings on H.R. 11701 and H.R. 13743 Before the Subcomm. on Public Health and Welfare of the House Comm. on Interstate and Foreign Commerce, 91st Cong., 2d Sess. (1970) (statement of John E. Ingersoll, Director, Bureau of Narcotics and Dangerous Drugs). And see Controlled Dangerous Substances, Narcotics and Drug Control Laws: Hearings on H.R. 17463 Before the Comm. on Ways and Means, House of Representatives, 91st Cong., 2d Sess. (1970) (section–by– section analysis by John E. Ingersoll).

As originally enacted in 1970, § 881 was not thought to be applicable to drug money. For eight years, no attempts were made to apply § 881(a)(2) to money, and it was not until November 10, 1978, that a new paragraph on money was added to the statute. 21 U.S.C. § 881(a) (6). This amendment is evidence that § 88l(a)(2) was not meant to apply to money. See Pirkey v. State, 327 P.2d 463 (1958).

Finally, it seems unlikely that § 881(a) (2) was meant to apply to conveyances. A separate, comprehensive provision on conveyances is contained in § 88l(a)(4). That section has special protections for owners of stolen conveyances and common carriers. Applying § 88l(a)(2) to conveyances would avoid these protections. Congress could not have intended such a result. Conveyances can only be forfeited under § 881(a) (4).

2. Anything Used, or Intended for Use, to Illegally Manufacture, Deliver, or Import Drugs, is Forfeitable.

The Government need not show actual use; intended use is enough. Whether an object is intended for illegal use is a question of fact, which can be proved by circumstantial evidence. Note that objects intended for use to inject, inhale or ingest illicit drugs are not included; only things used, or intended for use, in manufacturing, delivering or importing drugs are forfeitable. See U.S. v. One 1945 Douglas C-54, 461 F.Supp. 324 (WD MO. 1978), which holds intent to use aircraft to traffic in drugs as revealed in wire interception makes aircraft forfeitable. See appeals at 604 F.2d 27 (8 Cir. 1979) and 647 F.2d 864 (8 Cir. 1981) which find after remand that defendant had no standing as actual owner to contest forfeiture, cert. denied 102 S.Ct. 1002. Also see U.S. v. One 1983 Pontiac Grand Prix, 604 F.Supp. 893 (ED MICH. 1985) where intent to transport the defendant and profit from drug sale from Detroit to Ottawa was held to be facilitation.

Discussion

a. Actual Use Is Not Required

Certainly, if an object is used illegally, the users can be criminally prosecuted and the object civilly forfeited. But, actual use is not required. People who control property with the intent to use it illegally are also subject to punishment. No constitutional provision requires the Government to stand back and wait for the illegal use to occur. Many statutes make it a crime to possess property intended for illegal use, and also provide for the civil forfeiture of such property. See U.S. v Lots 12, 13, 14, 15, Keeton Heights, etc., 869 F.2d 942 the Cir. (1989), under "Innocence of an Owner is no Defense to a Civil Forfeiture." supra p. 17. See also U.S. v. $73,277, 710 F.2d 283 (7 Cir. 1983) where defendant admitted taking money to Florida in unsuccessful effort to buy marijuana.

For example: **(1)** 25 U.S.C. § 5686 and § 7302 make it a crime to "have or possess any property intended for use in violating . . . (the federal liquor laws)" and they forfeit any property intended for use to violate . . . (any part of the Internal Revenue Laws); **(2)** 18 U.S.C. § 492 provides for the forfeiture of "any material or apparatus used or . . . intended to be used, in making . . . counterfeit (money);" **(3)** 18 U.S.C. § 1952 and § 1953 make it a crime to send in interstate commerce "any . . . paraphernalia . . . paper, writing, or other device used or to be used, . . . in . . . bookmaking. . . ."; and **(4)** 26 U.S.C. § 5763 provides for the forfeiture of "all property intended for use in . . . (the illicit production and distribution of tobacco products)."

b. Seizures Incident to Violations

Obviously, it is a question of fact whether property is intended for illegal use. And, unless the person in control of property admits his intent, it must be proved by circumstantial evidence. See One 1941 Ford 1/2 Ton Pickup Truck v. U.S., 140 F.2d 255 (6 Cir. 1944); and G.M.A.C. v. U.S., 32 F.2d 121 (8 Cir. 1929); U.S. v. 18 Barrels of Alcohol, 20 F.2d 186 (ED PA 1927).

When property is seized close in time and place to the site of illegal activity, it should be easy to prove the intended use of the property. For example, if you raid a house with a PCP lab inside, and a truck loaded with chemicals is backed up to the door of the house, it seems certain the chemicals on the truck are intended for use to illegally manufacture PCP. See U.S. v. One Ford Truck, 46 F.2d 176 (SD TEX. 1931) and Marggraf v. Lewis, 45 F.2d 247 (D MASS. 1930). And, if you find a second truck loaded with glassware and chemicals needed to make PCP abandoned on a road facing in the direction of the PCP lab, a mile away, it seems probable the glassware and chemicals on the truck are also intended for use at the lab. See Yellow Mfg. Acceptance Corp. v. U.S., 84 F.2d 164 (9 Cir. 1936). In both cases, the property is forfeitable.

c. Remote Seizures

As the time and distance between the property and the illegal activity increase, it becomes more difficult to prove the property is intended for illegal use; but it is not impossible. Courts are generally willing to find that property is intended for illegal use when:

(1) A significant amount of property CAPABLE OF ILLEGAL USE is assembled,

(2) by someone having NO APPARENT LEGITIMATE PURPOSE,

(3) under SUSPICIOUS CIRCUMSTANCES.

When all three conditions are met, the property can usually be seized for forfeiture. See U.S. v. Tasto, 586 F.2d 1068 (5 Cir. 1978); U.S. v. Gordon, 580 F.2d 827 (5 Cir. 1); U.S. v. Johns, 421 F.2d 413 (5 Cir. 1970); U.S. v. Ragland, 306 F.2d 732 (4 Cir. 1962); Chapman v. U.S., 271 F.2d 593 (5 Cir. 1959); U.S. v. Bryan, 265 F.2d 698 (5 Cir. 1959); U.S. v. One 1955 Mercury Sedan, 242 F.2d 429 (4 Cir. 1957); and DeHart v. U.S., 237 F.2d 227 (4 Cir. 1956).

CAUTION: A fine line cannot be drawn as to when probable cause exists in these cases. Consult your prosecutor or legal advisor, if possible, before baking "remote" seizures for forfeiture.

d. Non-Defendant Suppliers

Merchants and suppliers are not exempt from 21 U.S.C. § 881(a) (2) and UCSA § 505(a) (2). It is possible to apply these forfeiture actions to merchants and suppliers catering to customers with illegal intentions. A supplier's property can be seized because it is intended for illegal use if:

(1) the supplier instructs buyers on the illegal uses of his merchandise; see Israel v. U.S., 63 F.2d 345 (3 Cir. 1933); Jones v. U.S., Il F.2d 98 (4 Cir. 1926); or

(2) he assembles his merchandise into "kits" for illegal use, or he adapts or designs it for illegal use; see Weinstein v. U.S., 293 F.2d 388 (l Cir. 1923); Vinto Products Co. v. Goddard, 43 F.2d 399 (D MINN. 1930); or

(3) he omits records or reports to conceal the sale; see U.S. v. Piampiano, 271 F.2d 273 (2 Cir. 1959); U.S. v. Loew, 145 F.2d 332 (2 Cir. 1944); Bacon v. U.S., 127 F.2d 985 (10 Cir. 1942); U.S. v. Cusimano, 123 F.2d 611 (7 Cir. 1941); U.S. v. Harrison, 121 F.2d 930 (3 Cir. 1941); or

(4) he secretly delivers the merchandise; see U.S. v. Russo, 284 F.2d 539 (2 Cir. 1960); Neely v. U.S., 145 F.2d 828 (5 Cir. 1944); Borgia v. U.S., 78 F.2d 550 (9 Cir. 1935); Vukich v. U.S., 28 F.2d 666 (9 Cir. 1928); and U.S. v. 600 Bags of Turbinado Brand Sugar, 225 F.Supp. 705 (WD LA. 1964).

Any factor which shows the supplier's "guilty knowledge" of the illegal use his buyers will make of his merchandise can be used to establish probable cause. A merchant or supplier need not himself intend to use property illegally. His guilty knowledge is enough to civilly forfeit his merchandise. U.S. v. Ragland, 306 F.2d 732 (4 Cir. 1962); U.S. v. 2265 One-Gallon Paraffined Tin Cans, 260 F.2d 105 (5 Cir. 1958).

For example, if a chemical supplier were to assemble all the ingredients needed to make PCP into a kit complete with instructions, there is little doubt his kits could be seized for forfeiture.

> "Merchants who procure supplies for . . . (criminals) . . . knowing of the purpose to which they are to be put, cannot shield themselves from the forfeiture which the law prescribes by providing that they are to be paid." Snead v. U.S., 217 F.2d 912, 914 (4 Cir. 1954), cert. denied 75 S.Ct. 532 (1955).

Readers interested in criminally prosecuting suppliers should read Note, Falcone Revisited: The Criminality of Sales to an Illegal Enterprise, 53 Columbia Law Review 228 (1953).

e. Drug "Use" Objects Are Not Forfeitable

Neither § 881(a) (2) nor § 505(a) (2) applies to objects associated with the illegal use of drugs, such as "bongs," syringes, rolling papers, roach clips, etc. These sections are basically confined to property connected with manufacturing, delivering and importing drugs.

In 1979, DEA's Office of Chief Counsel drafted a Model State Paraphernalia Act which amended UCSA § 505 to provide for the forfeiture of "use" paraphernalia. The Model Act had the approval of the U.S. Department of Justice and was recommended for enactment by the White House. The Model Act was enacted in most states, was supported by every Federal Appeals Court to consider it, and resulted in the closing of "head shops" in the United States. U.S. v. 57,261 Items of Drug Paraphernalia, 869 F.2d 955 6th Cir. (1989); cert. denied; __U.S.__, __L. Ed. 2d __, 110 S.Ct. 324. (Ceramic cigarette holders, ceramic pipes, and water pipes are drug paraphernalia under 21 U.S.C. See. 857, which forbids the use of the U.S: Postal Service for the sale of drug paraphernalia. Relevant criteria for determining whether or not items are drug paraphernalia include descriptive material included with the items; the manner in which the items were displayed for sale in the retail store; the fact that the retail store sold legitimate tobacco products; the scope of the legitimate uses of the items in the community; and expert testimony regarding the use of the items. A factor of particular concern is the item's suitability for tobacco. Title 21 U.S.C. Sec. 857 includes its own criminal forfeiture provision. However, the civil forfeiture provision of 19 U.S.C. Sec. 1595a(c) could be concurrently invoked).

> [Sec. 21 U.S.C. Sec. 1595a(c) provides for forfeiture of any merchandise introduced or attempted to be introduced into the United States contrary to law. This case can be extended to support the conclusion that the civil forfeiture provisions of 21 U.S.C. See 851 and the criminal forfeiture provisions of 21 U.S.C. Sec. 853 can be applied concurrently. The relevant rule of statutory construction, which was applied in this case is that multiple statutes should be construed as effective, absent express mutual inconsistency or specific Congressional intention otherwise.]

See Record Revolution No. 6 v. The City of Parma, Ohio, 709 F.2d 534 (6 Cir. 6/10/83) (Third Opinion); Nova Records, Inc. v. Sendak, 706 F.2d 782 (7 Cir. 1983); Weiler v. Carpenter 695 F.2d 1348 (10 Cir. 1982); Kansas Retail Trade Co-Op v. Stephan, 695 F.2d 1343 (10 Cir. 1982); Stoianoff v. Montana, 695 F.2d 1214 (9 Cir. 1983); New England Accessories Trade Assn'n v. Tierney, 691 F.2d 35 (l Cir. 1982); Levas v. Village of Antioch, 684 F.2d 446 (7 Cir. 1982); Tobacco Accessories Trade Ass'n v. Treen, 681 F.2d 378 (5 Cir. 1982); New England Accessories Trade Ass'n v. City of Nashua, 679 F.2d l (l Cir. 1982); Florida Businessmen for Free Enterprise v. City of Hollywood, 673 F.2d 1213 (11 Cir. 1982); Brache v. County of Westchester, 658 F.2d 47 (2 Cir. 1981); Casbah, Inc. v. Thone, 651 F.2d 551 (8 Cir. 1981).

Example

17. A previously reliable informant tells you that X is organizing a scheme to smuggle marijuana by plane into the United States. The plane is to land at a makeshift airfield in a rural part of your county. You set up a surveillance at the suspected landing area. That night you hear the sounds and see the lights of a truck parking on the field. At dawn you approach the truck and see X asleep inside. Attached to the rear of the truck is a specially designed aviation fuel trailer with a 500 gallon capacity. You tap the outside of the fuel trailer – its full. X immediately awakes and gets out of his truck. After checking his ID, you ask for, and receive, a lawful consent to search his truck. Inside you find: several hundred large plastic bags, unused; a strobe light and six spot lights; ten cans of industrial deodorizer; a portable vacuum cleaner; two ground-to-air VHF radios; a hand operated fuel pump; extra clothes; a sleeping bag; $90,000.00 in cash; a notebook showing the following "expenses," "$5,000 for driver A," "$7,200 for pilot B," "$57,200 for used cargo plane. The notebook shows a beginning balance of $162,500.00. Can you seize all this property for civil forfeiture?

    Yes. The fuel trailer, the fuel, and all the equipment are intended for use to import and deliver marijuana. It seems "probably true" that X intends to use these objects to communicate with a smuggler's plane, to help it to land, to unload it, to clean it, to refuel it, to package the bulk marijuana, and so forth. The illegal use need not actually occur. It is enough that X intends to use the property illegally. It is forfeitable under Section 881(a) (2) (federally) and UCSA § 505(a) (2) (state law). And, as we shall see later, the truck and the money are also forfeitable under other sections.

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See MASFA § 4(b).

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Authorities

5 Cir: U.S. v. $64,000 in U.S. Currency, 722 F.2d 239 (1984); U.S. v. Ogden, 703 F.2d 629 (1983) – intended use in drug smuggling conspiracy.

D. CONTAINERS FOR FORFEITABLE DRUGS, EQUIPMENT & MATERIALS ARE ALSO FORFEITABLE

Anything used, or intended for use, to contain forfeitable drugs, equipment, products and materials is also subject to forfeiture.

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See MASFA § 4(b)

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Authorities

21 U.S.C. § 881(a) (3); UCSA § 505(a) (3).

Discussion

These sections are not limited to objects generally considered to be containers, such as bags, jars, cans, and boxes. Instead, they apply to "All property which is used, or intended for use, as a container. . . ." Also see U.S. v. 57,261 Items of Drug Paraphernalia; 869 F.2d 955 6th Cir. (1989); cert. denied; ___U.S.___ ___ L. Ed. 2d ___; 110 S. Ct. 324; under "Drug 'Use' Objects are Not Forfeitable," supra.

THE USE, OR INTENDED USE, OF THE OBJECT IS CONTROLLING -- NOT ITS CHARACTER.

For example, condoms and balloons are neither designed nor generally considered to be containers, but they are widely used to package small quantities of heroin and cocaine for street delivery. Therefore, they are forfeitable.

Anything used, or intended for use, to package illicit drugs is forfeitable, such as capsules, wrappers, envelopes, tin foil, glassine bags and bales.

Anything used, or intended for use, to store or conceal illicit drugs is forfeitable, such as "stash" cans, bags, bottles, vials, attache cases and luggage.

Anything used, or intended for use, to package, store or conceal forfeitable equipment, products and materials is also forfeitable, such as bottles for PCP or piperidine, fifty–five gallon drums, or collapsible bladders used by smugglers to carry extra fuel on long flights.

Almost anything used to hold, wrap, package, store or conceal forfeitable drugs and property can be included; EXCEPT conveyances, land and buildings. For reasons already discussed, it seems certain these sections on containers were not meant to apply to cars, planes, mobile trailers or houses.

Examples

18. A college professor is arrested for possession of cocaine. He admits he smuggled the cocaine back from Colombia, South America, hidden in an expensive, hollowed out sculpture. Is the sculpture subject to a civil forfeiture?

Yes. His admission gives you probable cause to believe the sculpture was used to hold and conceal cocaine. The use of the follow sculpture to contain illicit drugs makes it forfeitable.

E. CONVEYANCES

Federal law provides for the civil forfeiture of:

> "All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of . . . (forfeitable drugs, products, equipment and raw materials)." 21 U.S.C. § 881(a) (4).

State law provides for the civil forfeiture of:

> "All conveyances, including aircraft, vehicles or vessels, which are used, or intended for use, to transport, or in any manner to facilitate the transportation, for the purpose of sale or receipt of . . . (forfeitable drugs, products, equipment and raw materials)." UCSA § 505(a) (4).

The exceptions to these provisions are discussed later in this guide. You should note that although these sections are similar in many respects, there are significant differences between them. A chart comparing them is on page 96. Review the chart before you read this material. Also see U.S. v. One 1984 Cadillac, 888 F. 2d 1133 (6th Cir. 1989), under "Probable Cause is Enough to Begin a Forfeiture." supra.

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See MASFA § 4(b).

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1. A Conveyance is any Mobile Thing Capable of Transporting Objects or People

Discussion

We have not found any reported cases interpreting the term "conveyances" as used in Sections 881(a) (4) or 505(a) (4). Certainly, the statutes make clear it applies to all things recognized as "aircraft, vehicles, or vessels." But, the use of the general term "conveyances" suggests a broader meaning was intended.

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See MASFA § 1. Definitions. Paragraph (2). Conveyance includes any vehicle, trailer, vessel, aircraft or other means of transportation.

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a. Mobility Is The Key

Attacking the mobility of drug traffickers was a major purpose behind these provisions. In 1970, when the proposed federal Controlled Substances Act was being considered, the Director of the Bureau of Narcotics and Dangerous Drugs testified before Congress on why Section 881 was needed:

> "Effective law enforcement demands that there be a means of confiscating the vehicle and instrumentalities used by–the drug trafficker in carrying on his trade. The trafficker must merchandise his product, and to do so, he needs mobility. Seizure and forfeiture of the vehicles he uses in carrying on his illicit trade will prevent their use in subsequent offenses and restrict mobility, which in many cases is vital to the illicit trafficker's success."

See Drug Abuse Control Amendments – 1970: Hearings on H.R. 11701 and H.R. 13743 Before the Subcomm. on Public Health and Welfare of the House Comm. on Interstate and Foreign Commerce, 91st Cong., 2d Sess. (1970) (statement of John E. Ingersoll).

The draftsmen of the UCSA echoed this view in their official comment to Section 505:

> "Effective law enforcement demands that there be a means of confiscating the vehicles and instrumentalities used by drug traffickers in committing violations under this Act. The reasoning is to prevent their use in the commission of subsequent offenses . . . and to deprive the drug traffickers of needed mobility."

With this purpose in mind, the draftsmen of Sections 881(a) (4) and 505(a) (4) chose the word "conveyances" rather than limiting the law to just aircraft, vehicles or vessels. A conveyance has traditionally been defined as ". . . that by which anything is borne along, carried, conveyed or transported; or which serves as a means or way of carriage . . ." 18 C.J.S., Conveyance (Main text, p. 90). Webster's Third New International Dictionary (G. &. C. Merriam Co. 1976) defines conveyance as ". . . a carrier of goods or passengers. . . ." Mobility is at the heart of all definitions of "conveyances." A conveyance is simply any mobile thing capable of transporting objects or people. The draftsmen's use of the additional words "All" and "including" supports this broad interpretation, since they indicate that objects which are not easily categorized as aircraft, vehicles, or vessels, can still be covered by the term "conveyances.

Thus, bicycles, hot air balloons, sleds, rafts, rowboats, ice–yachts, hang–gliders and even sedan–chairs can be considered conveyances.

b. House Trailers

Are house trailers conveyances? There are only two reported cases to discuss the status of house trailers as conveyances.

(1) True Mobile Homes are Conveyances

House trailers which have been used, or are readily capable of use, as mobile homes, have been found to be "vehicles" subject to forfeiture under the Contraband Seizure Act (49 U.S.C. § 781). Biasotti v. Clarke, 51 F.Supp. 608 (RI, 1943). Therefore, they are conveyances under Sections 881(a) (4) and 505(a) (4).

(2) Immobilized House Trailers are Not

House trailers which are installed at fixed locations, which are on permanent or semi-permanent foundations, and which are not readily mobile, have been held not to be conveyances subject to forfeiture under the Internal Revenue Laws. U.S. v. One 1953 Model Glider Trailer, 120 F. Supp. 504 (ED NC 1954). It seems fair to say that trailers in this category have lost their character as conveyances and have become buildings.

c. Appurtenances are Forfeitable

Appurtenances are basically the parts of a conveyance. They are objects which: (1) have a purpose related to the conveyance, (2) are usually, but not always, attached to it, and (3) are generally considered as permanent parts. For example, a vehicle's appurtenances include the spare tire, jack, tools, hubcaps, mirrors, seat covers, radio, and floor mats.
Lawyers define an "appurtenance" as "That which belongs to something else; an adjunct; an appendage; something annexed to another thing more worthy as principal, and which passes as incident to it. . . ." Black's Law Dictionary (4th ed. rev. 1968).

Because the term "conveyance" automatically includes all appurtenances, they are also forfeitable. No special reference to appurtenances is required in a forfeiture statute. The Frolic, 148 F.921 (D.RI 1906). Courts routinely forfeit appurtenances incident to the forfeiture of conveyances. See U.S. v. One 1972 Mercedes-Benz 250, 545 F.2d 1233 (9 Cir. 1976); U.S. v. One 1974 Jeep, 536 F.2d 1285 (9 Cir. 1976); U.S. v. One (1) 1972 Wood, 19 Ft. Custom Boat, 501 F.2d 1327 (5 Cir. 1974); U.S. v. One 1976 Buick Skylark, 453 F.Supp. 639 (D COLO. 1978); U.S. v. Vessel FL 4127 SE, 311 F.Supp. 1353 (SD FLA. 1970); and U.S. v. One 1964 MG, 408 F.Supp. 1025 (WD WASH. 1976).

WARNING: Personal property, which does not qualify as an appurtenance, is not forfeitable simply because it is found in a forfeitable conveyance. It must be an appurtenance to be forfeitable under Sections 881(a) (4) and 505(a) (4).

Examples

19. B agrees to sell you cocaine. He insists the exchange take place at the intersection of two rural roads. It is winter and the ground is covered with snow. You and your partner drive to the intersection. Within minutes B approaches cross-country on a snowmobile. He delivers the cocaine, takes the money and drives off into the woods. Eventually, you arrest B and seize the snowmobile for forfeiture. B's lawyer shows you a section of the state vehicle code which says snowmobiles are not considered "vehicles" and need not be registered, inspected, etc. B's lawyer insists the snowmobile is not forfeitable. Is he correct?

    No. Both state and federal law subject to forfeiture conveyances that have transported illicit drugs for sale. A conveyance is any mobile thing capable of transporting objects or people; it is not limited to just aircraft, vehicles or vessels. The snowmobile qualifies as a conveyance within the meaning of the forfeiture statutes (21 U.S.C. § 881(a) (4); UCSA § 505(a) (4)). The fact that it is not a "vehicle" within the meaning of the motor vehicle code is irrelevant. It is forfeitable.

20. You seize a schooner used to transport heroin from Hawaii to San Francisco. Aboard the vessel at the time of seizure is an expensive new navigation device that has been leased to the owner of the vessel. The leasing company tells you the

lease is for three years with an option to buy at any time. Is the navigation device forfeitable?

Yes. It has a purpose related to the schooner. It is attached to the schooner, even though it can be removed. And, it is generally considered to be a permanent or at least long-term part of the vessel. Therefore, it is an appurtenance. No special reference to appurtenances is required in a forfeiture statute. They are forfeitable as parts of the conveyance. See The Frolic, cited above, and U.S. v. One Chevrolet Stylemaster Sedan, 91 F.Supp. 272 (DC COLO. 1950); and In Re SS Tropic Breeze, 456 F.2d 137 (1 Cir. 1972).

Authorities

5 Cir: U.S. v. One 1978 Mercedes Benz, 4 Dr. Sedan, 711 F.2d 1297 (1983) (car telephone held not a vehicle accessory or fixture).

ED VA: U.S. v. One Custom Sport Fisherman Vessel, etc., 543 F.Supp. 749 (1982) (all gear, equipment, etc., on vessel forfeited under 21 U.S.C. § 881, 19 U.S.C. § 1595(a), and 49 U.S.C. § 781)).

2. Transportation of Drugs for Any Purpose, in Any Amount, Subjects A Conveyance to Federal Forfeiture

The transportation need not be related to drug trafficking. And, the amount of drugs transported is irrelevant. As harsh as it may seem, the transportation of any measurable quantity of illicit drugs subjects a conveyance to federal forfeiture.

Authorities

21 U.S.C. § 881; 49 U.S.C. § 781-782; 19 U.S.C. § 1703 (traps & hidden compartments, etc.).

S.Ct.: See Calero-Toledo v. Pearson Yacht Leasing Co., 94 S.Ct. 2080, 2097 (1974) (one marijuana cigarette).

9 Cir: U.S. v. One 1976 Porsche 911S, 670 F.2d 810 (1979) (marijuana sweepings); Wiren v. Eide, 542 F.2d 757 (1976) (small amount of hashish).

8 Cir: Ted's Motors v. U.S., 217 F.2d 777 (1954) (five marijuana cigarettes).

6 Cir: U.S. v. One 1975 Mercedes 2805, 590 F.2d 196 (1978) (four marijuana cigarette butts).

5 Cir: U.S. v. One 1975 Ford Pickup Truck, 558 F.2d 755 (1977) (two grams of cocaine); Associates Investment Co. v. U.S., 220 F.2d 885 (1955) (two marijuana cigarette butts).

2 Cir: U.S. v. One 1986 Mercedes Benz, 846 F.2d 2 (1988) (The transportation of even a small amount of a controlled substance can subject a vechicle to forfeiture. A claimant who lends his vehicle abandons any legitimate

expectation of privacy for interior area searches.)
Lee v. Thornton, 538 F.2d 27 (1976) (one gram marijuana seeds).

CD CA: U.S. v. 1985 BMW 635 CSI, 677 F.Supp. 1039 (1987), under "Double Jeopardy." supra, p.27. U.S. v. $280,000 etc., 655 F.Supp. 1487 (1986), under "Innocence of an Owner is No Defense to a Civil Forfeiture." Supra, p.18.

1 Cir: U.S. v. One Clipper Bow Ketch Nisku, 548 F.2d 8 (1977) (small amount of marijuana for personal use).

D. CO: U.S. v. One 1977 Chevrolet Pickup, 503 F.Supp. 1027 (1980).

ED NY: F. Calif. case U.S. v. One 1973 Jaguar Coupe, 431 F.Supp. 128 (1977) (small tin foil packet of cocaine); U.S. v. One 1975 Mercury Monarch, 423 F.Supp. 1026 (1976) (mere trace of drugs).

ED PA: U.S. v. One 1971 Porsche Coupe, 364 F.Supp. 745 (1973) (small amount of heroin for use of addicted veteran); U.S. v. One 1955 Ford Convertible, 137 F.Supp. 830 (1956) (1.7 grams of heroin).

SD FL: U.S. v. One (1) Homemade Vessel Named Barracuda, 625 F.Supp. 893 (1986) (owner of vessel with hidden trap, although innocent under Calero-Toledo, does not gain relief from 19 U.S.C. § 1703 forfeiture).

ED WI: U.S. v. One 1963 Cadillac Hardtop, 231 F.Supp. 27 (1964) (small tin foil packet of marijuana).

Discussion

The language of 21 U.S.C. § 881(a) (4) is clear: it applies to any transportation of illicit drugs. The statute does not say "transport for the purpose of sale." It does not say "transport more than an ounce." It simply says "transport." On its face, Section 881(a) (4) applies to any transportation of illicit drugs for any purpose in any amount.

In spite of this far-reaching language, claimants frequently challenge forfeitures involving only small amounts of drugs. Their argument is straight-forward: (1) Congress passed the federal forfeiture statutes to strike at commercial trafficking in drugs; (2) transportation of very small amounts of drugs, particularly for personal use, is not significantly connected to commercial trafficking; (3) therefore, there should be no forfeiture in such cases.

There are serious problems with this argument. First, federal courts should not attempt to "read the mind" of Congress when the language of a statute is clear and unambiguous. Ex parte Collett, 69 S.Ct. 944 (1949).

Second, Congress can, and usually does, have more than one purpose in mind in passing any law. It is true that a major purpose behind Section 881 and the Controlled Substances Act of 1970 was to strike a commercial drug trafficking. But, this was neither the only, nor the ultimate, objective. The ultimate goal of all drug laws is to prevent drug abuse – meaning the non-medical use of drugs. To accomplish this goal, Congress controlled secondary activities, or conduct, which make abuse possible: possession of drugs, transportation of drugs, delivery of drugs, manufacturing of drugs, prescribing of drugs, and so forth. Nothing in the history of the law indicates Congress was exclusively interested in punishing commercial traffickers.

Third, Section 881(a) (4) was modeled after federal forfeiture laws which have never been restricted to commercial trafficking. For example, the Contraband Seizure Act, 49 U.S.C. § 781, § 782 provides for the forfeiture of conveyances in which illicit drugs are transported regardless of the amount of drugs or whether they are for personal use. Ted's Motors v. U.S.,; and Associates Investments Co. v. U.S., cited above.

For these reasons, federal courts have refused to restrict the broad wording of Section 881(a) (4) to commercial trafficking in large quantities of drugs. The transportation of any measurable quantity of illicit drugs subjects a conveyance to federal forfeiture.

a. Compare: Under State Law Transportation Must be for the Purpose of Sale

State law requires that a conveyance be involved in drug trafficking to be forfeitable. Forfeiture is improper under state law in simple possession cases.

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See MASFA § 4 (b). Conveyances forfeited for mere possession offenses may be forfeited only pursuant to *in personam* procedures.

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Authorities

UCSA § 505(a) (4)

AL: Reeder v. State, 314 So.2d 853 (1975).

FL: Griffis v. State, 356 So.2d 297 (1978).

MA: Com. v. One 1969 Mercedes-Benz Auto, 378 N.E. 2d 65 (App. 1978).

SD: State v. One 1972 Pontiac Grand Prix, 242 N.W.2d 660 (1976).

TX: Amrani-Khaldi v. State, 575 S.W.2d 667 (App. 1978).

UT: State v. One Porsche 2-Door, 526 P.2d 917 (1974).

Discussion

UCSA § 505(a) (4) requires that drugs be transported for the purpose of sale (or receipt) before a conveyance can be forfeited. This same section also contains a separate exemption for the simple possession of drugs in a conveyance. § 505 (a) (4) (iii). The intent could not be any clearer: a conveyance must be involved in commercial trafficking to be forfeitable.

Even in states which have rejected § 505(a) (4) in favor of the broader federal language of Section 881(a) (4), courts have done some "judicial juggling" to require evidence of commercial trafficking. See the Florida, South Dakota and Utah cases cited above.

Forfeiture of a $20,000 yacht or a $3,000 car merely because of a marijuana cigarette is found inside is a very harsh policy. If the executive branches of state governments do not develop policies pardoning conveyances in simple possession cases, the temptation for state judges to "re-write" broadly worded forfeiture statutes is great. To combat this temptation, legal scholars are encouraging law enforcement agencies to adopt regulations limiting the seizure of conveyances to commercial trafficking situations. The Model Rules For Law Enforcement caution:

> "Statutes authorizing forfeiture of vehicles in narcotics offenses are typically very broad. The Model Rule proposes, as an alternative position, that police should seize vehicles only where a substantial amount of narcotics or drugs is involved, or where the owner of the vehicle is a significant drug violator. This approach would exclude . . . a mere user of narcotics. But dealers and pushers would be subject to seizure for forfeiture proceedings. The effect of the Rule should be to lighten the administrative burden on the police while effecting the statutory purpose of impeding the traffic in drugs." Project on Law Enforcement Policy and Rulemaking, Searches, Seizures, and Inventories of Motor Vehicles 59 (Commentary on Rule 601A, 1974).

Only a handful of states follow the federal rule of forfeiture conveyances in simple possession cases:

AZ: Matter of 1972 Chevrolet Monte Carlo, 573 P.2d 535 (App. 1977).

IA: State v. One Certain Conveyance, 211 N.W.2d 297 (1973).

NE: State v. One 1970 2-Door Sedan Rambler (Gremlin), 215 N.W.2d 849 (1974).

The vast majority prohibit the forfeiture of conveyances not involved in trafficking.

Examples

21. D is arrested on a vehicular charge while driving a new pickup truck. A search incident to arrest reveals a baggie containing 1.45 grams of marijuana in his coat pocket. Is the truck forfeitable?

    No, in the majority of states; the transportation of drugs must be for the purpose of sale. The quantity of drugs involved here indicates it was possessed for personal use. And, there is no independent evidence the drugs were being transported to, or from, an illicit sale. Without evidence of trafficking, conveyances are not forfeitable in most states.

Yes, under federal law and in a handful of states. Transportation of drugs for any purpose, in any amount, subjects a conveyance to federal forfeiture. Federal law makes no exception for simple possession cases. See Matter of 1976 Blue Ford Pickup, 586 P.2d 993 (App. 1978).

b. To "transport" includes providing the moving power

Engines, tractors, tow trucks, and other conveyances, that push, pull, or in any way provide the power to move illicit drugs are guilty of "transporting." Drugs need not be present in conveyances which supply motive power; they are equally forfeitable for transporting.

Authorities

9 Cir: Yellow Mfg. Acceptance Corp. v. U.S., 84 F.2d 164 (1936).

5 Cir: Utley Wholesale Co. v. U.S., 308 F.2d 157 (1962); U.S. v. Bryan, 265 F.2d 698 (1959); and see U.S. v. One (1) 1972 Wood, 19 Ft. Custom Boat, 501 F.2d 1327 (1974) (boat trailer forfeited with boat).

4 Cir: See Weathersbee v. U.S., 263 F.2d 324 (1958).

Example

22. X buys a sophisticated barge. It has a pneumatic system that allows it to be raised or lowered in the water. The hold of the barge is watertight. Using this system, the fully loaded barge can be towed slightly below the water line so as to be virtually invisible to surrounding vessels. It can even be lowered to the bottom, cut loose, and at a later time reconnected and raised. X loads the barge in Mexico with a ton of marijuana. He uses his pleasure yacht to tow the barge up the West Coast toward California. Anytime he nears land or other vessels, he lowers the barge deep into the water to avoid detection. Are the barge and the yacht forfeitable?

Yes. Both the barge and the yacht are conveyances: They are mobile and capable of transporting persons or objects. The barge is clearly transporting marijuana. The yacht is supplying the power to move the barge. Therefore, the yacht is also "transporting" marijuana. A conveyance which does not contain contraband, but which provides the moving power, regardless of how the contraband is contained, is being used to transport the contraband. See U.S. v. Bryan, cited above.

c. Transporting drug-carrying passengers subjects a conveyance to forfeiture

A conveyance used to transport drug-carrying passengers is forfeitable under both state and federal law if: (1) the owner knows a passenger is in possession of illicit drugs; and (2) the drugs are being transported by the passenger in connection with an illicit sale. Federal law goes so far as to subject a conveyance to forfeiture even though: (1) the owner and operator are unaware a passenger has illicit drugs; and (2) the drugs are simply possessed for personal use.

Authorities

49 U.S.C. § 781(a) (2), § 782; 21 U.S.C. § 881(a) (4).

9 Cir:	U.S. v. One 1971 BMW 4-Dr. Sed., 652 F.2d 817 (1981); U.S. v. One 1967 Buick Riviera, 439 F.2d 92 (1971); Thill v. U.S., 66 F.2d 432 (1933).
5 Cir:	U.S. v. One 1975 Ford Pickup Truck, 558 F.2d 755 (1977); U.S. v. Addison, 260 F.2d 908 (1958).
4 Cir:	U.S. v. One 1971 Mercedes Benz 2-Door Coupe, 542 F.2d 912 (1976).
DC LA:	U.S. v. One (l) Oldsmobile Sedan, 75 F.Supp. 83 (1948).
DC MO:	U.S. v. One 1969 Cadillac DeVille Convertible, 330 F.Supp. 1338 (1971).
ED NY:	U.S. v. One 1946 Plymouth Sedan, 73 F.Supp. 88 (1946).
WD TX:	U.S. v. One 1973 Pontiac Grand AM, 413 F.Supp. 163 (1976).
ED WI:	U.S. v. One 1963 Cadillac Hardtop, 231 F.Supp. 27 (1964).
AZ:	SEE Matter of One 1965 Ford Econoline Van, 591 P.2d 569 (App. 1979).
NJ:	State v. One (1) Ford Van, 381 A.2d 387 (App. 1977).
OR:	Blackshear v. State, 521 P.2d 1320 (App. 1974).

Discussion

Owners and operators have a duty to prevent the transportation of contraband in their conveyances. It is a federal offense "to conceal or possess any contraband article in or upon any vessel, vehicle, or aircraft, or upon the person of anyone in or upon any vessel, vehicle, or aircraft. . . ." 49 U.S. § 781(a) (2). Most states have similar laws which make an owner or operator criminally liable if he voluntarily transports a passenger known by him to be in possession of illicit drugs. This duty was recently explained by the California Supreme Court in People v. Rogers, 486 P.2d 129 (1971):

> "Regardless of his purpose or intent, the driver or owner of an automobile has the responsibility to prevent the conveyance of contraband by himself or his passengers, at least while that vehicle is under his dominion or control. Proof of his knowledge of the character and presence of the drug, together with his control over the vehicle, is sufficient to establish his guilt without further proof of an actual purpose to transport the drug for sale or distribution."

Commenting on the situation in which drugs are exclusively in the possession of a passenger, the high court also noted:

> "Although possession is commonly a circumstance tending to prove transportation, it is not an essential element of that offense and one may 'transport' marijuana or other drugs even though they are in the exclusive possession of another."

Although an owner's or operator's guilty knowledge is required for a criminal conviction, it is not required for a civil forfeiture, at least under federal law. Federal statutes subject conveyances to forfeiture anytime they transport drugs-carrying passengers. 49 U.S.C. § 782; 21 U.S.C. § 881(a) (4).

> "(Federal) . . . Courts are closed to innocent vehicle owners, who must suffer the consequences even of the surreptitious transmission of contraband by passengers, unless the . . . (Executive Branch) . . chooses to be lenient." U.S. v. One 1946 Plymouth Sedan, 73 F.Supp. 88, 89 (ED NY 1946).

State forfeiture laws are more restrictive. An owner must know a passenger is in possession of illicit drugs. UCSA § 505(a) (4) (ii). And, the passenger must be transporting the drugs in connection with an illicit sale. The ignorant owner who gives a ride to a drug-carrying passenger is protected under state law. Even before UCSA § 505 was drafted in 1970, state supreme courts were rejecting the federal rule by requiring that an owner know a passenger was in possession of contraband before there could be a forfeiture:

> "I forfeit title to my automobile if I overtake, on the road, a man with a bottle of whiskey in his pocket, invite him to ride and he accepts the invitation. He is using my automobile to transport whiskey unlawfully. I have not consented to it and do not know it -- but . . . that will not avail me . . . . Is this result absurd? It surely is; but it is a conclusion inevitable from the argument that is put before us in this case." Hoover v. People, 187 P.531, 533 (Colo. 1920).

As a practical matter, the federal rule is not as harsh as it appears. Owners caught in such a situation are virtually certain of receiving a "pardon" of their property from the Executive Branch, provided they were not negligent in accepting the passenger. 19 U.S.C. § 1618.

Examples

23. Mr. S. owns a commercial building. He also owns a new Mercedes-Benz coupe. One night S gives a ride to a worker in his building. The worker is carrying an attache case containing contraband drugs. Both are arrested by drug agents. S swears he was unaware of what his passenger had in the case. The passenger corroborates S's statement and does not implicate S in the crime. Criminal charges against S are dismissed. Is the Mercedes subject to civil forfeiture for transporting contraband?

    No, under state law. S was ignorant that his passenger was transporting drugs in the car. Therefore, the car is not subject to state forfeiture. See People v. One 1948 Chevrolet Convertible Coupe, 290 P.2d 538 (1955).

    Yes, under federal law. Ignorance of an owner or driver is no defense to federal forfeiture. They have a duty to prevent the transportation of contraband in conveyances under their control. S is limited to petitioning the Attorney General for a pardon (remission) of the forfeiture. See U.S. v. One 1971 Mercedes-Benz 2-Door Coupe; U.S. v. One 1975 Ford Pickup Truck; and U.S. v. One 1946 Plymouth Sedan, cited above.

3. Transportation of Forfeitable Equipment, Products & Materials Subjects a Conveyance to Forfeiture

Conveyances transporting forfeitable equipment, products and raw materials are forfeitable under both state and federal law. See Example. 17. State law requires the transportation be connected to commercial trafficking.

Authorities

21 U.S.C. § 881(a) (4); UCSA § 505(a) (4).

5 Cir: U.S. v. One 1964 Beechcraft Baron, 691 F.2d 725 (1982). U.S. v. One 1978 Chevrolet Impala, 614 F.2d 983 (1980).

8 Cir: U.S. v. One 1976 Ford F150 Pickup, 769 F.2d 525 (1985) (use held too remote).

4. Facilitation

Conveyances used, or intended for use, to "facilitate" the transportation of illicit drugs are forfeitable under state and federal law, to the same extent as those used to transport the contraband. A conveyance need not actually transport illicit drugs to be forfeitable. Federal law also provides for the forfeiture of conveyances that "facilitate" the sale, receipt, possession or concealment of contraband drugs.

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See MASFA § 4 (b). All property used or intended to be used to facilitate conduct giving rise to forfeiture is forfeitable.

***

a. To "Facilitate" Means to Have a Significant Connection to . . .

Discussion

Because legislators have used the word "facilitate" in so many statutes without bothering to define it, courts; have traditionally interpreted the word according to its ordinary or dictionary meaning. Platt v. U.S., 163 F.2d 165 (10 Cir. 1947); Howard v. U.S., 423 F.2d 1102 (9 Cir. 1970); U.S. v. One (1) 1971 Chevrolet Auto, 496 F.2d 210 (5 Cir. 1974); U.S. v. One 1950 Buick Sedan, 231 F.2d 219 (3 Cir. 1956).

Webster's Third New International Dictionary (G. & C. Merriam Co. 1976) defines "facilitate" as:

> **"TO MAKE EASIER OR LESS DIFFICULT: free from difficulty or impediment . . . to lessen the labor of: ASSIST, AID."**

From a logical viewpoint, every conveyance used by a law violator assists his illegal activities, if only in a very small or remote way. If the dictionary meaning of facilitation is stretched to logical extremes, then every conveyance belonging to a drug violator is guilty of "facilitating" or assisting him in his crimes. It seems unlikely that legislators intended this result. Therefore, the courts have never interpreted the word in such an extreme fashion.

> "(T)he mere fact that a car is used by a law violator does not establish the requirement for "facilitation.'" U.S. v. One 1952 Ford Victoria, 114 F.Supp. 458, 460 (ND CAL. 1953).

Instead, courts have placed some practical limitations on the meaning of the word. They require a significant connection between a conveyance and a crime before the conveyance can be found guilty of "facilitation."

> "It can readily be seen that whether any particular connection of a vehicle with contraband, where the contraband is not in the vehicle or in the possession of the occupant of the vehicle, constitutes facilitation is a question of degree, which is in turn a question of fact not readily susceptible to generalization." U.S. v. One Dodge Coupe, 43 F.Supp. 60, 61 (SD NY 1942).

For years courts have struggled to verbalize the degree of involvement needed to justify forfeiture. Several "tests" have been devised to date. For example, there is the "ACTIVE AID TEST" of facilitation:

> The test of whether a conveyance is being used to facilitate a crime is whether or not its use is an active aid in carrying out essential elements of the offense.

This test was developed by the United States Court of Appeals for the Fifth Circuit in: U.S. v. One 1968 Ford LTD, 425 F.2d 1084 (1970); U.S. v. One 1959 Pontiac Tudor Sedan, 301 F.2d 411 (1962); and U.S. v. G.M.A.C., 239 F.2d 102 (1956).

More recently, there is the "SUBSTANTIAL OR INSTRUMENTAL CONNECTION TEST" of facilitation:

> ". . . to be forfeited, a vehicle must have some substantial connection to, or be instrumental in, the commission of the underlying criminal activity which the statute seeks to prevent." U.S. v. One 1972 Datsun, 378 F.Supp. 1200, 1204 (DC NH 1974).

Courts using this test include: U.S. v. One 1970 Pontiac GTO, 2-Door Hardtop, 529 F.2d 65 (9 Cir. 1976); U.S. v. One 1973 Volvo, 377 F.Supp. 810 (WD TEX. 1974); U.S. v. One 1970 Buick Riviera, 374 F.Supp. 277 (DC MINN. 1973); and see U.S. v. One (1) Liberian Refrigerator Vessel, 447 F.Supp. 1053 (MD FLA. 1977).

None of these tests is very helpful, but at least they point out that there must be a SIGNIFICANT CONNECTION between property and prohibited conduct before the property can be forfeited for facilitation. For further discussion of the "substantial connection" test, particularly as applied to 21 U.S.C. § 881(a) (6), see page 120 of this guide.

b. Common Patterns of Facilitation

Fortunately, it is possible to describe examples, or common patterns, of facilitation, despite the difficulty in defining the word. Conveyances which fall within these established factual patterns are clearly subject to forfeiture.

(1) Escort Conveyances are Forfeitable

If a conveyance is forfeitable for transporting illicit drugs, other conveyances that escort it for some special purpose are also forfeitable. Pilot, lookout, guard, escape, decoy, and counter-surveillance conveyances are guilty of "facilitating" the transportation of drugs in the "load" conveyance. They need not contain drugs to be forfeitable.

Authorities

6 Cir: U.S. v. Lawson, 266 F.2d 607 (1959).

5 Cir: U.S. v. One 1979 Mercury Cougar, 666 F.2d 228 (1982); U.S. v. One 1968 Ford LTD 4-Door, etc., 425 F.2d 1084 (1970); U.S. v. One 1952 Lincoln Sedan, 213 F.2d 786 (1954).

4 Cir: Weathersbee v. U.S., 263 F.2d 324 (1958); U.S. v. One 1956 Ford Tudor Sedan, 253 F.2d 725 (1958); and see U.S. v. One 1957 Ford 2-Door Sedan, 262 F.2d 651 (1958).

3 Cir: U.S. v. One Dodge Sedan, 113 F.2d 552 (1940).

DC CA: U.S. v. One Dodge Sedan, 28 F.2d 44 (1928).

ND CA: Weinstein v. Mueller, 563 F.Supp. 923 (1982).

DC MA: U.S. v. One 1938 Buick Sedan, 29 F.Supp. 752 (1939).

ND MS: U.S. v. One 1962 Mercury Sedan, 218 F.Supp. 140 (1963).

ED NY: U.S. v. One 1980 BMW 320i, 559 F.Supp. 382 (1983).

WD SC: U.S. v. One 1950 Model Willys Jeep, 91 F.Supp. 822 (1950).

Discussion

There mere fact that two conveyances travel in tandem over a common route does not prove they are a convoy; one is not necessarily escorting the other. U.S. v. One 1957 Model Pontiac, 156 F.Supp. 837 (ED NC 1957). An escort conveyance must have some special purpose for accompanying another conveyance. It might serve as a pilot or guide. It might serve as a scout or lookout. It might serve as an armed guard. It might provide a potential means of escape. It might serve as a decoy to confuse pursuers. It might run interference with pursuers. Or, it might carry tools, parts or supplies needed if there is a mechanical breakdown.

The exact nature of the service provided by the escort makes no difference. What is important is that it is present for some special purpose related to the illegal transportation of contraband.

> "Forfeiture does not turn upon differences in the risk sought to be avoided; whatever the risk which seems to require attendance of a convoying vehicle, the relation of the convoy to the shipment, for purposes of forfeiture, would seem to be the same." U.S. v. One 1956 Ford Tudor Sedan, 253 F.2d 725, 727 (4 Cir. 1958).

Whatever function the escort serves, it clearly has a significant connection to the transportation of illicit drugs. If the "load" conveyance is forfeitable, then escorts are also forfeitable for "facilitation." Also see U.S. One 1984 Ford Bronco, 674 F. Supp. 424 (ED NV 1987), under "Examples (RE Probable Cause)." supra, p.12

Examples

24. You observe X loading his Chevy van with large plastic bags known by you to contain marijuana. When the van is fully loaded, X drives away followed by his brother Y, who is driving a new Ford LTD. You follow the two vehicles. Suddenly, the headlights of Y's Ford blink twice to X's van in front of it. X's van accelerates to a high speed while Y's Ford slows down. Apparently, Y had realized he is being followed. You try to pass the Ford to catch up to the Chevy, but the Ford purposely swerves back and forth across the road blocking your way. You radio other members of your surveillance team who apprehend X in the Chevy van. A lawful search of the van produces 600 pounds of marijuana. Is the Ford forfeitable?

    Yes. The Chevy van transported drugs for the purpose of sale. That makes it forfeitable under both state and federal law. The Ford escorted the Chevy to act as a lookout and to run interference so the Chevy could escape. Therefore, the Ford is forfeitable under state and federal law for facilitating the illegal transportation of drugs in the Chevy. See U.S. v. One 1968 Ford LTD 4-Door, cited above.

(2) Transferring Drug Money in a Conveyance Subject it to Federal Forfeiture

A conveyance that has never contained illicit drugs, but is used as a place to hand over drug purchase money, is subject to forfeiture under federal law for "facilitating" the illegal sale.

Authorities

9 Cir: U.S. v. One 1970 Pontiac GTO, 529 F.2d 65 (1976).

6 Cir: U.S. v. One 1980 Cadillac Eldorado & $43,000, 705 F.2d 862 (1983).

3 Cir: U.S. v. One 1950 Buick Sedan, 231 F.2d 219 (1956).

DC CT: U.S. v. One 1951 Oldsmobile Sedan Model 98, 126 F.Supp. 515 (1954).

SD AL: U.S. v. One 1960 Ford Galaxie Sedan, 203 F.Supp. 387 (1961).

ED PA: U.S. v. One 1981 Datsun 280ZX, 563 F.Supp. 470 (1983) (Display of money).

Discussion

A conveyance offers a reasonable amount of privacy from public observation, from public eavesdropping and from public interference. A conveyance also offers the advantages of mobility. For these reasons, many professionals and businessmen use conveyances as mobile offices. The drug trafficker is no exception; privacy and mobility help him avoid apprehension, and promote the efficiency of his illegal operation.

> "That an automobile is a form of property which is a facility for the illicit traffic in narcotics is evident from the facts in this case. The automobile enables the dope seller to make himself more elusive in traveling to places where he meets his customers or his confederates. It is more difficult to trail the law violator if he uses an automobile. He can travel greater distances, follow less frequented streets or roads, move about at will and alone, and be completely independent of public means of conveyance. The automobile helps him escape observation, detection and capture. It is an operating tool of the dope peddler's trade." U.S. v. One 1941 Pontiac Sedan, 83 F.Supp. 999, 1002 (SD NY 1948).

A conveyance used as a place to hand over drug purchase money is significantly connected to the illegal transaction. It is "facilitating" the "sale, receipt, possession or concealment" of illicit drugs. Therefore, it is forfeitable under federal law. 21 U.S.C. § 881(a)(4).

> "Negotiations for an illegal sale of narcotics do not take place openly and publicly. It is always convenient that some degree of privacy attend all phases of the sale. The automobile certainly provided a convenient place for conversation and payment. Of course, the parties might have talked on the sidewalk. By the same token, they could have transacted their business in a million other places. But that does not mean that the automobile did not facilitate the sale." U.S. v. One 1950 Buick Sedan, 231 F.2d 219, 222 (3 Cir. 1956).

Contrast State Law: UCSA § 505(a) (4) does not provide for the forfeiture of conveyances that facilitate illegal sales. Section 505(a) (4) is limited to conveyances that transport, or facilitate the transportation of illicit drugs. In most states, transferring drug money in a conveyance does not, by itself, subject it to forfeiture.

There are, nevertheless, a few states which have the broader language of the federal statute, and which follow the federal rule. For example, see:

FL: Mosley v. State, 363 So.2d 172 (App. 1978).

(3) Negotiating Details of a Drug Delivery in a Conveyance Subjects it to Federal Forfeiture

A conveyance that has never contained illicit drugs, but is used as a place to negotiate or arrange the details of a future drug delivery, is subject to forfeiture under federal law for "facilitating" the illegal sale or receipt of drugs.

Authorities

10 Cir:	U.S. v. One 1950 Chevrolet 4-Door Sedan, 215 F.2d 482 (1954).
9 Cir:	See U.S. v. One 1970 Pontiac GTO, 529 F.2d 65 (1976).
3 Cir:	U.S. v. One 1950 Buick Sedan, 231 F.2d 219 (1956).
SD CA:	U.S. v. Ford Coupe Automobile, 83 F.Supp. 866 (1949).
ED PA:	U.S. v. One 1981 Datsun 280ZX, 563 F.Supp. 470 (1983).

Discussion

Drug traffickers seldom conduct the details of their trade over the telephone. The possibility the government is tapping their phones may be slight, but the potential consequences of a tap are very serious. Similarly, drug traffickers do not conduct their business by mail. Offers to sell heroin, price quotations, availability of supply, counter-offers, conditions of delivery, acceptances and final contracts are never put in writing. Unlike legitimate businessmen, traffickers are totally dependent upon face-to-face negotiations to carry on their illicit trade.

The advantages to the trafficker of using a conveyance as a place to hand over drug money apply as well to the use of a conveyance as a place to negotiate the details of a drug delivery. In both instances, the conveyance is significantly connected to the illicit sale or receipt of drugs. Therefore, it is forfeitable under federal law. 21 U.S.C. § 881(a) (4).

Contrast State Law: As already noted, UCSA § 505(a) (4) does not forfeit conveyances that facilitate illicit sales. Conducting drug negotiations in a conveyance does not subject it to forfeiture in most states.

(4) Transporting Drug Money in a Conveyance to a Sale Subjects it to Federal Forfeiture

A conveyance used to secure or transport forfeitable drug money prior to or during a drug sale is subject to forfeiture under federal law. Although it may never have contained drugs, it has "facilitated" their illegal sale or receipt. However, see Corvette case appeal in First Circuit below where use of car after the sale was completed was held not to facilitate deal -- no antecedent relationship.

Authorities

WD TX: U.S. v. One 1973 Volvo, 377 F.Supp. 810 (1974).

DC CT: U.S. in. One 1951 Oldsmobile, 126 F.Supp. 515 (1959).

SD NY: U.S. v. One 1941 Pontiac Sedan, 83 F.Supp. 999 (1948).

SD CA: See U.S. v. One 1962 Ford Galaxie Sedan, 236 F.Supp. 529 (1964).

DC MN: U.S. v. One 1970 Buick Riviera, 374 F.Supp. 277 (1973) (Contra).

D MA: U.S. v. One 1972 Chevrolet Corvette, 625 F.Supp. 1026 (1980); rev'd 625 F.2d 1026 (1 Cir. 1980).

5 Cir: See Wingo v. U.S., 266 F.2d 421 (1959).

9 Cir: See Nocita v. U.S., 258 F.2d 199 (1958).

SD FL: U.S. v. One 1980 Silver Volvo, 582 F.Supp. 1166 (1984) (car took currency to money laundering location).

ED OH: U.S. v. One 1979 Lincoln Continental, 574 F.Supp. 156 (1983).

Discussion

Transportation of money is an essential part of drug trafficking. Checks, money orders and other monetary instruments leave a "paper trail" for law enforcement to follow. Moreover, under the Bank Secrecy Act of 1970, commercial banking transactions involving $10,000 or more must be reported to the Department of Treasury. To avoid the risks associated with a paper trail, more drug traffickers conduct their business on a cash–and–carry basis.

By current estimates, the annual gross income of drug traffickers in the United States approaches 60 billion dollars. Given the cash–and–carry nature of the business, traffickers face serious problems with storing, concealing, safeguarding and moving large amounts of bulky cash. Conveyances play a big part in solving these problems.

During illicit sales, conveyances are used to safeguard and transport drug purchase money. A car, particularly a car trunk, provides a relatively secure place to store large amounts of cash during a drug exchange. It is also a fairly secure way to move cash to and from the site of exchange. In a very real sense, a car can act as a kind of mobile "safe." This facilitates the sale and receipt of drugs within the meaning of 21 U.S.C. § 881(a) (4).

The problems of safeguarding and moving money do not end with the individual exchange. Although the market for illicit drugs is within the United States, the sources of supply are thousands of miles away from this Country. Operating on a cash–and–carry basis, the drug trafficker must secretly move drugs from foreign sources to points of sale within the U.S. market and he must secretly move bulky cash from the market back to foreign suppliers. In reality, the flow of drugs into this Country is "mirrored" by a flow of money in the opposite direction.

Again, conveyances play a key role in moving the ill-gotten cash out of the United States. This activity is important to the successful accomplishment of the illegal scheme. Both the flow of drugs and the flow of money are vital to the sale of illegal drugs within this Country.

For a more detailed discussion of how traffickers move money, see Kobakoff, Narcotics Money law, Drug Enforcement (Magazine), Vol. 5 No. 1, July 1978).

Contrast State Law: Conveyances that facilitate sales by transporting drug money are not forfeitable under UCSA § 505(a) (4).

(5) Mere Presence of Drugs in a Conveyance Subjects it to Federal Forfeiture

The mere possession or concealment of illicit drugs in a conveyance, in any amount, for any purpose, subjects it to forfeiture under federal law. Simple physical presence of drugs on one occasion is enough; nothing more need be shown.

Authorities

21 U.S.C. § 881(a) (4); 49 U.S.C. § 781(a) (3), 782.

9 Cir: U.S. v. One 1967 Buick Riviera, 439 F.2d 92 (1971).

6 Cir: U.S. v. One 1975 Mercedes 2805, 590 F.2d 196 (1978).

5 Cir: Associates Investment Co. v. U.S., 220 F.2d 885 (1955); U.S. v. One 1952 Model Ford Sedan Auto, 213 F.2d 252 (1954).

1 Cir: See U.S. v. One Clipper Bow Ketch Nisku, 548 F.2d 8 (1977).

SD FL: U.S. v. One (1) 1984 No. 1 Boat Mfg. Lobster Vessel, 617 F.Supp. 672 (1985).

DC MI: U.S. v. One 1973 Dodge Van, 416 F.Supp. 43 (1976).

DC PA: See U.S. v. One 1971 Chevrolet Corvette Auto, 393 F.Supp. 344 (1975).

ED PA: See U.S. v. One 1971 Porsche Coupe Auto, 364 F.Supp. 745 (1973).

SD TX: See U.S. v. One Buick Automobile, 39 F.2d 107 (1930).

Discussion

The argument is sometimes made that actual transportation of drugs must be shown to justify the forfeiture of a conveyance. More than fifty years ago, the United States Supreme Court held that mere concealment or possession of contraband on one occasion is enough to declare a forfeiture; actual transportation is not required. U.S. v. One Ford Coupe' Automobile, 47 S.Ct. 154 (1926).

Today, at least two federal statutes require forfeiture where any contraband has been physically present in a conveyance. Section 881(a) (4) of the Controlled Substances Act (21 U.S.C.) provides for the forfeiture of "All conveyances . . . used, or intended for use . . . in any manner to facilitate the . possession, or concealment of . . . (illicit drugs, products and equipment)." Section 781(a) (3) of the Contraband Seizure Act (49 U.S.C.) makes it unlawful "to use any vessel, vehicle, or aircraft to facilitate the . . . concealment . . . (or) . . . possession . . . of any contraband article." And Section 782 forfeits conveyances used illegally.

Under these statutes, the mere presence of any amount of illicit drugs in a conveyance subjects it to federal forfeiture.

Contrast State Law: USCA § 505(a) (4) does not forfeit conveyances in which drugs are simply possessed or concealed.

Several states follow the federal rule. See:

AZ: Matter of One 1965 Ford Econoline Van, 591 P.2d 569 (App. 1979).

Example

25. You are searching S's garage for cocaine under the authority of a valid warrant. During the search, you see several marijuana butts in plain view on the dashboard of S's new Mercedes 280S. Is the car forfeitable?

    Yes, under federal law. The mere possession or concealment of illicit drugs in a conveyance, in any amount, for any purpose, subjects it to federal forfeiture. See U.S. v. One 1975 Mercedes 2805, cited above.

    No, in most states.

(c) Mere Commuting Should be Considered Facilitation

In the past, a conveyance used solely for the personal convenience of the driver to commute to a site of illegal activity has not been considered forfeitable under state or federal law. The Controlled Substances Act has, apparently, changed this old rule in some federal circuits.

A conflict exists between the federal appeal courts whether mere commuting" to the scene of a violation is "facilitation" under 21 U.S.C. § 881(a) (4). A 1985 Fourth Circuit case, U.S. v. 1966 Beechcraft Aircraft Model King Air, 777 F.2d 947 (4 Cir. 1985), describes and resolves the conflict as follows:

> "The circuits are divided over whether the language in 21 U.S.C. § 881(a) (4) subjecting to forfeiture 'all conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession or concealment' of controlled substances may reach vehicles and aircraft used only to transport conspirators to the site of a drug transaction and not to transport the controlled substances. The First, Ninth and Tenth Circuits have concluded that 'subsection 881(a) (4) by its terms lays down a per se forfeiture rule only for transportation of certain items of contraband,' not for the mere transportation of suspected conspirators. United

States v. One 1972 Chevrolet Corvette, 625 F.2d 1026, 1028 (1st Cir. 1980); see also Howard v. United States, 423 F.2d 1102, 1104 (9th Cir. 1970); Platt v. United States, 163 F.2d 165, 167 (10th Cir. 1947). However, the Second, Fifth and Eleventh Circuits have determined that forfeiture is proper where the vehicle only transports the drug dealer to the site of a proposed exchange. See United States v. One 1979 Porsche Coupe, 709 F.2d 1424, 1427 (11th Cir. 1983); United States v. One 1979 Mercury Cougar, 666 F.2d 228, 230 (5th Cir. 1982); United States v. One 1977 Cadillac Coupe DeVille, 644 F.2d 500, 503 (5th Cir. 1981); United States v. One 1974 Cadillac Eldorado Sedan, 548 F.2d 421, 427 (2d Cir. 1977).

"In resolving this dispute the legislative history instructs that `it is the intent of these provisions that property would be forfeited only if there is a substantial connection between the property and the underlying criminal activity.' Psychotropic Substances Act of 1978, Joint Explanatory Statements of Titles I and II, 95th Cong., 2d Sess., reprinted in 1978 U.S. Code Cong. & Ad. News 9496, 9518, 9522. It is our conclusion that the use of an airplane or other vehicle or vessel in a drug transaction, either to transport controlled substances or to transport conspirators to an exchange site, establishes a 'substantial connection' between the conveyance and the criminal activity sufficient to justify an order of forfeiture.

"Consequently, we hold that the use of an airplane or other vehicle or vessel to transport conspirators to the scene of a drug sale subjects that conveyance to forfeiture under 21 U.S.C. § 881(a) (4). We agree with the Second Circuit that

> if the purpose of the statute is, as Congress indicated, to reduce the profits of those who practice this nefarious profession, we are loathe to make the forfeiture depend upon the accident of whether dope is physically present in the vehicle. Its use to transport the peddler or his confederates to the scene of the sale or to a meeting where the sale is proposed is sufficient.'

One 1974 Cadillac Eldorado Sedan, 548 F.2d at 426; see also United States v. One 1979 Lincoln Continental, 574 F.Supp. 156, 159–160 (N.D. Ohio 1983), aff'd, 754 F.2d 376 (6th Cir. 1984)."

Authorities

(other than cited in 1966 Beechcraft above) 21 U.S.C. §,881(a) (4)

S.Ct: U.S. v. Lane Motor Co., 73 S.Ct. 459 (1953).

9 Cir: Simpson v. U.S., 272 F.2d 229 (1959).

8 Cir: See One 1961 Linc. Cont. Sedan in. U.S., 360 F.2d 467 (1966).

7 Cir: U.S. v. Fleming, 677 F.2d 602 (1982).

5 Cir: U.S. v. One 1977 Cadillac, 644 F.2d 500 (1981); U.S. v. One (l) 1971 Chevrolet Corvette Auto, 496 F.2d 210 (1974); Burt v. U.S., 283 F.2d 473 (1960).

4 Cir: U.S. v. One Ford Coach, 1949 Model, 184 F.2d 749 (1950).

3 Cir: U.S. v. One 1948 Plymouth Sedan, 198 F.2d 399 (1952).

ND ED IL: U.S. v. One 1980 Cadillac, 521 F.Supp. 1253 (1981).

MA: U.S. v. One 1981 Ford F100 Pickup Truck, 577 F.Supp. 221 (1983).

ED NY: U.S. v. One 1980 BMW 320i, 559 F.Supp. 382 (1983).

ED PA: U.S. v. One 1981 Datsun 280ZX, 563 F.Supp. 470 (1983).

Discussion

The logic of the Second, Fifth, and Eleventh Circuits as outlined by the Fourth Circuit in the 1966 Beechcraft case seems compelling:

> (1) Prior commuting cases merely interpreted prior statutes; they did not state a constitutional rule on commuting.
>
> (2) Congress intended 21 U.S.C. § 881(a) (4) to have a much wider scope than earlier laws. To reflect this, it placed the words "in any manner" before the term "to facilitate" in the statute.
>
> (3) Therefore, earlier decisions on commuting are irrelevant to 21 U.S.C. § 881(a) (4).
>
> (4) Congress passed 21 U.S.C. § 881(a) (4) to deprive traffickers of their mobility. This is clear from the legislative history quoted on page 60a of this guide.
>
> (5) The mobility of the buyer and seller is as important as the mobility of drugs and drug money. See page 76 of this guide.
>
> (6) Therefore, transportation of a buyer or seller to negotiations or sales should also result in forfeiture for "facilitation."

(d) Beyond the Cokon Patterns

Statutes are often written in general terms that are broad enough to cover many factual situations which were not foreseen at the time the laws were passed. New factual patterns are covered by generally worded laws, provided they come within both the wording and the spirit of the statutes.

> "Old crimes . . . may be committed under new conditions. Old laws apply to changed situations . . . While a statute speaks from its enactment, even a criminal statute embraces everything which subsequently falls within its scope." Browder v. U.S., 61 S.Ct. 599, 602 (1941).

The word "facilitate" is a general term; it is not frozen, or restricted, to the common patterns we have discussed. To emphasize this, the draftsmen of 21 U.S.C. § 881 (a,) (4) and UCSA § 505(a) (4) placed the phrase "in any manner' before the term "to facilitate." See U.S. v. One 1974 Cadillac Eldorado Sedan, 548 F.2d 421 (2 Cir. 1977).

THE FACILITATION SECTIONS OF STATE AND FEDERAL FORFEITURE STATUTES CAN APPLY TO FACTUAL PATTERNS AS YET UNKNOWN.

For miscellaneous facilitation cases, not falling within the common patterns, see: U.S. v. Arias, 453 F.2d 641 (9 Cir. 1972); U.S. v. Bride, 308 F.2d 470 (9 Cir. 1962); D'Agostino v. U.S., 261 F.2d 154 (9 Cir. 1958); U.S. v. LaVecchia, 513 F.2d 1210 (2 Cir. 1975); U.S. v. One 1966 Ford LTD 4-Door Sedan, 273 F.Supp. 1007, aff'd sub nom Bullock v. U.S., 384 F.2d 747 (5 Cir. 1967); and U.S. v. One 1962 Ford 2-Door Sedan, 234 F.Supp. 798 (WD VA. 1964).

Example

27. Acting in an undercover capacity, you meet with L at a restaurant to buy $25,000 worth of heroin. L arrives there in his car. You show him the money which you have stored in the trunk of your car. Then you ask L to see the drugs. He says he doesn't have them; his source has the heroin and is waiting for L to call. L quickly goes to a phone. When he returns, he asks you to follow him across town to a bar. He drives there in his car. At the parking lot of the bar a stranger enters L's car and talks to L for no more than a minute. The stranger then gets out and disappears back into the bar. L comes over and asks you to follow him to a train station. He drives there in his car. At the station, L shows you a key which the suspect gave him at the bar. He asks you to accompany him to the public lockers in the train station. He asks you to bring your money. En-route, he explains that the heroin is in a certain locker which he will open with the key. You are to take out the drugs and put your money in. L will keep the key and return it to his source. After inspecting the drugs in the locker, you arrest L. Is his car forfeitable?

    Yes, under federal law. The delivery plan devised by L and his source required L to travel quickly about the city. L's car was used for more than just commuting; it was a necessary part of a complex plan to deliver drugs. And, constructive possession of the heroin was transferred in L's car when his source handed him the locker key. The use of this vehicle does not fit the common patterns we have seen, but it has facilitated the sale of heroin in a significant way. Therefore, it is forfeitable under federal law. See U.S. v. LaVecchia, cited above.

5. Common carriers are exempt from civil forfeiture

A common carrier, such as a commercial airplane, bus, train or taxi, is exempt from both state and federal forfeiture, unless:

1. It is not being operated as a common carrier at the time of illegal use; or

2. An owner or person in control (captain, driver, conductor, pilot, etc.) knows of and acquiesces in the illegal use.

Although common carriers are exempt, the exemption is not absolute.

Authorities

21 U.S.C. § 881; 49 U.S.C. § 782; 19 U.S.C. § 1594; U.S.C.A. § 505(a) (4) (i); 21 U.S.C. § 885; 19 U.S.C. § 1615.

8 Cir: U.S. v. One Rockwell Intern. Commander, 754 F.2d 284 (1985).

MD FLA: U.S. v. One (1) Liberian Refrigerator Vessel, 447 F.Supp. 1053 (1977).

MD: Prince George's County v. Blue Bird Cab Company, 284 A.2d 203 (App. 1971).

Discussion

Both state and federal law exempt common carriers from civil forfeiture. Section 881(a) (4) (A) of the federal Controlled Substances Act (21 U.S.C.) provides:

> "no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation. . . ."

Similar provisions appear in Section 782 of the federal Contraband Seizure Act (49 U.S.C.), and in Section 1594 of the federal Tariff Act of 1930 (19 U.S.C.). The state Uniform Controlled Substances Act contains a virtually identical provision in Section 505(a) (4) (i).

Basically, a "common carrier" is a person or company employed to transport goods or passengers, such as a commercial airline, bus line, train, taxi, parcel or freight service.

> "The salient characteristic of a common carrier is that `He must be engaged in the business of carrying goods for others as a public employment, and must hold himself out as ready to engage in the transportation of goods for persons generally . (and) holds himself out as ready to engage in the transportation of goods for hire as a public employment . . . and . . . undertakes for all persons indifferently." U.S. v. One (1) Liberian Refrigeration Vessel, cited above (quoting from U.S. v. Stephen Bros. Lines, 384 F.2d 118, 5 Cir. 1967).

The rationale given for exempting common carriers is that, unlike owners of private conveyances, they are generally required by law to accept all persons and all parcels for carriage.

> "There can, we think, be no clearer case of reasonableness in classification for purposes of enforcing the narcotics statutes than the one made here. The opportunity of the owner of a common carrier to detect or prevent carriage by one of its passengers (who must be carried without discrimination) of a small quantity of narcotics is obviously slight as compared with the opportunity of the owner of an automobile who reserves the full right of inviting to ride whom he wishes." U.S. v. One 1957 Oldsmobile Auto., 256 F.2d 931 (5 Cir. 1958).

Because of this distinction, owners of property not exempted from forfeiture cannot complain they have been denied due process or equal protection of the laws. U.S. v. One 1971 Mercedes Benz, 542 F.2d 912 (4 Cir. 1976); U.S. v. One 1957 Oldsmobile Auto, 256 F.2d 931 (5 Cir. 1958); U.S. v. One 1962 Ford Thunderbird, 232 F.Supp. 1019 (ND Ill. 1964); State v. Richards, 301 S.W.2d 597 (Tex. 1957); and see Com. in. One 1977 Pontiac Grand Prix Auto, 378 N.E.2d 69 (Mass. 1978).

The common carrier exemption is not absolute, and the burden of proving the exemption rests partly with the carrier. First, the government has the burden to show probable cause for the seizure. Second, the burden shifts to the claimant to prove that the conveyance was being operated as a common carrier at the time of illegal use. 21 U.S.C. § 885, 19 U.S.C. § 1615. Third, the burden shifts back to the government to prove that either the owner or person in control of the common carrier acquiesced in the illegal use. U.S. in. One (1) Liberian Refrigeration Vessell, cited above.

Examples

28. You develop probable cause to believe that G, a local taxi driver, is selling heroin to students. You observe G drive his cab to a local high school and park. Students begin to enter and leave his cab. You arrest G seated in his taxi. He has many small bags of heroin and a large quantity of small bills in his possession. Is the taxi forfeitable?

    Yes. As a general rule, common carriers are exempt from civil forfeiture, but the exemption is not absolute. If a conveyance is not being operated as a common carrier at the time of illegal use, then it is not exempt. Also, if the person in control acquiesces in the illegal use, then it is not exempt. Here, both of these exceptions apply: the taxi was not being used for public transportation at the time it was parked outside the school, and the driver knew of the illegal use of the cab. Therefore, the taxi is not exempt as a common carrier. Since heroin was present in the cab, it is subject to federal forfeiture. And, since G transported heroin in the cab ,for the purpose of sale, it is subject to state forfeiture. See Prince George's County v. Blue Bird Cab Company, 284 A.2d 203 (App. 1971).

29. You are surveiling a docked ship believed to be involved in smuggling. At 2:30 a.m., several crew-members unload dark colored trash bags through a porthole on to the dock. You approach the dock and the crew-members immediately scatter in the direction of a nearby field. You do not catch any of the men, but you find a dark colored trash bag floating in the water between the ship and the dock, and you find seven more dark colored trash bags abandoned in the nearby field. The bags contain a total of 173 pounds of pure cocaine. In the morning, you interview the ship's officers and crew. The "boatswain," who is the liaison between the ship's officers and crew, and who is responsible for the crew's work assignments, denies any involvement in smuggling. He does admit, however, that he, the Captain, and another officer had seen the cocaine on board in one of the crew's cabin at the beginning of the voyage. Is the ship forfeitable?

    Yes. Although no drugs were found on board, the circumstantial evidence makes it virtually certain that a very large quantity of cocaine was transported in the ship for sale in the United States. Therefore, it is forfeitable under both state and federal law. And, the common carrier exception to forfeiture does not apply. The Captain, plus one of the ship's officers, plus the boatswain knew at the beginning

of the voyage that cocaine was on board, yet they took no action to remove it or to call the authorities. Since the people in control of the ship knew of, and acquiesced in, the transportation of cocaine, it is not exempt from forfeiture. See U.S. v. One (1) Liberian Refrigerator Vessel, 447 F.Supp. 1053 (MD Fla. 1977).

6. Stolen conveyances are exempt from civil forfeiture

A conveyance is exempt from federal forfeiture if the owner can prove:

1. It was possessed unlawfully at the time of illegal use; and

2. Possession was illegally acquired in violation of the criminal laws of the United States or of any state.

In other words, the exemption depends upon the owner's ability to prove the conveyance was stolen. Because most states exempt all innocent owners from civil forfeiture, stolen conveyances are also exempt under state law.

Authorities

21 U.S.C. § 881; 49 U.S.C. § 782; UCSA § 505(a) (4) (ii); 21 U.S.C. § 885; 19 U.S.C. § 1615.

S.Ct: Peisch v. Ware, 8 U.S. (4 Cranch) 347 (1808).

9 Cir: U.S. v. One 1967 Cadillac Coupe Eldorado, 415 F.2d 647 (1969); U.S. v. Andrade, 181 F.2d 42 (1950).

8 Cir: See U.S. v. One 1972 Toyota Mark II, 505 F.2d 1162 (1974).

6 Cir: See One 1941 Ford 1/2 Ton Pickup A. Truck, etc. v. U.S., 140 F.2d 255 (1944).

5 Cir: General Finance Corp. v. U.S., 333 F.2d 681 (1964); Westfall Oldsmobile v. U.S., 243 F.2d 409 (1957); Associates Investment Co. v. U.S., 220 F.2d 885 (1955); U.S. v. One Chevrolet Truck, 1934 Model, 79 F.2d 651 (1935); Beaudry v. U.S., 79 F.2d 650 (1935).

SD FL: U.S. v. One 1977 36 Foot Cigarette Ocean Racer, 624 F.Supp. 290 (1985).

ED NY: U.S. v. One 1978 Chrysler LeBaron, 531 F.Supp. 32 (1981).

SD NY: U.S. v. One Mercedes Benz 380 SEL, 604 F.Supp. 1307 (1984).

MD: Prince George's County v. Blue Bird Cab Company, 284 A.2d 203 (App. 1971).

Discussion

As early as 1808, the Supreme Court of the United States suggested that it might be unconstitutional to forfeit stolen property:

> "The court is . . . of opinion, that the removal for which the act punishes the owner with a forfeiture of the goods, must be made with his consent or connivance, or with that of some person employed or trusted by him."
>
> "If, by private theft, or open robbery, without any fault on his part, his property should be invaded. . . . the law cannot be understood to punish him with the forfeiture of that property." Peisch v. Ware, 8 U.S. (Cranch) 347, 365, 2 L.Ed. 643.
>
> Later Supreme Court decisions have referred to this statement, but have not directly decided whether stolen property is constitutionally exempt from forfeiture. It seems unlikely that any decisions will be made on this issue, because the vast majority of forfeiture statutes contain exemptions for stolen conveyances. To illustrate, Section 782 of the Contraband Seizure Act (49 U.S.C.) provides:
>
> "That no . . ., vehicle, . . . shall be forfeited under the provisions of this chapter by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such . . ., vehicle, . . . was unlawfully in possession thereof in violation of the criminal laws of the United States, or of any State."

Similarly, 21 U.S.C. § 881(a) (4) (B) provides:

> "no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State."

a. Possession Must Be Criminal

A conveyance must be "stolen" before an owner can rely upon this exemption.

The National Motor Vehicle Theft Act, also known as the Dyer Act, 18 U.S.C. § 2312, § 2313, controls whether a conveyance is stolen within the meaning of federal law. Readers interested in an extended discussion of the federal meaning of "stolen" should refer to 45 ALR Fed. 370. State statutes and common law decisions control whether a conveyance is stolen under state law. Readers interested in this topic should refer to the annotations in 70 ALR 3d.1202, 38 ALR 3d.949, and 9 ALR 3d.633. Because of the many differences in state laws, any detailed discussion of this subject is far beyond the scope of this guide. But, several generalizations are possible.

(1) Default on Payments

If a buyer, or renter, of a conveyance is behind on his payments to a seller, lessor, or secured party, the conveyance is not stolen within the meaning of state or federal law. Continued possession of a conveyance after defaulting on payments is not a crime. And, the conveyance was legally acquired. Therefore, the stolen conveyance exception does not apply. U.S. v. 1967

Cadillac Fleetwood El Dorado Auto, 296 F.Supp. 891 (SD TEX. 1969); U.S. v. One 1948 Cadillac Convertible Coupe, 115 F.Supp. 723 (D NJ 1953); Prince George's County v. Blue Bird Cab Co., 284 A.2d 203 (MD. App. 1971).

(2) Exceeding Permission

If the owner, lessee, or possessor of a conveyance has agreed not to use it for unlawful purposes, and he breaks the agreement, the conveyance is not considered "stolen." In addition, possession of the conveyance was lawfully acquired. Therefore, the stolen conveyance exception does not apply. U.S. v. 1967 Cadillac Coupe Eldorado, 415 F.2d 647 (9 Cir. 1969); U.S. v. One Chevrolet Truck, 1934 Model, 79 F.2d 651 (5 Cir. 1935); U.S. v. One 1941 Chrysler Brougham Sedan, 74 F.Supp. 970 (ED Mich. 1947); and see U.S. v. One 1972 Toyota Mark II, 505 F.2d 1162 (8 Cir. 1974).

If a conveyance is loaned to someone for a particular purpose, and he goes on a "frolic" of his own using the conveyance for some other purpose, the conveyance is generally not considered "stolen." And, it was not criminally acquired. Therefore, the stolen conveyance exception does not apply. U.S. v. One 1976 Buick Skylark, 453 F.supp. 639 (D. Colo. 1978); U.S. v. One 1951 Oldsmobile Sedan, 135 F.Supp. 873 (ED Pa. 1955).

If a conveyance is loaned to someone and, without permission, he allows a third party to drive it, it is not "stolen." And, it was not criminally acquired. Therefore, the exception does not apply. U.S. v. One 1963 Cadillac Hardtop, 231 F.Supp. 27 (ED Wis. 1964); U.S. v. One Lincoln Touring Car, 11 F.2d 551 (ND NY 1925).

(3) Illegal Taking (Theft)

If a conveyance is illegally acquired by fraud, such as by forging papers, it will be considered "stolen" in most states. Compare U.S. v. 1957 Oldsmobile 4-Door Sedan, 173 F.Supp. 956 (SD Tex. 1959) with Gen. Finance Corp. v. U.S., 333 F.2d 681 (5 Cir. 1964); Westfall Oldsmobile v. U.S., 243 F.2d 409 (5 Cir. 1957); and Beaudry v. U.S., 79 F.2d 760 (5 Cir. 1935).

If a conveyance is taken, even by a relative, without the express or implied permission of the owner, it is considered "stolen" and will be exempt from forfeiture. U.S. v. One Ford Mustang 1971 Mach I, 354 F. Supp. 81 (CD Cal. 1973); U.S. v. One 1971 Ford Truck, 346 F.Supp. 613 (CD Cal. 1972); U.S. v. One 1962 Ford Galaxie Sedan, 236 F.Supp. 529 (SD Cal. 1964); U.S. v. One 1954 "98" Oldsmobile Convertible, 152 F.Supp. 616 (MD Pa. 1957); U.S. v. One 1954 Cadillac 2-Door Sedan, 135 F.Supp. 1 (WD Mo. 1955); U.S. v. One 1938 Chevrolet Coach Auto., 78 F.Supp. 676 (WD SC 1948) (owner too drunk to give "legal" permission.)

b. Owners Must Prove Theft

The Evidence Section of this guide explains that once probable cause is shown for forfeiture, the claimant has the burden of disproving the illegal use of the property, or of proving it fits within a statutory exception. 19 U.S.C. § 1615, 21 U.S.C. § 885. In addition, the plain wording of 49 U.S.C. § 782 and 21 U.S.C. § 881(a) (4) (B) requires the claimant to establish his property was stolen.

A mere "hue and cry" that property was stolen will not satisfy this requirement. Merely pleading, or claiming, that a conveyance was stolen is not enough. The claimant must establish his property was stolen by a preponderance of evidence. See the cases cited earlier in this guide on burden of proof. In particular, see U.S. v. Andrade, 181 F.2d 42 (9 Cir. 1950); One 1941 Ford 1/2 Ton Pickup v. U.S., 140 F.2d 255 (6 Cir. 1944); U.S. v. One (l) 1950 Burger Yacht, 395

F.Supp. 802 (SD Fla. 1975); and U.S. v. One Oldsmobile Sedan, 30 F.Supp. 254 (D. Mass. 1939).

c. State Law Compared

An owner need not prove his conveyance was stolen to escape forfeiture under state law. Certainly, if it was stolen, it will be exempt from state forfeiture. But state law, as discussed below, excepts property from forfeiture anytime the illegal use was without the knowledge of the owner. UCSA § 505(a) (4) (ii).

7. Additional State Exceptions

States which have adopted UCSA § 505(a) (4) have several exceptions to the civil forfeiture of conveyances, which federal law does not recognize.

a. Simple Possession Cases

UCSA § 505(a) (4) (iii) provides that "a conveyance is not subject to forfeiture for a violation of Section 401(c) . . . ." This refers to the simple possession of drugs' offense in the Uniform Act.

It is unclear why this provision was included in the Uniform Act, since the main part of Section 505(a) (4) already prohibits forfeiture in non-trafficking cases. Whatever the reason, state governments have the initial burden of establishing the probability of trafficking. This "exception" need not be proved by a claimant. Griffis v. State, 356 So. 2d 297 (Fla. 1978); Reeder v. State, 314 So.2d 853 (Ala. 1975).

Contrast Federal Law: Remember, federal law contains no statutory exception for conveyances involved in simple possession cases. Instead, owners must seek a pardon (remission or mitigation) from the Attorney General.

b. Innocent Owner

UCSA § 505(a) (4) (ii) provides that:

> "no conveyance is subject to forfeiture under this Section by reason of any act or omission established by the owner thereof to have been committed or omitted without his knowledge or consent."

If a conveyance has more than one owner, the guilty knowledge of one is imputed, or chargeable, to all the others. As long as any one of the owners had knowledge of the illegal use, the "Innocent Owner" Exception does not apply; the conveyance remains forfeitable. State v. One 1968 Buick Electra, 301 A.2d 297 (Del. 1973); Amrani-Khaldi v. State, 575 S.W.2d 667 (Tex. App. 1978).

A non-registered party, who is a "true owner" is an owner under this section. Matter of 1976 Blue Ford Pickup, 586 P.2d 993 (Ariz. App. 1978).

The exception makes clear that the owner has the burden of proving his ignorance of the illegal conduct that gave rise to the seizure. State ex rel Reid in. Kemp, 574 S.W.2d 695 (Mo. App. 1978); State v. Richardson, 208 S.E.2d 274 (NC App. 1974).

Of course, if the owner testifies that he was ignorant of the illegal activity, and if he is

judged to be credible, and if the State has no evidence he had guilty knowledge, this should be enough to avoid forfeiture under the exception. State v. Ozarek, 573 P.2d 209 (NM 1978); State v. One (i) Certain 1969 Ford Van, 191 N.W.2d 662 (Iowa 1971); Garner v. State, 175 S.E.2d 133 (Ga. App. 1970).

If a conveyance is seized twice from the same drug violator, and if after the first seizure an owner invokes the Innocent Owner Exception as a defense, that owner's guilty knowledge will virtually be presumed in the second forfeiture proceeding.. State v. Richardson, 208 S.E.2d 274 (NC App. 1974).

***

See MASFA § 5. Exemptions. Subsection (a). Property is exempt from forfeiture if:

(1) the owner or interest holder acquired the property before or during the conduct giving rise to forfeiture and he (i) did not know and could not reasonably have known of the act or omission or that it was likely to occur; or (ii) acted reasonably to prevent the conduct giving rise to forfeiture; or

(2) if the owner or interest holder acquired the property after the conduct giving rise to forfeiture, including acquisition of proceeds of conduct giving rise to forfeiture, and he acquired the property in good faith, for value and was not knowingly taking part in an illegal transaction.

See also MASFA § 5(b). Even if the owner or interest holder lacks knowledge or reason to know, property is forfeitable if:

(1) the owner or interest holder holds the property jointly with the person whose conduct gave rise to forfeiture;

(2) the wrong-doer had the authority to convey the property to a good faith purchaser for value at the time of the conduct;

(3) the owner or interest holder is a co-conspirator or otherwise criminally responsible for the conduct giving rise to forfeiture; or

(4) the owner or interest holder acquired the property with notice of its actual or constructive seizure for forfeiture, or with reason to believe it was subject to forfeiture.

***

Contrast Federal Law: Federal law has no statutory exception for innocent owners of conveyances. They must petition for a pardon of the property (remission or mitigation) from the Attorney General.

c. Innocent Secured Parties

UCSA § 505(a) (4) (ii) provides that:

> "a forfeiture of a conveyance encumbered by a bona fide security interest is subject to the interest of the secured party if he neither had knowledge of nor consented to the act or omission."

"Is subject to" means subordinate, inferior or secondary to. It means the State's right to forfeit a conveyance may not interfere with, or jeopardize, the interests of a bona fide secured party. If necessary, a state court can order return of a conveyance to a secured party to protect his interest pending the completion of forfeiture proceedings. State v. One 1977 Dodge Van, 397 A.2d 733 (NJ Super. 1979).

A "secured party" is a creditor who has special rights in specific property of the debtor. The bank that lends money to buy a new car is a secured party; it has special rights (a security interest) in the car (the collateral). Not every creditor is a secured party. Who qualifies depends upon the commercial law of the State. See Article 9 of the Uniform Commercial Code.

Owners are not considered secured parties. Matter of 1976 Blue Ford Pickup, 586 P.2d 993 (Ariz. App. 1978).

Contrast Federal Law: Again, federal law contains no statutory exception for innocent secured parties of conveyances. They must petition the Attorney General for a pardon of their interests in the seized property (remission or mitigation).

***

See MASFA § 5. Exemptions.

***

Forfeitable Conveyances

The Following Are Subject To Forfeiture... All Conveyances... Used, or Intended for Use To:

(State) U.C.S.A. 505	(Federal) 21 U.S.C. 881
Transport Drugs for the Purpose of Sale	**Transport Drugs** for any Purpose, in any Amount.
Facilitate Transportation of Drugs for the Purpose of Sale. —Escort Conveyances	**Facilitate Transportation of Drugs** for any Purpose, in any Amount. —Escort Conveyances
	Facilitate the Sale of Drugs —Negotiate Sale in Conveyance —Transport Drug Money —Payoff in Conveyance
	Facilitate Receipt of Drugs
	Facilitate Possession or Concealment —Mere Presence of Drugs in Conveyance

Exceptions

Stolen Conveyances	**Stolen Conveyances**
Common Carriers	**Common Carriers**
Simple Possession Cases	
Innocent Owner's Interests	
Creditor's Interests	

F. RECORDS KEPT BY DRUG VIOLATORS ARE FORFEITABLE

All records of drug violations, including research, formulas, microfilm, tapes and data, which are made and kept by drug violators are forfeitable under both state and federal law. Books of general distribution and drug related literature, on the other hand, are constitutionally exempt from civil forfeiture.

Authorities

U.S.C.A., Constitution, Amendment 1. 21 U.S.C. § 881(a) (5); UCSA § 505(a) (5).

WD KY: Kane v. McDaniel, 407 F.Supp. 1239 (1975).

ND GA: High 01 Times v. Busbee, 456 F.Supp. 1035 (1978).

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See MASFA § 4(b).

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G. CURRENCY & PROCEEDS

Prior to November 10, 1978, the civil forfeiture provisions of federal law did not reach so-called "drug money" or drug profits. On that date Section 881 of the Controlled Substances was extended to include:

> "All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of . . . (the Controlled Substances Act or the Controlled Substances Import and Export Act) . . .,"
>
> "all proceeds traceable to such an exchange, and"
>
> "all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of . . . (the Controlled Substances Act or the Controlled Substances Import and Export Act) . . ."
>
> "except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by the owner, to have been committed or omitted without the knowledge or consent of that owner."

Although these provisions are written as one paragraph in the statute (21 U.S.C. § 881(a) (6)), they are actually four distinct sections:

(1) The EXCHANGE Section,

(2) The PROCEEDS Section,

(3) The FACILITATION MONEY Section, and

(4) The INNOCENT OWNER Section.

***

See MASFA §(4)(c). All proceeds of any conduct giving rise to forfeiture are forfeitable and §(4)(b).

***

You may find the following chart helpful in distinguishing between these actions as you read through this guide.

Drug Currency and Proceeds

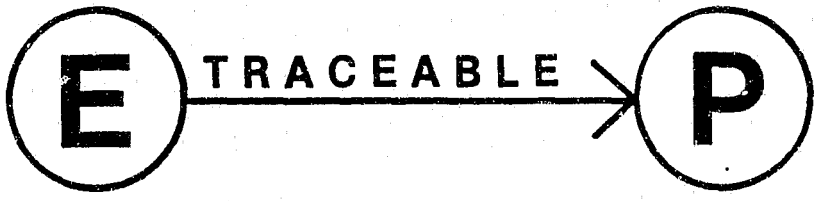
21 U.S.C. 881 (a) (6)

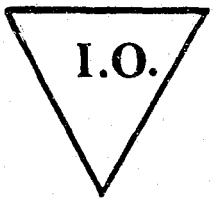
Exchange Section

"All...things of value furnished or intended to be furnished... in exchange for...(drugs)."

Proceeds Section

"All proceeds traceable to such an exchange..."





Facilitation Money Section

"All money...used or intended to be used to facilitate any... (drug law)...violation..."

Innocent Owner Section

"Except... property... established by the owner to have been...(illegally used)... without his knowledge..."

1. Anything exchanged, or intended for exchange, for illicit drugs is subject to federal forfeiture

Federal law provides for the civil forfeiture of anything of value furnished, or intended to be furnished, illegally in exchange for controlled substances. Many states have similar, although not identical, civil forfeiture provisions. See the Summary of State Drug Forfeiture Laws in the Appendix to this guide.

***

See MASFA § 4(b). All property furnished or intended to be furnished by any person in an exchange that constitutes conduct giving rise to forfeiture.

***

Authorities

21 U.S.C. § 88l(a) (6).

Discussion

Although the Exchange Section of 21 U.S.C. § 881(a) (6) specifically refers to moneys, negotiable instruments and securities, it is not limited to them. It applies to "(any) other things of value" exchanged, or intended for exchange, for illicit drugs.

a. Direct Evidence of Exchanges

Your observations, the observations of an informant, or the admissions of a defendant or owner, will frequently provide you with direct evidence of an exchange or intended exchange.

To illustrate, suppose you observe A giving B $2,000 in exchange for an ounce of cocaine; the money is forfeitable under the Exchange Section of 21 U.S.C. § 881(a) (6).

Suppose you masquerade as a major supplier of Thai heroin and B negotiates with you to buy a large shipment of the drug. You give B a very small sample to test and he shows you a bankbook with a $200,000 balance and a check made out to you in the same amount. The check, the passbook and the money in B's account are forfeitable under the Exchange Section of 21 U.S.C. § 881(a) (6). They are intended for exchange for drugs; an actual exchange need not take place.

Suppose Z is stopped at the border as he is returning from Mexico and a Customs search of his suitcase reveals one pound of marijuana, 800 qualude tablets, a vial of hashish oil and $4,000 in cash. Z admits he went to Mexico with $6,000 in cash to buy all the drugs he could find. He complains he could only find $2,000 worth of drugs, so he gave up looking and came home. The $4,000 is forfeitable under the Exchange Section of 21 U.S.C. § 881(a) (6). It was intended for exchange for illicit drugs. Remember, an actual exchange need not take place.

b. Circumstantial Evidence of Exchanges

Too often you will not have direct evidence of an exchange; fortunately; this will not necessarily preclude forfeiture. Circumstantial evidence is admissible to prove an exchange occurred or that one was intended. See State v. Petty, 241 S.E.2d 561 (SC 1978) and Lettner v. Plummer, 559 S.W.2d 785 (Tenn. 1977). In addition, the circumstantial evidence need not prove an exchange to a certainty – mere "probability" of an exchange is enough to begin a civil forfeiture. For these reasons, it is important to consider the kinds of circumstantial evidence you are likely to encounter.

(1) Simple Possession of Money & Drugs

If small sums of money are found with small amounts of drugs, a reasonable suspicion exists that they are connected in some way. Two states (Idaho and Maryland) have elevated this suspicion to a statutory presumption. For example, Maryland's law forfeits:

> "All money or currency which shall be found in close proximity, to contraband controlled dangerous substances. . . ."
>
> ***
>
> **See MASFA § 11. Judicial Proceedings Generally. Subsection (j). Money or a negotiable instrument found in close proximity to contraband or an instrumentality of conduct giving rise to forfeiture is rebuttably presumed to be proceeds of conduct giving rise to forfeiture or was used or intended to be used to facilitate conduct.**
>
> **See also § 11(k). A rebuttable presumption that property is subject to forfeiture exists if:**
>
> **(1) the person engaged in conduct giving rise to forfeiture;**
> **(2) property was acquired during the period of the conduct or within a reasonable time thereafter; and**
> **(3) there was no likely source for the property other than the conduct.**
>
> ***

The Exchange Section of 21 U.S.C. § 881(a) (6) does not contain such a presumption. It requires the Federal Government to establish the probability that money was exchanged, or was intended for exchange for drugs. Without more evidence, small sums of money found with small amounts of drugs are not subject to federal forfeiture.

To illustrate, suppose B is arrested at an airport for smoking marijuana. During his arrest, one marijuana cigarette, seven grams of marijuana in a small bag, and $55 in cash are found in one of his pockets. The money is forfeitable in some states simply for being found in close proximity to drugs. It is not forfeitable under federal law; simple possession of drugs and money does not create a probability the money is connected to an illicit exchange.

Suppose, in this last example, an additional $3,900 in cash is found rolled in two bundles hidden in the arrestee's socks. Does the larger sum of money create a probability it is connected to a drug exchange? No. A large sum of money is certainly suspicious, but without some evidence of drug trafficking there is no probability it is linked to an illegal exchange.

(2) Small Sums Possessed by Traffickers

Suppose you obtain an arrest warrant for an attorney indicted of drug trafficking. And suppose during his arrest you find $100 in cash in his wallet. Is the cash forfeitable? No. Small sums of money are common. You cannot say with any probability that the money is related to a drug exchange. It seems just as likely the cash is spending money acquired in a legitimate way. Without more evidence, small sums possessed by traffickers are not forfeitable under "state or federal law.

(3) Large Sums Possessed by Traffickers

The drug trafficking business has many peculiar characteristics. We have already noted that it is a cash–and–carry trade, it relies upon face–to–face transactions, it avoids leaving a paper trail, and it is very dependent upon mobility.

In addition, it cannot depend upon a steady source of supply; seizures and arrests continually interrupt the supply line. Both the availability and purity of drugs can vary dramatically with time. And, it cannot depend upon a steady stream of reliable buyers; the peddler cannot advertise; and new buyers must be scrutinized to avoid infiltration by government agents.

The result is a somewhat chaotic market in which drugs suddenly become available, or unavailable, purity fluctuates, and prices change up to the moment of sale. To function effectively in this market, the successful trafficker needs a cash reserve on hand to buy drugs as they become available and to pay last minute price increases. Given the high value of illicit drugs (an ounce of pure cocaine has a retail street value of over $17,000 and an ounce of pure heroin brings over $60,000), the cash reserve usually involves a large sum of money.

Large sums of cash possessed by drug traffickers probably were received in exchange for drugs, or are intended for exchange for a particular shipment of drugs, or are a cash reserve intended for exchange for drugs that might become available. Judges understand this: they believe that possession of large sums of unexplained cash is highly relevant evidence of drug trafficking. See U.S. v. U.S. Currency Totaling $29,500.00, 677 F. Supp. 1181 (ND Ga) (1988), aff'd mem., U.S. v. $29,000 in U.S. Currency, 866 F. 2d 1423 (11th Cir. 1989), under "Examples (RE Probable Cause.)" supra. p. 11; U.S. v. Barnes, 604 F.2d 121 (2 Cir. 1979); U.S. v. Magnano, 543 F.2d 431 (2 Cir. 1976); and U.S. v. Tramunti, 513 F.2d 1087 (2 Cir. 1975).

In Barnes the court states:

> Evidence of the possession and receipt of huge amounts of money is highly relevant in an operation in which the costs of the commodity and the profits therefrom are astronomical." 604 F.2d at 146.

In Tramunti the court held:

> "The possession of large amounts of unexplained cash in connection with evidence of narcotics trafficking on a large scale is similar to the possession of special means, such as tools or apparatus, which is admissible to show the doing of an act requiring those means." 513 F.2d at 1105.

Jurors are even more convinced that large sums of unexplained cash are evidence of wrongdoing. The likelihood of seeing or possessing $15,000 or $100,000 or $1,000,000 in cash is extremely remote. Most jurors are awed at the sight of piles of money and quickly conclude it was illegally obtained. For this reason, prosecutors are eager to display large sums of cash as evidence in drug cases.

If large sums of cash are legally considered highly relevant evidence of trafficking (exchanges), and if they are logically considered to be very unusual in the community, it seems highly probable that they were intended for exchange, or were exchanged for drugs. Therefore, they should be forfeitable without any direct evidence of exchanges.

(4) Large Sums Found With Drugs Intended For Distribution

The quantity, the purity, and the packaging of illicit drugs can create a presumption they are intended for illegal exchange (distribution). The logic behind this presumption is so strong that an individual can be convicted of intending to distribute drugs without any direct evidence of an intended exchange. U.S. v. Davis, 562 F.2d 681 (DC Cir. 1977); U.S. v. Heiden, 508 F.2d 898 (9 Cir. 1974); U.S. v. Nocar, 497 F.2d 719 (7 Cir. 1974); U.S. v. Polite, 489 F.2d 679 (5 Cir. 1974); U.S. v. King, 485 F.2d 353 (10 Cir. 1973); U.S. v. Echols, 477 F.2d 37 (8 Cir. 1973); and U.S. v. Bishop, 469 F.2d 1337 (1 Cir. 1972).

If large sums of cash are found with drugs intended for distribution, it seems highly probable the money was exchanged or is intended for exchange for drugs.

To illustrate, suppose you arrest A for drug trafficking. In his possession you find seven (7) pounds of 98% pure cocaine and $109,800 in cash. The conclusion seems inescapable that A got the cash in exchange for some of the cocaine, or that he intended to buy more cocaine with the money. What possible legitimate explanation exists for the possession of such a large sum of cash with such a large quantity of drugs?

(5) Large Sums Found With Non-Drug Evidence Of Trafficking

Occasionally, traffickers will be found in possession of marked funds used by government agents on prior occasions to buy illicit drugs. Or, they will be found in possession of records of illicit drug transactions showing customers, costs, receipts and so forth. Evidence of trafficking can take many forms. See U.S. v. White, 660 F.2d 1178 (7 Cir. 1981) where $38,394 was mixed with $3,800 of government drug purchase money.

Remembering that drug trafficking is a cash-and-carry trade and that large sums of cash are highly unusual in the community, finding a large sum of cash with other evidence of trafficking makes it probable the money was exchanged or intended for exchange for drugs. Therefore, it should be forfeitable. See U.S. v. $111,980 in U.S. Currency, 660 F. Supp. 247 ED WI (1987), under "Examples (RE Probable Cause.)" supra, p. 13. U.S. v. One Machine For

Corking Bottles (And $), 267 F.501 (WD Wash. 1920).

(6) Large Sums at Airports – Dog "Sniffs"

The federal case authority regarding the use of drug detector dogs to establish probable cause to forfeit large sums of currency is not clear. The lack of clarity arises because in most cases other probable cause is also present to support the preponderance of evidence needed to sustain the forfeiture. See U.S. v. $13,000 in U.S. Currency, 733 F.2d 581 (8 Cir. 1984) where a dog "sniff" was present, but also plastic bags, tape and rubber bands (common materials used by narcotic violators) in the airline luggage of a defendant previously arrested for drug trafficking via aircraft. The court sustained the forfeiture. Similarly, see U.S. v. $319,820, 620 F.Supp. 1474 (Ga. 1985) where a dog "sniff" and a number of other factors were before the court that sustained the probable cause for seizure. However, in 1986, after trial, the same court at 634 F.Supp. 700, concluded the currency was not forfeitable. The IRS then proceeded with a tax lien which was held superior to a subsequent claim for attorney's fees.

The court in the 1985 $319,820 case also highlighted at page 1478 that "the standard for probable cause in 881 forfeiture cases is similar to that used in search and seizure cases." In this regard, the Second, Fifth, and Seventh Circuits have sustained the use of drug detector dogs to establish probable cause and have further held the use of detector dogs does not constitute a search under the Fourth Amendment. See U.S. v. Waltzer, 682 F.2d 370 (2 Cir. 1982); U.S. v. Goldstein, 635 F.2d 356 (5 Cir. 1982); and U.S. v. Klein, 626 F.2d 22 (7 Cir. 1980). Also see U.S. v. Sullivan, 625 F.2d 9 (4 Cir. 1980); U.S. v. Robinson, 707 F.2d 811 (4 Cir. 1983); U.S. v. Solis, 536 F.2d 880 (9 Cir. 1976); U.S. v. Bronstein, 521 F.2d 459 (2 Cir. 1975); U.S. v. Fulero, 498 F.2d 748 (D.C. 1974); and U.S. v. $5,644,550 in U.S. Currency, 799 F.2d 1357 at 1359 (9 Cir. 1986).

Authorities

11 Cir: U.S. v. $4,255,000, etc., 762 F.2d 895 (1985) ("nothing in the statute requires evidence of a particular narcotics transaction.")

9 Cir: U.S. v. $215,300 in U.S. Currency,882 F.2d 417 (1989) (Factors to consider in forfeiting large sums of currency seized from airline passengers include (1) Money tied to the waist; (2) amount of cash; (3) narcotic dog alert; (4) lying about the money's source; and (5) reputation of origin; e.g. Miami is a well-known center of illegal drug activity. The forfeiture was affirmed in part because the particular sniffer dog had a perfect record for alerts and the government had taken the necessary precautions to ensure a reasonable probability of proper identification and lack of tampering.); U.S. v. $25,000 in U.S. Currency, 853 F.2d 1501 (1988). (This case has a good review of airport search issues, including consent to search and investigative detentions.); U.S. v. Dickerson, 873 F.2d 1181 (1988). (A dog sniff cannot be used to show probable cause for seizure where a seized aircraft was not properly secured during the six days between seizure and the dog alert.)

8 Cir: U.S. v. $13,000 in U.S. Currency, 735 F.2d 581 (1984); U.S. v. $93,685.61 in U.S. Currency, 730 F.2d 571 (1984).

7 Cir: U.S. v. $84,000 in U.S. Currency, 717 F.2d 1090 (1983).

6 Cir: U.S. v. $83,320, 682 F.2d 573 (1982).

5 Cir: U.S. v. $364,960, 661 F.2d 319 (1981) (court infers a connection to drugs "from sheer quantity of currency seized under these circumstances.")

2 Cir: U.S. v. $2500, 689 F.2d 10 (1982) (cocaine, drug records, and fine scale equal probable cause for money forfeiture).

DC Cir: U.S. v. Brock, 747 F.2d 761 (1984) (inferences from circumstantial evidence).

WD ARK: U.S. v. Certain Real Property Situated at Rt. 3, et al., 568 F.Supp. 434 (1983) (nontracing case – court supports "inference that the property constitutes proceeds traceable to drug transactions.")

SD FL U.S. v. $280,500, etc., 655 F. Supp. 1487 (1986), under "Innocence of an Owner is No Defense to a Civil Forfeiture." supra.

ND GA U.S. v. U.S. Currency Totalling $92,000, 707 F.Supp. 540 (1989). (Factors to consider in forfeiting large sums of money at an airport include: (1) reputation of the travellers as drug dealers; (2) a narcotics dog alert; (3) clandestine manner of travel; and (4) reputation of destination city as a known source for drugs.)

ED HO: U.S. v. $44,000, 596 F.Supp. 1308 (1984).

ED NY: U.S. v. $131,602 in U.S. Currency, 563 F.Supp. 921 (1982).

SD NY: U.S. v. $4,000 in U.S. Currency, 613 F.Supp 349 (1985) (amount of money and other facts "supports an inference that it was collected as proceeds from a narcotics sale, intended as part of the final payment, or both.")

SD OH: U.S. v. U.S. Currency: $24,927, 635 F.Supp. 475 (1986) ($2,000 in marked Government purchase money mixed with seized money – other evidence of drug trafficking).

ED PA: U.S. v. 1988 BMW 750 IL, etc., 716 F.Supp. 171 (1989), aff'd mem., 891 F.2d 284 (3rd Cir., 1989) (A dog sniff is not a search, as it is purely investigatory and does not further any of the interests of an inventory search. Facilitation under Sec. 881(a)(4) is presently based on the following: (1) a large amount of currency in small bills in a bag inside the vehicle; (2) prior drug related arrests of the occupants; (3) detector dog alert to the bag containing the currency; and (4) a small amount of cocaine found in that bag.); U.S. v. Premises Known as 2639 Meeting House, 633 F.Supp. 979 (1986) (affirms constitutionality of § 881(a) (6)).

MA: U.S. v. One Lot of $99,870 in U.S. Currency, No. 88-0207-N (December 27, 1988), under "Examples (RE Probable Cause.)" supra.

2. All proceeds traceable to illicit drug exchanges are subject to federal forfeiture

If something exchanged for illicit drugs is later sold, exchanged or otherwise disposed of, everything received in its place is considered "proceeds" of the original drug exchange. If these proceeds are subsequently disposed of, everything received in their place is considered proceeds of the original drug exchange. As long as these changes can be traced and the final proceeds can be identified with reasonable accuracy, they are subject to civil forfeiture under federal law. About one-half of the states have similar provisions.

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See MASFA § 4(c). All proceeds of conduct giving rise to forfeiture are forfeitable.

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Authorities

4 Cir: U.S. v. $10,694 in U.S. Currency, 828 F.2d 233 (1987), (Sec. 881(a)(6) regarding traceable proceeds contains an objective, actual knowledge standard, i.e. whether or not the individual knew or should have known that the money was derived from drug proceeds. However, claimant has the burden of proving lack of actual knowledge. The claimant was an attorney who claimed that an assignment had been made.)

21 U.S.C. § 881(a) (6)

Discussion

Profits from the cash-and-carry drug trade are eventually hidden by changing their form. They are converted into homes, yachts, planes, cars precious metal accounts, stocks, bonds, businesses, bank accounts and other property. The power to seize and forfeit cash exchanged for drugs strikes at the operational funds of the illicit business. The power to seize and forfeit drug "proceeds" poses a much greater threat to the accumulated profits of traffickers.

a. Proceeds Defined

The word "proceeds" is a flexible term that appears in many areas of the law. It can be found in leases, land sale contracts, wills, insurance policies, divorce decrees, deeds, trusts, commercial contracts and in a wide variety of other legal documents. See 34 Words & Phrases, Proceeds (West). At last count, the word appears 1,864 times in the United States Code.

***

See MASFA § 1. Definition. Paragraph (6). Proceeds means property acquired directly or indirectly from, provided through, realized through or caused by an act or omission and includes any property without reduction for expenses of acquisition, maintenance, production, or any other purpose.

***

(l) The Ultimate Product of Exchange

In virtually every context:

PROCEEDS MEANS WHATEVER IS RECEIVED WHEN AN OBJECT IS SOLD, EXCHANGED, OR OTHERWISE DISPOSED OF

It does not necessarily mean money. More importantly, every time proceeds are disposed of in exchange for other property, the newly acquired property becomes proceeds. In a sense, proceeds is a status, or character, that attaches to any property substituted for what was originally exchanged. See 68 Am.Jur.2d, Secured Transactions Sec. 186 et seq.; Uniform Commercial Code Sec. 9–306; 76 Am.Jr.2d, Trusts Sec. 251 et seq.; 4A Collier on Bankruptcy Sec. 70.25; and Restatement, Restriction Sec. 202, Comment (i) (1937).

The best way to clarify this is with an example: Suppose A uses $10,000 in cash to buy five ounces of cocaine from B, and B opens a new bank account with the $10,000; the account is proceeds of the drug exchange. Suppose B withdraws $9,000 from this account and buys a new car; the car is considered proceeds of the drug exchange. Both the car and the $1,000 remaining in the account are forfeitable under federal law.

Because the word "proceeds" is used in so many different contexts, the exact scope of its meaning depends upon the purpose or goal of the draftsmen using the term. Phelps v. Harris, 101 U.S. 370, 25 L.Ed. 855 (1879).

The term "proceeds" in 21 U.S.C. § 881(a) (6) is intended to apply to the PROFITS of drug trafficking. Senator John Culver (D–Iowa), who sponsored the statute with Senators Lloyd Bentsen (D–Tex), William Hathaway (D–Me), and Sam Nunn (D–Ga), made this clear when he introduced the law into the United States Senate:

"Mr. CULVER . . . .

* * *

"Mr. President, the third title of the amendment which I am offering would authorize U.S. officers to seize any moneys or other property that was furnished or intended to be furnished in exchange for illegal drugs."

* * *

"(It) would authorize Federal officers to seize such moneys much as they now seize illicit drugs and vehicles that are used to transport to conceal these substances. In certain cases, they would also be able to seize property that is traceable to such illegal transactions. Finally, the provision would allow authorities to seize certain money, negotiable instruments and securities if they are used or intended to be used to facilitate such an illegal exchange.

* * *

(124 Congressional Record 517644, October 7, 1978).

The Senate unanimously passed this provision on October 7, 1978.

Congressmen Paul Rogers (D-Fla), Harley O. Staggers (D. W.Va.), Tim Lee Carter (R-Ky), Benjamin Gilman (R-NY) and Lester L. Wolff (DL-NY) echoed the same purpose when they introduced the statute into the United States House of Representatives:

"Mr. ROGERS. Mr. Speaker, I am pleased to present to the House for consideration the Senate amendment to the . . . Psychotropic Substances Act of 1978 . . . ."

* * *

"The purpose of Title III of the Senate amendment is to provide Federal drug law enforcement officials with the ability to strike at the profits of illicit trafficking in abusable controlled substances."

* * *

(124 Congressional Record H12790, October 13, 1978).

"Mr. STAGGERS . . . ."

* * *

"Mr. Speaker, I believe the Senate amendment will help curb the illegal manufacture and abuse of dangerous drugs and urge Members to support it."

"In addition, the Senate amendment will enable the Drug Enforcement Administration to strike at the profits of illicit drug traffickers."

* * *

"Currently, the DEA cannot seize moneys used in illegal drug transactions or seize the proceeds of those transactions."

(124 Congressional Record Hl2793-Hl2794, October 13, 1978).

"Mr. CARTER. Mr. Speaker . . . ."

* * *

"(T)he Senate amendment expands section 511 of the Controlled Substances Act to require the forfeiture of all moneys or other things of value which are substantially connected to a criminal violation of our drug control laws. In other words, Mr. Speaker, the Senate amendment simply requires the drug pusher to give up his ill–gotten gains."

* * *

(124 Congressional Record H12793, October 13, 1978).

"Mr. GILMAN. Mr. Speaker . . . ."

* * *

"This measure strikes at the coffers of the traffickers . . . by requiring the forfeiture of the proceeds from illicit drug transactions."

* * *

(124 Congressional Record Hl2793, October 13, 1978).

"Mr. WOLFF. Mr. Speaker . . . ."

* * *

"(T)itle III subjects to forfeiture the traceable proceeds of illegal drug transactions. This provision . . . is an extremely important weapon against the financial backers of illegal drug trafficking since it reaches them where it hurts the most. No longer will the big–money men of illegal drugs be able to hide their ill–gotten profits with impunity."

"This legislation is critical if we are to continue to fight the war against drugs."

* * *

(124 Congressional Record H12793, October 13, 1978).

The statute passed the House of Representatives by a two– thirds vote on October 13, 1978.

As the statements of its sponsors make clear, it is intended to force traffickers to give up their operating funds and their ill–gotten gains. Any refinements on the definition of "proceeds" must be consistent with this goal.

Like Section 881(a) (6), the Law of Restitution aims at forcing the wrongdoer to give up everything he has gained from his wrongdoing. The concept of identifying the "proceeds" of wrongdoing is central to both areas of the law. For these reasons, the Law of Restitution stands out as a potential source of guidance on the meaning of "proceeds" under 21 U.S.C. § 881(a) (6).

See Restatement of Restitution (American Law Institute, 1937); and Wade, The Literature of the Law of Restitution, 19 Hastings Law Journal 1087 (1968) (the most comprehensive bibliography on the subject).

(2) Gain Is Included

ANYTHING RECEIVED AS A RESULT OF HOLDING PROCEEDS IS ALSO FORFEITABLE

If drug proceeds increase in value, or if they are invested and generate interest, dividends, rent, or other income, the "gain" should be considered forfeitable. It is a direct product of the proceeds, therefore, it is logical to treat it as proceeds. The Law of Restitution takes this approach:

> "Sec. 205 ACCOUNTABILITY FOR DIRECT PRODUCT Where a person received property for which he is accountable to another, he is accountable for any direct product which he receives from the property." Restatement, Restitution Sec. 205 (1937).

This interpretation forces the wrongdoer to forfeit all of the profits directly attributable to his illegal conduct. It eliminates all the incentive to wrong-doing. See Restatement, Restitution Sec. 202, Comments (c) & (j); and 76 Am.Jur.2d Trusts Sec. 254. This is consistent with the goal of 21 U.S.C. 881(a) (6).

Authorities

Fed Cir. U.S. v. One (1) 1979 Cadillac Coupe de Ville, 833 F.2d 994 (1987) (The Tucker Act, 28 U.S.C. Sec. 1346, does not create any substantive right against the United States for money damages. Title 28 U.S.C. Sec. 2465 does not authorize payment to a claimant for depreciation after a forfeiture. Thus, claimant was not entitled to recover depreciation of his vehicle after the government loses the forfeiture action.)

SD FL: U.S. v. One Parcel of Real Estate Located at 116 Villa Rella Drive, 675 F.Supp. 645 (1987) (Under Sec. 881(a)(6), the appreciation of real property purchased with illegal proceeds accrues to the government.)

(3) Proceeds Means Gross, Not Net

PROCEEDS MEANS GROSS PROCEEDS

Assume A buys drugs for $8,000 and immediately resells them for $10,000. His "gross proceeds" are $10,000. His "net proceeds" are $2,000. The Exchange Section of 21 U.S.C. § 881(a) (6) subjects the entire $10,000 to forfeiture; it makes no allowances for illegal costs or expenses surrounding the exchange. Everything received from the illegal exchange is forfeitable.

The Proceeds Section of 21 U.S.C. 881(a) (6) permits the government to follow the "gross proceeds" of the exchange as they change form.

***

See MASFA § 1(6).

***

b. The Need to Trace

PROCEEDS MUST BE TRACED TO SPECIFIC ASSETS

Each time proceeds change hands, or change form, a "link" is added to the "chain" that connects them to an illicit drug exchange. To forfeit a specific asset under the Proceeds Section of 21 U.S.C. § 881(a) (6), this chain must be identified with reasonable accuracy. The process of identifying, pursuing, or following the chain is called "tracing."

In every area of the law, tracing is essential to establishing a property right in proceeds. Section 215 of the Restatement of Restitution (1937) provides a good example:

> "Sec. 215 NECESSITY OF TRACING PROPERTY . . . (W)here a person wrongfully disposes of the property of another but the property cannot be traced into any product, the other has merely a personal claim against the wrongdoer and cannot enforce a . . . lien upon any part of the wrongdoer's property."

Congress incorporated this requirement in 21 U.S.C. § 881(a) (6) by inserting the term "traceable" after the term "tracing" in the Joint House–Senate Explanation of the new law:

> "(The Statute) . . . provides for forfeiture of property which is the proceeds of an illegal drug transaction only if there is a traceable connection between such property and the illegal exchange of controlled substances. Thus if such proceeds were, for example, co–mingled with other assets, involved in intervening legitimate transactions, or otherwise changed in form: they would still be subject to forfeiture, but only to the extent that it could be shown that a traceable connection to an illegal transaction in controlled substances existed." (1978 U.S. Code Cong. & Ad. News at 9522).

If the proceeds of an illegal drug exchange cannot be traced, in whole or in part, to a specific, identifiable asset, there is nothing to seize and forfeit.

***

See MASFA § 11(l). A finding that property is the proceeds of conduct giving rise to forfeiture does not require proof that property is the proceeds of any particular exchange or transaction.

***

COMMENT: Remember that virtually any fact can be established by circumstantial evidence – direct evidence is not required. You should be able to prove the existence of some of the "links" in the "chain" by circumstantial evidence. See Church of Jesus Christ v. Jolley, 467 P.2d 984 (Utah 1970) and Costell v. First National Bank of Mobile, 150 So. 2d 683 (Ala. 1963). Also remember, you need not prove each link of the chain beyond a reasonable doubt. In a civil forfeiture action you need only prove the probable existence of any link. Absolute certainty is not required.

c. Mingling

MINGLING MEANS MIXING

Wrongdoers frequently mix proceeds with non–proceeds, particularly in bank accounts. They usually make additions to the withdrawals from the mingled funds. Sometimes they commingle the funds with the money of an innocent third party, such as a wife or child. They might use part of the mingled, or co–mingled, funds to buy stocks, houses or other property. The funds might earn interest or the property might increase or decrease in value. Tracing "mingled" proceeds can present complex accounting problems.

(l) Tracing Satisfied

MINGLED FUNDS ARE SEIZABLE

The need to trace proceeds is satisfied when a specific asset can be identified into which the proceeds have been mingled. The Joint House–Senate Explanation of 21 U.S.C. § 881(a) (6), quoted above, makes this clear. Every other area of the law follows the same rule on tracing. Again, the Restatement of Restitution (1937) provides a good example:

> "Sec. 209 MINGLING WITH FUNDS OF WRONGDOER. Where a person wrongfully mingles money of another with money of his own, the other is entitled to obtain reimbursement out of the fund."

Mingling does not destroy the government's right to seize the mingled fund or mingled property, and to civilly forfeit that part which is proceeds. See National Bank v. Insurance Co., 104 U.S. 54, 26 L.Ed. 693 (1881), and U.S. v. Premises Known as 2639 Meeting House, 633 F.Supp. 979 (ED Pa. 1986).

To illustrate, suppose A received $500 from B in exchange for marijuana. And suppose A deposits the money in his savings account, which already contains $1,000. The account can be seized" and $500 of the account can be civilly forfeited as proceeds of the drug exchange.

***

See MASFA § 11 (m). If property subject to forfeiture has been commingled with other property, the court shall order forfeiture of mingled property and its fruits to the extent of the forfeitable property, unless an owner or interest holder proves that specified property does not contain forfeitable property or their interest is exempt.

***

(2) A Part of the Whole

ONLY THAT PART CONSISTING OF TRACEABLE PROCEEDS IS FORFEITABLE

Under traditional tracing rules, a party has a property right in mingled funds equal to the amount of his money traceable to them. He gets a part of, but not all of, the funds. See Restatement, Restitution § 209, Comment (a); and Sec. 211, Comment (d)(1937).

Congress adopted this rule when it passed 21 U.S.C. § 881(a) (6). The Joint House–Senate Explanation, quoted above, emphasizes that mingled proceeds are forfeitable.

> ". . . but only to the extent that it could be shown that a traceable connection to an illegal transaction in controlled substances existed."

(3) Purchases With Mingled Funds

ASSETS BOUGHT WITH MINGLED FUNDS ARE SEIZABLE

If mingled funds are used to buy other assets, the government has the right to seize those assets, and to civilly forfeit that fraction of the property which represents the government's share of the mingled funds. See Restatement, Restitution Sec. 210 (k937).

The Joint House–Senate Explanation of 21 U.S.C. § 881(a) (6) states that "intervening legitimate transactions" with proceeds (mingled or non–mingled) does not destroy the right to follow them into the newly acquired property. But again, only that part or fraction attributable to traceable proceeds if forfeitable.

To illustrate, suppose A mingles $10,000 from a cocaine exchange with $20,000 of non–forfeitable money, and he uses the $30,000 to buy stocks. The government can seize and forfeit one–third of the stocks under 21 U.S.C. § 881(a) (6). And, since proceeds includes any "gain," if the stocks double in value to $60,000, the government is entitled to $20,000 of the stocks – one–third of the investment plus one–third of the gain.

(4) Withdrawals

If a part of mingled funds is withdrawn and can be traced to the purchase of another asset, the government can seize and civilly forfeit an appropriate fraction of that asset.

If the withdrawn funds cannot be traced to some new asset, the government can continue to look to the remaining part of the mingled funds to recover its share of traceable proceeds.

If non-traceable withdrawals reduce the funds to an amount less than the proceeds originally traceable to it, the right to forfeit is limited to the lowest balance reached by the funds.

If at any time the funds are totally depleted by non-traceable withdrawals, the right to civilly forfeit the fund is lost. See Restatement, Restitution Secs. 210-212 (1937).

(5) The Swollen Estate Problem

Suppose you prove that a trafficker received substantial amounts of cash from illegal drug exchanges. And, suppose you prove that his estate, or "worth," increased significantly in value during the same period. And, suppose you are unable to trace the proceeds of an exchange to any specific asset in his estate. You have a "swollen estate" problem.

Simply proving that money obtained from trafficking "swelled" the trafficker's estate does not satisfy the tracing requirement of 21 U.S.C. § 881(a) (6). See Schuyler v. Littlefield, 34 S.Ct. 466, 58 L.Ed. 806 (1914); 76 Am. Jr.2d Trusts Sec. 262; A. Scott, Trusts Sec. 521 (2ed. 1956); 4A Collier on Bankruptcy § 70.25(2) (1978); and Restatement, Restitution Sec. 215 (1937).

The Proceeds Section of 21 U.S.C. § 881(a) (6) requires tracing to specific, identifiable assets. To illustrate, suppose you have direct evidence that X received a total of $200,000 over a six month period in exchange for heroin. But, you cannot trace the money after it was received by X. You feel sure that X has hidden it in some way; you can show he made several random bank deposits and bought several assets during this period. But, you are unable to identify with any probability a specific account or asset into which the money has been mingled. There is nothing to seize and' forfeit under the Proceeds Section of 21 U.S.C. § 881(a) (6).

This "Strict Tracing" requirement has been severely criticized by several legal scholars. See Taft, A Defense of a Limited Use of the Swollen Assets Theory Where Money Has Wrongfully Been Mingled with Other Money, 39 Columbia Law Review 172 (1939). Nevertheless, it continues to be a recognized rule of tracing followed in virtually every area of the law of "proceeds". It seems almost certain the courts will follow this rule in applying the Proceeds Section of 21 U.S.C. § 881(a) (6).

Because the swollen estate is strong circumstantial evidence of illegally accumulated profits, it is not without its uses. The Internal Revenue Service relies upon the swollen estate to establish that traffickers have received income which they did not declare as taxable. Following the "Net Worth and Expenditures Method" of circumstantial proof, IRS measures the growth, or swell, in an estate for the taxable period, it adds on estimated living expenses, and declares the balance to be income. It then takes action against the trafficker to collect the taxes due.

Similarly, the swollen estate is excellent evidence that a trafficker received "substantial income and resources" from his activities. This is an indispensable element of proof in convicting a trafficker of engaging in a continuing criminal enterprise (21 U.S.C. § 848). See U.S. v. Jeffers, 532 F.2d 1101 (7 Cir. 1976). Once convicted, the swell in his estate which represents his profits is subject to seizure as a form of criminal fine or criminal penalty (a criminal forfeiture).

It is helpful to understand that tax cases and criminal forfeitures are fundamentally different than civil forfeitures. Tax assessment is a personal claim against the taxpayer. It demands he account for the money he owes the government. Only if he refuses to pay, will the government satisfy the tax debt from his assets. Similarly, criminal forfeiture begins as a personal charge against the trafficker. It accuses him of engaging in racketeering or a continuing criminal drug enterprise. Only after he is convicted of the charge can the government seize and forfeit his profits from the crime. In legal jargon, the tax case and the criminal forfeiture are *in personam* actions (against a person).

Civil forfeiture, on the other hand, is an *in rem* action (against an object or property). It depends upon a showing that a specific asset is directly connected to illegal activity. It is a property action totally independent of any personal claims or charges against an owner. Evidence of a swollen estate is very useful in *in personam* cases; but it is not very helpful in *in rem* proceedings.

d. Paying Debts

(1) Unsecured Debts

If a trafficker owes a lawful debt, and if the debt is not secured by any collateral, and if the creditor is unaware he is dealing with a trafficker, and if the trafficker pays the debt with forfeitable proceeds, then the right to forfeit the proceeds is lost. See Restatement, Restitution Sec. 207, Comment (d) (1937).

To illustrate, suppose A receives $10,000 in exchange for several ounces of heroin and he delivers it to his bank to pay off a personal, unsecured loan. There is nothing to seize and forfeit.

(2) Secured Debt

If a trafficker owes a lawful debt, and if the debt is secured by some asset (collateral), and if the trafficker pays the debt with forfeitable proceeds, then the asset–collateral is "proceeds." See Restatement, Restitution Sec. 207, Comment (b) (1937).

To illustrate, suppose X uses forfeitable proceeds to pay off a $50,000 mortgage on his $100,000 home. The home is seizable and one–half the home is forfeitable as proceeds.

(3) Illegal Debt

If a trafficker uses forfeitable proceeds to pay an illegal debt (to a loan shark, bookie, drug supplier, and so forth), the proceeds continue to be seizable if they can be identified in the possession of the illegal creditor. See the following discussion on Bona Fide Purchasers.

e. Bona Fide Purchasers Are Exempt

A Bona Fide Purchaser (BFP) is an innocent party who:

(l) gives something of legal value in exchange for proceeds, AND

(2) has no knowledge that what he is acquiring is connected to drug trafficking.

Both conditions must be met to qualify as an BFP.

To illustrate, suppose B uses $10,000 of forfeitable proceeds to buy a new car from Dealer X. The Dealer has given something of legal value in exchange for the money and, in a commercial, "arm's length" transaction, he does not know the money is drug-related. Therefore, Dealer X is a BFP of the money.

PROCEEDS TRANSFERRED TO A BFP ARE NEITHER SEIZABLE, NOR FORFEITABLE..

Traditionally, money or property loses its status as proceeds when it is transferred to a BFP. See Uniform Commercial Code Secs. 8-301, 302; 76 Am. Jur.2d, Trusts Sec. 269; 4A Collier on Bankruptcy Sec. 70.25; and Restatement, Restitution Secs. 172-176 (1937). The Law of Restitution states:

> "Sec. 172 BONA FIDE PURCHASER . . . Where a person acquires title to property under such circumstances that otherwise he would hold it . . . subject to . . . (a) . . . lien, he does not so hold it if he gives value for the property without notice of such circumstances.

In most cases, everyone benefits from this rule. BFP's are protected because they take property free from any unknown claims. Parties pursuing proceeds are protected because they have the right to claim the property given to the wrongdoer by the BFP as proceeds. Dealer X, for example, is protected from any claims to the $10,000 he received for his car. The government is protected because it can seize the car sold to B as proceeds.

Occasionally, the BFP rule works to the disadvantage of the party pursuing proceeds. For example, suppose a female drug violator uses $50.00 in forfeitable proceeds to get her hair styled. The commercial beauty shop is a BFP of the money. It has provided a valuable service in exchange for the $50.00, and it does not know the money is drug-related. Therefore, the government cannot seize the money from the beauty shop, and is left with nothing to forfeit.

Remember, proceeds transferred to a non-BFP are seizable, while proceeds transferred to a BFP are not seizable.

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> **See MASFA § 5. Exemptions. Subsection (a). Property is exempt from forfeiture if the owner or interest holder acquired the property aftery the conduct giving rise to forfeiture, including acquisition of proceeds of conduct giving rise to forfeiture, and he acquired the property in good faith, for value, and was not knowingly taking part in an illegal transaction.**
>
> **See also § 5(b). Even if the owner or interest holder lacked knowledge or reason to know of the conduct giving rise to forfeiture the property interest is forfeitable if the:**
>
> **(1) owner or interest holder holds the property jointly**

with the person whose conduct gave rise to forfeiture;
(2) the wrong-doer had authority to convey the property to a good faith purchaser for value;
(3) the owner or interest holder is a co-conspirator or otherwise criminally responsible for the wrong-doer's conduct; or
(4) the owner or interest holder acquired property with notice of its actual or constructive seizure, or with reason to believe it was forfeitable.

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Authorities

2 Cir: U.S. v. Banco Cafetero Panama, 797 F.2d 1154 (1986) (tracing commingled funds in money laundering operation).

6 Cir: U.S. in Premises Known as 8584 Brown Rd., 736 F.2d 1129 (1984) (§ 881(a) (6) held to cover real property)).

11 Cir: U.S. v. $4,255,000, etc., 762 F.2d 895 (1985) (co-mingled assets in money laundering case forfeited – claimant must prove absence of actual knowledge).

SD FL: U.S. v. One Condominium Apartment, 636 F. Supp. 457 (1986) (post seizure interest and attorney's fees disallowed mortgagor).

SD NY: U.S. v. Banco Cafetero Intern, 608 F. Supp. 1394 (1985) (co-mingled in money laundering); U.S. v. $131,602 in U.S. Currency, 563 F. Supp. 921 (1982) (portion of money and jewelry returned to claimant – not traceable).

ED PA: U.S. v. One 1976 Corvette, 477 F.Supp. 32 (1979) (BFP protected via Calero-Toledo dicta).

WD TX: U.S. v. Various Pieces of Real Estate, 571 F.Supp. 723 (1983) (post-seizure interest and attorney's fees denied mortgagor).

3. All facilitation moneys significantly connected to any drug offense are subject to federal forfeiture

a. All moneys, negotiable instruments, and securities used, or intended for use, to facilitate any drug law violation are subject to federal forfeiture. Only moneys, negotiable instruments and securities are forfeitable under this section.

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See MASFA § 4(b). All property, including the whole of any lot or tract of land, used or intended to be used to facilitate conduct giving rise to forfeiture is forfeitable.

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Authorities

21 U.S.C. § 881(a) (6)

1 Cir: U.S. v. Kingsley, 851 F.2d 16 (1988). (A claimant is entitled to interest on seized funds from the time they reasonably should have been placed in an interest-bearing account until the time of criminal forfeiture under Sec. 853.)

4 Cir: In Re Metmor Financial, Inc., 819 F.2d 446 (1987) (Under 21 U.S.C. Sec. 881(a)(6), mortgage holders can recover mortgage interest on seized real property.)[The majority view is that mortgage holders are not allowed post-seizure interest. The federal courts are split as to whether or not a mortgage holder is able to collect post-seizure interest. Specifically, Sec.881(h) codifies the relation back doctrine in providing that "all right, title and interest in property described in sub Sec. (a) of this Sec. shall vest in the United States upon commission of the act giving rise to the forfeiture under this Sec.." Since title vests in the government when the illegal act is committed, the claimant loses his property interest. Thus there is no longer any property ownership interest on which to base mortgage interest.]

7 Cir: U.S. v. $73,277, 710 F.2d 283 (1983).

6 Cir: U.S. v. $83,320, 682 F.2d 573 (1982).

11 Cir: U.S. v. Four Parcels of Real Property on Lake Forest Circle, etc., 870 F. 2d 586 (1989) under "Intervenors (RE Standing)." infra, p. 81.

DC App: U.S. v. Wright, 610 F.2d 930 (1979) ($2,100 in drug "shooting gallery" held not forfeitable – drug use – not sale).

SD FL: U.S. v. Gulfstream West, 2600 Harden Boulevard, Lakeland, 710 F.Supp. 792 (1989) (Innocent lienholders of a secured debt are entitled to the appropriate amount of principal and post-interest at the normal note rate. Interest runs from the time of sale. However, innocent lienholders are not allowed attorney fees, late charges, collection, court costs, or a penalty rate of interest.) [The court relies on the new provisions of "28 C.F.R. Sec. 91(h)," which are incorrectly cited as "2 C.F.R."]; U.S. v. $4,266,625.39, 551 F.Supp. 314 (1982).

ED KY: U.S. v. One 1965 Cessna 320C Twin Engine Airplane, 715 F.Supp. 808 (1989), under "Intervenor (RE Standing.)." infra.

ED LA: U.S. v. A Parcel of Real Property, etc., 650 F.Supp. 1534 (1987). (A lienholder is not entitled to post-seizure interest, attorney's fees, or other charges even if such charges are permitted under a mortgage note.)

ED MO: U.S. v. $2,355.96, 647 F.Supp. 1460 (1986) (intent of violator to use legitimate source funds for "seed money" for future drug violations).

ED NY: U.S. v. $20,294, 495 F.Supp. 147 (1980).

HI: U.S. v. Real Property Titled in the Name of Shashin, 680 F. Supp. 332 (1987) (A mortgage holder is entitled to post-seizure interest and other amounts provided by the loan agreement).

NY SD: U.S. v. All Funds and Other Property, Accont No. 032-217362, 661 F. Supp. 697 (1986) (Claimant has the burden of proving that facilitation moneys are not forfeitable. Eve though claimant only admitted that 60% - 70% of the laundered money came from drug trafficking, all the money was forfeited as facilitation moneys.

PA ED: U.S. v. 1988 BMW 750 Il, etc., 716 F. Supp. 171 (1989), aff'd mem., 891 F.2d 284 (3rd Cir. 1989), under "Large Sums at Airports - 'Dog Sniffs'." supra, p.41.

PA WD: U.S. v. Property Known as 708 - 710 West 9th Street, etc., 715 F. Supp. 1323 (1989) (The government must pay post-seizure interest to an innocent lienholder if the foreclosure is upheld on appeal because such payment is part of the lienholder's ownership interest in the property. However, the government is not obligated to pay post-seizure attorney's fees and costs because they are merely expenses protecting an ownership interest, not an actual property interest. The court noted that foreclosure is not proper because the forfeiture terminates the mortgage contract. [If the mortgage contract is terminated, it is logical that the owner would remain liable for the payments a damages directly caused by his illegal conduct.]

TN ED: U.S. v. Real Property is Sevier County, Tennessee, 703 F. Supp. 1306 (1989) (Innocent lienholders of a secured debt are entitled to the appropriate amount of principal and post-seizure interest, attorney fees, and such other charges which would prevent a diminution of their real property interest. The interest rate was the normal note rate, and accrues from the time of seizure to the time of sale) [In this case, the government elected to retain the seized property; conduct a private sale; and pay the lienholders the amount due. Therefore, the lienholder's request to foreclose on the property was denied.].

b. All moneys or other property used or intended to be used by violators to purchase controlled substances (or what the violator believes to be a controlled substance, which is termed "sham" drugs) from undercover enforcement officers are subject to forfeiture. In addition, there are cases which hold that once money is transferred to Government officers to purchase drugs ("reverse undercover" operation), the money becomes Government property even without forfeiture. See U.S. v. Farrell, 606 F.2d 1341 (D.C. Cir. 1979) and U.S. v. Smith, 659 F.2d 97 (8 Cir. 1981), which hold such money is Government property since the courts will not support an illegal contract. However, it is DEA policy that if such money or property is subject to timely forfeiture, DEA will proceed with such forfeiture rather than relying on the illegal contract theory.

Authorities

11 Cir: U.S. v. One 1979 Porsche Coupe, 709 F.2d 1424 (1983) (driving to a city and hotel to purchase "sham" cocaine made vehicle forfeitable).

8 Cir: U.S. v. $88,500, 671 F.2d 293 (1982) (money displayed to agents as marijuana purchase funds – non–tainted evidence under exclusionary rule).

6 Cir: U.S. v. One 1980 Cadillac Eldorado, 705 F.2d 862 (1983) (money delivered to agents for "sham" cocaine in vehicle – forfeited).

Discussion

ONLY MONEYS, NEGOTIABLE INSTRUMENTS & SECURITIES ARE FORFEITABLE

Other things of value are not forfeitable under the Facilitation Moneys Section of 21 U.S.C. § 881(a) (6). Refer back to the chart on page 99 of this guide. Note that the Facilitation circle at the bottom of the chart contains a dollar sign ($) as a reminder that it applies only to money and things like money.

MONEYS means officially issued coin and currency of the United States or any foreign country.

NEGOTIABLE INSTRUMENTS means documents, containing an unconditional promise to pay a sum of money, which can be legally transferred to another party by endorsement (signature) and delivered (e.g., a bank check).

SECURITIES means any evidence of debt or ownership of property, especially a bond or stock certificate.

As originally drafted, the Facilitation Money Section was limited to moneys which facilitate drug exchanges. See the speech of Senator Culver quoted on page 107 of this guide. But the section was expanded to include the facilitation of violation of the drug laws. Import–export violations, manufacturing violations, conspiracy violations, attempt violations, continuing criminal enterprise violations, possession violations and distribution violations are all included within this section. Congressman Paul Roqers emphasized this in his October 13, 1978 speech in Congress:

> "MR. ROGERS. Mr. Speaker . .
>
> * * *
>
> "Title III of the Senate amendment which is now before the House . . . differs from the original Senate passed version . . . ."
>
> "(I)t provides for the seizure and forfeiture of money, negotiable instruments and securities if they are used or intended to be used to facilitate any violation of controlled substances laws, not just those

violations involving an illegal exchange of controlled substances." (124 Congressional Record H12790).

The Evidence and Proceeds Sections of 21 U.S.C. § 881(a) (6) are dependent upon drug exchanges. The Facilitation Money Section applies to any drug violation. Remember the definition of facilitation? "To facilitate means to have a significant connection to . . . ." Congress was aware of this definition when it drafted and passed this section. The Joint House–Senate Explanation states:

> . . . any moneys, negotiable instruments, or securities that were used or intended to be used to facilitate any violation of the Controlled Substances Act would be forfeitable only if they had some substantial connection to, or were instrumental in, the commission of the underlying criminal activity which the statute seeks to prevent."

(1978 U.S. Code Cong. & AD. News at 9522).

A portion of the above quote has subsequently been cited by many, Federal courts as the "substantial connection" requirement of 21 U.S.C. § 881(a) (6). See U.S. v. $364,960 in U.S. Currency, 661 F.2d 319 (5 Cir. 1981), which highlights the important distinction, however, that the Government "merely must demonstrate the existence of probable cause for belief that a substantial connection exists between the property to be forfeited and the criminal activity defined by the statute."

The mere fact that moneys, negotiable instruments or securities are possessed by a drug violator does not subject them to forfeiture under this section.

Examples of money forfeitable under this section include:

- Money used to pay the operating expenses of a PCP lab;
- Money used to rent airplanes, pay pilots, buy fuel and bribe officials as part of a smuggling venture;
- Money used to pay drug couriers, or "mules"; and
- Money used by a drug courier to pay expenses.

The possibilities are almost limitless.

Authorities

11 Cir: U.S. in. $4,255,000, 762 F.2d 895 (1985) ("substantial connection" found). Case below at 441 F.Supp. 314 (Fa. S.D. 1982); U.S. v. One 1979 Porsche Coupe, 709 F.2d 1424 (1983) (Court cites "substantial connection" required under "§ 881" (was an 881(a) (4) case), but then holds that vehicle had "sufficient nexus" to the attempted drug purchase to support the forfeiture – p. 1427 of decision.)

9 Cir: U.S. v. $5,644,540 in U.S. Currency, 799 F.2d 1357 (1986) (case declines to impose "substantial connection test" as not being required by statutes, and highlights that legislative history speaks of probable cause for belief that substantial connection exists).

8 Cir: U.S. in One 1979 Datsun 280ZX, 720 F.2d 543 (1983) (Court applied "substantial connection" test to § 881(a) (4) rather than (a) (6).

5 Cir: U.S. in $38,600 in U.S. Currency, 784 F.2d 694 (1986) (no substantial connection); U.S. v. One 1964 Beechcraft Baron, 691 F.2d 725 (1982) (court holds that "substantial connection" test only applies to § 881(a)6 and not (a) (4)).

WD AR: U.S. v. Certain Real Property Situated at Rt. 3, et al., 568 F.Supp. 434 (1983).

SD NY: U.S. v. $4,000, 613 F.Supp. 349 (1985) (substantial connection found).

SD OH: U.S. v. U.S. Currency: $24,927, 635 F.Supp. 475 (1986) (court finds "nexus" currency and the criminal activity).

4. Innocent owners of currency & proceeds are exempt from federal civil forfeiture

a. Owners of seizable currency and proceeds are statutorily exempt from Federal civil forfeiture if they can prove their ignorance of the illegal conduct that gave rise to the seizure.

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See MASFA § 5. Exemptions.

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Authorities

21 U.S.C. § 881(a) (6)

SD FLA: U.S. v. $4,255,625.39, 551 F.Supp. 314 (1982).

b. However, claimants who allege a personal interest in seized property but refuse to testify or furnish information as to the details of such interest because of a claim of self-incrimination have been held not to "meet the level of dominion and control required for establishing an ownership interest." See U.S. v. $33,800, 555 F.Supp. 280 (ED NY 1983). Also see Baker v. U.S., 722 F.2d 517 (9 Cir. 1983) where court takes jurisdiction under the Tucker Act, but holds that claimant cannot claim self-incrimination as basis for not alleging a specific property interest. Court noted that claimants should not be allowed

to use the "Fifth Amendment shield as a sword." For a case holding that vague assertions of possible self-incrimination will not stop summary judgment for Government under 21 U.S.C. § 881(a) (4), see U.S. v. Little Al, 712 F.2d 133 (5 Cir. 1983). Also see U.S. v. $250,000 in U.S. Currency, 808 F.2d 895 (1 Cir. 1987) where court finds no conflict between forfeiture and defendants Fifth Amendment rights.

Discussion

Property owned by an innocent third party (other than a BFP) is subject to seizure if it falls within the categories of property forfeitable under 21 U.S.C. § 881(a) (6). The seizure, however, does not necessarily mean the property will be forfeited.
Congress puts the "Innocent Owner" Section in 21 U.S.C. § 881(a) (6) to insure that:

> ". . . no property would be forfeited . . . to the extent of the interest of any innocent owner of such property. The term `owner' should be broadly interpreted to include any person with a recognizable legal or equitable interest in the property seized. Specifically, the property would not be subject to forfeiture unless the owner of such property knew or consented to the fact that:
>
> 1. the property was furnished or intended to be furnished in exchange for a controlled substance in violation of law,
>
> 2. the property was proceeds traceable to such an illegal exchange, or
>
> 3. the property was used or intended to be used to facilitate any violation of Federal illicit drug laws."
>
> * * *

(Joint House-Senate Explanation, 1978 U.S. Code Cong. & AD. News 9422, 9523).

The broad meaning given to the term "owner" protects the property interests of all innocent parties, including: donees, creditors with security interests, and BFP's.

At the same time, a party cannot protect what he does not own. Therefore, innocent owners are protected only to the extent of their interests. If they own less than the entire seized property, they cannot prevent the forfeiture of what remains.

Traditionally, the word "owner" means something more than merely having a right to possession of property. To illustrate, if you lend your car to a friend for a day, he has a possessory interest in your car; he can prevent anyone (except you) from taking the car from him. This is called a "bailment." But, he is not considered an owner of your car. The Joint House-Senate Explanation of "owner," quoted above, refers to recognizable legal or equitable interests in property - not possessory interests. Therefore, despite the broad interpretation Congress intended for the term "owner," it should not be applied to minor possessory interests in property, such as a bailment.

Finally, although innocent owners of currency and proceeds are protected from forfeiture, the burden is on them to prove their innocence. The plain wording of the Innocent Owner Section makes this clear:

> "except that no property shall be forfeited . . . by reason of any act or omission established by the owner, to have been committed or omitted without the knowledge or consent of that owner." (underlines added).

To illustrate all these points, suppose H and W are married and live in a community property state. H is a major drug violator. H uses forfeitable proceeds to buy a house in his own name. This house is seizable (attachable) as proceeds under 21 U.S.C. § 881(a) (6). Although W is not a BFP (she gave nothing of value for the house), she is an owner under Section 881(a) (6). The community property laws give her a vested one-half interest in all property acquired by her spouse during their marriage. As a result, if W can offer enough evidence to prove she was unaware of H's drug activities, her half of the house will escape forfeiture. If she cannot offer such evidence, the entire house will be forfeited.

5. The ex posto facto clause applies to the forfeiture of currency & proceeds

Proceeds of illicit drug exchanges occurring before November 10, 1978 are not subject to Federal civil forfeiture.

Authorities

U.S. Const., Article I, Sec. 9, cl. 3.

5 Cir: U.S. v. D.K.G. Appaloosas, Inc., 829 F.2d 532 (1987); cert. denied, One 1984 Lincoln Mark VII Two-Door v. U.S., 485 U.S. 976 (1988); 99 L.Ed. 2d 481; 108 S. Ct. 1270 under "Forfeitable Property." supra.

9 Cir: (Contra: U.S. v. $5,644,540.00 in U.S. Currency, 799 F.2d 1357 (1986), which holds ex post facto not applicable to relation back principle in 21 U.S.C. § 881(h) civil forfeiture; U.S. v. Crozier, 777 F.2d 1376 (1985) (Crime Act of 1984 (P.L. 98-473) applied to prior CCE seizures).

SD MS: U.S. v. 5708 Beacon Drive, etc., 712 F.Supp. 525 (1988), under "On Land (RE Venue). infra.

CO: U.S. v. Rogers, 602 F.Supp. 1332 (1985) (Crime Act of 1984 (P.L. 98-473) applied to prior RICO violations).

NV: U.S. v. Lot No. 50 as Shown on Map of Kingsbury, 557 F.Supp 72 (1982) (overruled by 9th Cir. in Note 8, p. 1364 of U.S. v. $5,644,540 in U.S. Currency (see above).

Discussion

Section 881(a) (6), providing for the forfeiture of currency and proceeds, is an amendment to the original Controlled Substances Act (21 U.S.C.). It did not become effective until November 10, 1978, when it was signed by President Carter. It seems virtually certain it cannot be applied to the proceeds of illicit drug exchanges occurring prior to its effective date.

a. The Ex Post Facto Problem

The United States Constitution prohibits both the Federal Government and the states from passing "ex post facto" laws. U.S. Const., Art. I, Sec. 9, cl. 3 and Sec. 10, cl. 1.

Basically, an ex post facto law is one which makes an act punishable in a manner in which it was not punishable when committed. The most quoted definition of an ex post facto law appears in Calder v. Bull, 3 U.S. (3 Ball) 386, a United States Supreme Court case decided in 1798:

> "1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender."

Many Supreme Court decisions have stated that the ex post facto clause applies only to criminal statutes. But, there are also Supreme Court cases that have applied the clause to civil statutes which were really "punishments" in disguise. See U.S. in. Lovett, 328 U.S. 303 (1946); Ex Parte Garland, 71 U.S. (4 wall.) 333 (1867); Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867).

This has caused some confusion, and a lot of debate, over when a law should be considered "punishment," even though it appears civil in form. Note, Ex Post Facto Limitations of Legislative Power, 73 Mich. L. Rev. 1491 (1975); Slawson, Constitutional and Legislative Considerations in Retroactive Lawmaking, 48 Calif. L. Rev. 216 (1960); and Crosskey, The True Meaning of the Constitutional Prohibition of Ex-Post Facto Laws, 14 U. Chi. L. Rev. 539 (1947).

The Supreme Court has already decided that the civil forfeiture of contraband per se is not punishment; it is truly civil in nature and does not violate the ex post facto clause. Removing moonshine, heroin,sawed-off shotguns, Molotov Cocktails, and so forth, from the community benefits society, independently of any punishment imposed upon the possessor of such contraband. Samuels in. McCurdy, 45 S.Ct. 264 (1925). Therefore, statutes providing for the civil forfeiture of contraband per se can be applied to objects legitimately possessed prior to their passage.

On the other hand, the Court has decided that the civil forfeiture of derivative contraband, such as a car, is "quasi- criminal" or penal in nature. Therefore, the Fourth Amendment right against unreasonable searches and seizures, and the Fifth Amendment right against self-incrimination apply to forfeitures of cars, money, land, and all other property not inherently dangerous to the community. One 1958 Plymouth Sedan v. Com. of Pennsylvania, 85 S.Ct. 1246 (1965); Boyd v. U.S., 6 S.Ct. 524 (1886)

If the courts follow this distinction, it seems probable they will apply the ex post facto prohibition to the civil forfeiture of currency and proceeds. Forfeiting the proceeds of drug exchanges occurring prior to November 10, 1978, subjects drug violators to an additional "punishment" which was not applicable to them when the illicit exchanges took place. The courts are likely to find that this violates the ex post facto clause, as explained by Chief Justice Marshall in Fletcher v. Peck: An ex post facto law is one ". . . which renders an act punishable in a manner in which it was not punishable when it was committed. Such a law may inflict pecuniary penalties which swell the public treasury. The legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared, by some previous law, to render him liable to that punishment." 10 U.S. (6 Cranch) 87, 138-139 (1810).

As an aside, it is interesting to note that no federal forfeiture statute applied to the rifle used to assassinate President John F. Kennedy. Oswald's wife immediately sold her rights in the weapon to a buyer who wanted to display it at carnivals and side-shows. The buyer demanded the return of the weapon after the proceedings of the Warren Commission ended. The courts found this situation to be incredible:

> "Under the peculiar facts of this case, one would suppose that under some principle of common law or at least natural law or natural justice, weapons used in the commission of a crime of this magnitude would be subject to forfeiture by the proper authorities and, certainly, that property of this character would not be subject to commercial traffic. It is, therefore, somewhat astonishing to discover that there is not any such principle and that forfeiture is a matter of statutory regulation." King v. U.S., 292 F.Supp. 767, 771 (N.D. Tex. 1968).

Congress was intent on keeping the weapon, but could it pass a new forfeiture law that could work "backwards," or must it take the weapon by eminent domain and compensate the new owner? This question was never directly decided in the courts, because Congress passed a statute condemning the rifle and authorizing the courts to determine what "just compensation" must be paid to the owner. (P.L. 89-318, November 2, 1965).

b. Statutory Construction

Regardless of the constitutional arguments, the courts are virtually certain to apply the currency and proceeds sections of 21 U.S.C. § 881(a) (6) to drug violations occurring only on, or after, November 10, 1978. There is a fundamental rule of statutory construction that applies to all laws, both civil and criminal: laws are presumed to operate on conduct, events, or circumstances which occur after their enactment. Courts will never interpret a law as acting "backwards" unless the law clearly, expressly, states that it is intended to affect earlier rights or conduct. See Southerland, Statutes and Statutory Construction, Vol. 2, Sec. 41.04.

The United States Supreme Court clearly stated the principle in Union Pacific Railroad Co. v. Laramie Stock Yards Co.:

> ". . . the first rule of construction is that legislation must be considered as addressed to the future, not to the past."
>
> * * *
>
> ". . . a retrospective operation will not be given to a statute which interferes with antecedent rights, or by which human action is regulated, unless such be the unequivocal and inflexible import of the terms, and the manifest intention of the legislature." 34 S.Ct. 101, 102 (1913).

Nothing in the language of 21 U.S.C. § 881(a) (6), nor in its legislative history, indicates it was intended to apply retrospectively.

It is also a rule of statutory construction that the amendment of a statute to provide for the forfeiture of otherwise lawful property used in violating the statute indicates a legislative conclusion that the forfeiture of such property was not previously included within the terms of the statute, and therefore such property was not subject to forfeiture for its use in the commission of an offense prior to the amendment. Pirkey v. State, 327 P.2d 463 (Okla. 1958); 36 Am. Jur. 2d, Forf. & Pen. Sec. 25.

H. REAL PROPERTY – FACILITATION FORFEITURE

On October 12, 1984, P.L. 98–473, added a new provision which allows the forfeiture of real estate used in any felony violation of the Controlled Substances Act. This provision is codified as 21 U.S.C. § 881(a) (7) and states that the following is subject to forfeiture:

> "(7) All real property, including any right, title, and interest in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner."

DEA has proceeded to forfeit real estate used as laboratory sites, marijuana growing lands, airstrip locations, and drug storage facilities, under 21 U.S.C. § 881(a) (7). For a case holding that § 881(a) (7) permits the forfeiture of an entire lot or tract of land upon which a felony drug violation occurs even if the violation occurs on only a small portion of the property, see U.S. v. Real Property, Plumas County, APN:122– 210–08, ____ F.Supp. ____ (ED Cal. 1986). Also see U.S. v. A Parcel of Real Property, 636 F.Supp. 142 (ND Ill. 1986) forfeiting premises where needles, heroin and cocaine were distributed. It is the policy of the DEA to only proceed against real property that has substantially been used to facilitate a CSA felony violation, as opposed to a remote or incidental use of such property. For cases recently holding a judicial officer (as opposed to clerk of court) must approve a warrant of arrest in rem for real property, see cases

cited on page 199 of this guide.

The increase in the number of real property seizures and forfeitures has spawned many legal, managerial and administrative problems. Since the chances of seizing property without some form of initial investigation are rare, all property seizures should be planned and coordinated with appropriate individuals and organizations. Early and careful consideration must be given to custodial responsibilities since the seizing agency will be referring the property to the Marshals Service NASASP office for management. When appropriate, the Office of Chief Counsel, DEA, should be consulted as well as the U.S. Attorney's offices that may be prosecuting the case. It is imperative that a notice of Lis Pendens be filed in the jurisdiction where the property is located so that title to the property will be protected. Any extraordinary circumstances should be reported without delay to the Office of Chief Counsel, DEA. Moreover, it should be noted that on April 23, 1987, the Department of Justice instructed that "all real property forfeitures . . . shall proceed judicially."

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See MASFA § 4(b). All property, including the whole of any lot or tract of land, used or intended to be used to facilitate conduct giving rise to forfeiture is forfeitable.

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Authorities

1 Cir: U.S. v. A Parcel of Land with a Building Located Thereon at 40 Moon Hill Road, etc., 884 F.2d 41 (1989), under "Double Jeopardy." supra.

4 Cir: U.S. v. Reynolds, 856 F.2d 675 (1988). (Sec. 881(a)(7) authorizes forfeiture of a house and adjoining 30.60 acre tract because the house, driveway and pool were used to facilitate the sale of cocaine. An adjacent but unrelated tract was not forfeitable).

8 Cir: U.S. v. Premises Known as 3639 – 2nd Street, etc., 869 F.2d 1093 (1989); reh'g denied (April 11, 1989). (In a Sec. 881(a)(7) action, a house is forfeitable when the drug sale and exchange of money occur in the house. The court rejected a de minimus argument that only a single drug transaction occurred on the property, and that only about two ounces of cocaine were found. The court noted that drugs, drug paraphernalia, weapons, and buy money were found on the premises. The court also rejected a proportionality argument that the value of the forfeitable property, i.e. the house, was disproportionate to the severity of the injury inflicted by its use, i.e. forfeiture. Under Sec. 881(a)(6), when $250 traceable to drug transactions is commingled with $12,585, the entire $12,585 is forfeitable under a tracing theory. Funds traceable to or used in illegal drug transactions are forfeitable.) [In this case, the probable case included the presence of a drug scale, drugs, drug paraphernalia, weapons and buy money. All these factors combine to show a substantial connection between

the house and the illicit drug activity. Thus, the probable cause was more than, as the court suggests, a single drug transaction. It appears to create an undue litigious risk to pursue real property forfeitures involving merely incident connections between the realty and the illicit drug activity.]

9 Cir: U.S. v. Littlefield, 821 F.2d 1365 (1987). (A criminal forfeiture action under 21 U.S.C. Sec. 881(a)(7). Accordingly, if a portion of real property is forfeited under 21 U.S.C. Sec. 853 after the defendant's conviction, then the remaining property is forfeitable under 21 U.S.C. Sec. 853. The rationale is to avoid a civil forfeiture proceeding after a criminal forfeiture action and a felony drug conviction); U.S. v. Tax Lot 1500, etc., 861 F.2d 232 (1988); cert. denied, Jaffee v. U.S., _U.S._, 107 L.Ed.2d 351 (1989); 110 S.Ct. 364. (A house and land were forfeited under Sec. 881 (a)(7) even though the total ground space used to grow marijuana was less than 200 square feet. The court specifically rejected a proportionality argument as to the relative values of the crops and the real property. The court also rejected an Eighth Amendment argument.) [Most courts reject a proportionality argument. However, the majority also requires a substantial connection between the property and the illegal drug activity.]

SD FL: U.S. v. 31 N.W., 136th Court, etc., 711 F. Supp. 1079 (1989). (A residence is properly forfeited under Sec. 881(a)(7) when: (1) the owner arranged to receive cocaine at his home; (2) the owner took repeated counter-surveillance measures at his home before a cocaine delivery; and (3) ten kilograms of cocaine were delivered to his driveway. The court rejected arguments regarding the proportionality of the penalty); U.S. v. Real Property and Residence at 3097 S.W. 111 Avenue, etc., 699 F.Supp. 287 (1988). (Sec. 881(a)(7) authorizes forfeiture of real property when it was used as the site for an illegal drug transaction. In this case, claimant's residence was forfeited based on a single drug transaction in the residence's driveway, together with his insistence that drug sales take place at his residence and his intention to keep drug sale proceeds at his residence.)

ND GA: U.S. v. All That Tract (Riverdale), 696 F.Supp. 631 (1988). (In an action under 21 U.S.C. Secs. 881(a)(6) and (a)(7), the government is not entitled to summary judgment when there is an issue of material fact as to whether or not real and persona property owned by claimant was derived from drug proceeds, or used to facilitate drug activities.)

ND IL: U.S. v. 124 East North Avenue, etc., 651 F.Supp. 1350 (1987). (Real property is forfeitable under 21 U.S.C. Sec. 881(a)(7) where: (1) a telephone at the property was used regularly to coordinate the sale and delivery of drugs; and (2) there was a reasonable belief that a drug transaction would soon occur on the property. The court suggested that the isolated use of a telephone at a home would probably not be enough to permit forfeiture. Probable cause for forfeiture must be determined by a judicial officer, not a court clerk.)

SD TX: U.S. v. Real Property Located at 2011 Calumet Road, etc., 699 F.Supp. 108 (1988), under "Innocence of an Owner is No Defense to a Civil Forfeiture Action." supra.

ED VA: U.S. v. Certain Lots in Virginia Beach, 657 F.Supp. 1062 (1987). (A substantial connection must exist between the real property and the illegal drug transaction in order for the property to be forfeitable under 21 U.S.C. Sec. 881(a)(7). A one-time use of the property does not subject it to forfeiture, especially when there is no evidence that the house was used to store or to hide drugs.)

DC: U.S. v. Property Identified as 3120 Benneker Drive, N.E., 691 F.Supp. 497 (1988). (A residence is forfeitable under 21 U.S.C. Sec. 881(a)(7) on the basis of having found drugs and drug paraphernalia. The residence is forfeitable regardless of whether or not it is substantially connected to the drug deal.) [The case reflects the minority view which is that mere incidental use of the property for illegal drug activity is sufficient to render the property forfeitable.]

ME: U.S. v. Certain Real Property in Auburn, Maine, etc., 711 F.Supp. 660 (1989). (Property which a trafficker claimed was used to store drugs but which actually did not contain drugs was forfeitable because it was used in a manner calculated to facilitate the commission of the drug violations.)

MA: U.S. v. A Parcel of Land and Buildings Located Thereon at 40 Moon Hill Road, etc., No. 87-0110-XX (December 22, 1988), under "Collateral Estoppel." supra.

MD NC: U.S. v. 30.80 Acres, etc.,665 F.Supp. 422 (1987), under "Civil v. Criminal;" which applies the minority view of proportionality. supra.

D OR: U.S. v. One Parcel of Real Property Described as Lot 4, etc., 712 F. Supp. 810 (1989). ("Facilitation" in a Sec. 881 (a)(7) realty forfeiture merely requires the use of the realty "in any manner" in connection with the underlying crime. The court noted that other circuits interpret "facilitation" to require a substantial connection between the property and the underlying crime.)

SC: U.S. v. Property Located on Trafalgar Street, etc., 700 F.Supp. 857 (1988). (Forfeiture of a dentist's office was appropriate under Sec. 881(a)(7) when the dentist regularly used the office for over nine months to write illegal prescriptions for controlled substances. However, the court stated that forfeiture is not permissible when real property is used to store drugs on only one occasion and then only for a few hours.)

SEIZURES

This chapter discusses the necessity of seizing forfeitable property, who can seize it, how to seize it, the effect of delaying the seizure, pre-seizure notice, and the application of the Fourth Amendment's Warrant Requirement to forfeitures.

A. PROPERTY MUST BE SEIZED BEFORE PROCEEDINGS CAN BEGIN

In a civil forfeiture action the property is the defendant (*in rem*). Therefore, the property must be seized and brought within the territorial jurisdiction of a judge or other authority before forfeiture proceedings can begin.

Discussion

The power of a court to subject a particular thing to civil forfeiture depends upon its ability to get control over the object. Civil forfeiture is an *in rem* proceeding; the defendant is the object. A court's jurisdiction always depends upon having control over the defendant. The Brig Ann, 9 Cranch (U.S.) 289, 291 (1815); Pennington v. Fourth National Bank, 37 S.Ct. 282 (1917); Yokohama Specie Bank v. Wang, 113 F.2d 329 (9 Cir. 1940); Strong v. U.S., 46 F.2d 257 (1 Cir. 1931).

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See MASFA § 12. *In Rem* Proceedings and § 13. *In Personam* Proceedings.

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1. Movable property must be seized

The term "movable property" refers to things that can be easily moved, such as money, furniture, equipment, conveyances, documents, animals, and so forth. Movable property must actually be seized to be brought under the control of a court. The United States Supreme Court discussed this seizure requirement in Pelham v. Rose, 9 Wall 103, 106, 19 L.Ed. 602 (1870):

> "the seizure of the property . . . Is made the foundation of the subsequent proceedings. It is essential to give jurisdiction to the court to decree a forfeiture. Now, by the seizure of a thing is meant the taking of a thing into possession, the manner of which, and whether actual or constructive, depending upon the nature of the thing seized. As applied to subjects (objects) capable of manual delivery, the term means caption; the physical taking into custody."

Seizure prevents the object from being moved outside the territorial jurisdiction of the court while the proceedings are pending. Seizure also provides greater assurance that owners of the object will be informed of the forfeiture proceedings against their property. Pennoyer in. Neff, 95 U.S. 714, 727, 24 L.Ed. 565 (1878).

Federal court jurisdiction over the forfeiture of movable property depends upon where the property is first seized.

2. Immovables must be "served"

The power to forfeit land, buildings and other immovable property belongs to the court having jurisdiction over the territory where the property is located. Because immovable property is impracticable to seize, it is usually brought under the control of the court by affixing certain legal documents to the property in a conspicuous place and by leaving copies with the person in control. Heidritter v. Elizabeth Oil-Cloth Co., 5 S.Ct. 135 (1884); Tyler v. Judges of the Court of Registration, 55 N.E. 812 (Mass. 1908) (Justice Holmes); and see Treasure Salvors v. Unidentified Wrecked, Etc., 569 F.2d 330 (5 Cir. 1978).

> "while the general rule in regard to jurisdiction *in rem* requires an actual seizure and possession of the res (object) by the officer of the court, such jurisdiction may be acquired by acts which are of equivalent import, and which stand for and represent the dominion of the court over the thing, and, in effect, subject it to the control of the court." Cooper v. Reynolds, 10 Wall. 308-318.

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> **See MASFA § 6. Seizure of property. Subsection (c). Property may be seized constructively by:**
> **(1) posting notice on the property;**
> **(2) giving notice pursuant to § 8 or**
> **(3) filing notice in public records.**

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3. Intangible interests

Stock certificates, bonds, negotiable instruments and bank certificates of deposit are merely so much paper; their value lies in the intangible property interests which they symbolize. This creates special problems in forfeiture cases. For example, if a stock certificate is seized in Florida, but the company that issued the stock is incorporated in Delaware, yet all the tangible assets of the company are located in New Jersey, where is the "stock" located? Which court has jurisdiction over the forfeiture of the stock?

a. Stocks & Bonds

Forty-nine states have adopted either the uniform Stock Transfer Act or the Uniform Commercial Code. As a result, the property interest represented by a stock certificate or bond follows the document. In other words, by statute the court in whose territorial jurisdiction a stock or bond is found has jurisdiction over the forfeiture of the "shares" represented by the document. See Guaranty Trust Co. v. Fentress, 61 F.2d 329 (7 Cir. 1932); Norrie v. Lohman, 16 F.2d 355 (2 Cir. 1926); and Direction Der Disconto-Gesellschaft v. U.S., 454 S.Ct. 207 (1925).

b. Negotiable Instruments

Remember the definition of "negotiable instrument?" It means a document containing an unconditional promise to pay a sum of money, which can be legally transferred to another by endorsement (signature) and delivery. The court in whose territorial jurisdiction a negotiable instrument is found has jurisdiction over the forfeiture of the obligation represented by the document. See Pelham v. Rose, 9 Wall. 103, 19 L.Ed. 602 (1870); First Trust Co. of St. Paul v. Matheson, 246 N.W. 1 (Minn. 1932); and see Shaffer v. Heitner, 97 S.Ct. 2569 (1977).

c. Accounts

If no document embodies the obligation, the court in whose territorial jurisdiction the "obligor" is found has jurisdiction over the forfeiture. Harris v. Balk, 25 S.Ct. 625 (1905).

For example, a bank account merely involves an obligation by a bank to pay a depositor a certain sum of money, plus interest, on demand. The bank book issued to a depositor is simply a record of the account; the bank book does not embody the account. The account cannot be transferred by merely delivering the bank book to another person. If the book for a forfeitable bank account is seized in Florida, but the bank is located in New York, the Federal district court having territorial jurisdiction over the New York bank (the obligor) has jurisdiction over the forfeiture of the account.

B. SEIZURE WARRANTS

Searches for, and seizures of, forfeitable property must satisfy Fourth Amendment requirements. The Fourth Amendment applies to all government "searches and seizures.

It applies to health and safety searches. Marshal v. Barlow's, Inc., 97 S.Ct. 776 (1977). It applies to searches for, and seizures of people, whether felons, witnesses or hostages. Payton v. N.Y., 100 S.Ct. 1371 (1980); Rule 41, F.R.Cr.P. It applies to searches and seizures to enforce the tax laws. G.M. Leasing Corp. v. U.S., 97 S.Ct. 619 (1977).

No search or seizure, regardless of its purpose, is immune from the Amendment.

Because the Fourth Amendment applies to forfeitures, there must be probable cause to believe property is forfeitable before it can be seized. The existence of some form of probable cause is essential to all Fourth Amendment seizures. U.S. v. Premises Known As 608 Taylor Ave., 584 F.2d 1297 (3 Cir. 1978); McClendon v. Rosetti, 460 F.2d Ill (2 Cir. 1972); and Fell v. Armour, 355 F. Supp. 1319 (MD Tenn. 1972).

In addition, if forfeitable property is located in a home, in an office, in a garage, in a safety deposit box, in luggage, or in some other "private" area protected against government entry, then a criminal search warrant must be obtained to enter the area to search for and seize the forfeitable property. No one disputes these basic rules. See U.S. v. $128,035 in U.S. Currency, 628 F.Supp. 668 (SD Ohio 1986) which holds warrant from judicial officer necessary to seize residence.

There is, however, a controversy over whether a warrant is required to seize forfeitable property found in a "public" place. The vast majority of courts hold that a warrant is not required. A minority, on the other hand, has indicated that a seizure warrant is generally required. U.S. v. Pappas, 613 F.2d 324 (1 Cir. 1980); U.S. v. McCormick, 502 F.2d 281 (9 Cir. 1974); Melendez v. Shultz, 356 F.Supp. 1205 (D. Mass. 1973). As explained below, the majority is correct:no warrant is required to make a probable cause seizure of property found in a public place. Also see Anderson v. Creighton, 483 U.S. 635 (1987),; 107 S.Ct. 3034; 97 L.Ed.2 523, under "Discussion (RE Standard of Proof and Probable Cause)." supra. U.S. v. Villamonte-Marquez, 714 F.2d 428 (5th Cir. 1983), under "Discussion (RE Standard of Proof and Probable Cause)." supra. U.S. v. 1.678 Acres of Land, etc., 684 F.Supp. 426 WD NC (1987) under"Innocence of an Owner is No Defense to Civil Forfeiture." supra.

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See MASFA § 6(a). Property may be served upon a warrant issued on an affidavit under oath demonstrating probable cause for its forfeiture or that the property is the subject of a previous final judgment.

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1. A forfeitable conveyance can be seized in public without a warrant

If probable cause exists to believe a conveyance is forfeitable, and if it is located in a public area – an area not protected by the Fourth Amendment – it can be seized without a warrant. If, on the other hand, it is located in a private area, a search warrant is generally required to enter the area and seize the property. In either case, once a forfeitable conveyance is lawfully seized, it can be searched without obtaining a search warrant.

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See MASFA § 6(b). Property may be seized without process on probable cause to believe the property is subject to forfeiture.

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Authorities

S.Ct: See G.M. Leasing Corp. v. U.S., 97 S.Ct. 619 (1977); and Cooper v. California, 87 S.Ct. 788 (1967).

10 Cir: U.S. v. Stout 434 F.2d 1264 (1970); Sirimarco v. U.S., 315 F.2d 699 (1963).

9 Cir: Compare U.S. v. Spetz, 705 F.2d 1155 (1983) (warrant required unless exigent circumstances); U.S. v. Kimak, 624 F.2d 903 (1980); U.S. v. McCormick, 502 F.2d 281 (1974) (warrant is required unless 4th

Amendment exception exists) with Lockett v. U.S., 390 F.2d 168 (1968) (no warrant required); U.S. v. Johnson, 572 F.2d 227 (1978).

8 Cir: U.S. v. Milham, 590 F.2d 717 (1979); O'Reilly v. U.S., 486 F.2d 208 (1973); U.S. v. Young, 456 F.2d 872 (1972); Drummond v. U.S., 350 F.2d 983 (1965).

7 Cir: U.S. v. Edge, 444 F.2d 1372 (1971); U.S. v. Mills, 440 F.2d 647 (1971).

6 Cir: U.S. v. Steele, 727 F.2d 580 (1984); U.S. v. White, 488 F.2d 563 (1973).

5 Cir: U.S. v. Sink, 586 F.2d 1041 (1978); U.S. v. Pruett, 551 F.2d 1365 (1977); U.S. v. McKinnon, 426 F.2d 845 (1970); Grogan v. U.S., 261 F.2d 86 (1958); Sanders v. U.S., 201 F.2d 158 (1953).

4 Cir: U.S. v. $29,000, U.S. Currency, 745 F.2d 853 (1984); U.S. v. One 1978 Mercedes Benz, 4 dr. Sed., 711 F.2d 1297 (1983); U.S. v. Kemp, 690 F.2d 397 (1982); U.S. v. Trotta, 401 F.2d 514 (1968); U.S. v. Haith, 297 F.2d 65 (1961); U.S. v. One 1956 Ford Tudor Sedan, 253 F.2d 725 (1958).

3 Cir: U.S. v. Bush, 647 F.2d 357 (1981); U.S. v. One 1977 Lincoln Mark V, 643 F.2d 154 (1981); U.S. v. Trojano, 365 F.2d 416 (1966).

2 Cir: U.S. v. Panebianco, 543 F.2d 447 (1976); U.S. v. Zaicek, 519 F.2d 412 (1975); U.S. v. Capra, 501 F.2d 267 (1974); U.S. v. Francolino, 367 F.2d 1013 (1966); U.S. v. Pacific Finance Corp., 110 F.2d 732 (1940).

1 Cir: Compare U.S. v. Pappas, 613 F.2d 324 (1980) and U.S. v. One 1972 Chevrolet Nova, 560 F.2d 464 (1977) with Interbartolo v. U.S., 303 F.2d 34 (1962) and U.S. v. One 1975 Pontiac Lemans, 621 F.2d 444 (1980).

CO: Compare U.S. v. 1979 Mercury Cougar, 545 F.Supp. 1087 (1982).

SD FL: U.S. v. One Defender Lobster Vessel, 606 F.Supp. 32 (1984).

SD ME: U.S. v. Cresta, 592 F.Supp. 889 (1984); U.S. v. Balsamo, 468 F.Supp. 1363 (1979).

ND IL: U.S. v. Mided, 582 F.supp. 1182 (1983).

MD: Compare U.S. v. McMichael, 541 F.Supp. 956 (1982).

MA: U.S. v. One 1975 Pontiac Lemans, 470 F.Supp. 1243 (1979); Melendez v. Shultz, 356 F.Supp. 1205 (1973).

ED NY: U.S. v. Perez, 574 F.Supp. 1429 (1983).

SD NY: U.S. v. Vidal, 637 F.Supp. 327 (1986).

ED PA: U.S. v. Thrower, 442 F.Supp. 272 (1977).

MD TN: Fell v. Armour, 355 F.Supp. 1319 (1972).

WD TX: U.S. v. One 1973 Pontiac Grand Am, 413 F.Supp. 163 (1976).

IN: Brune v. State, 342 N.E. 2d 637 (App. 1976).

MD: Crowley v. State, 334 A.2d 557 (App. 1975).

TN: Fuqua v. Armour, 543 S.W.2d 64 (1976).

WA: State v. One 1972 Mercury Capri, 537 P.2d 763 (1975) (contra).

Discussion

a. Public Seizures

The United States Supreme Court has traditionally permitted the warrantless seizure of both persons and property found in a public place, provided the seizure is based upon probable cause.

For example, in Hester v. U.S., 44 S.Ct. 445 (1924), the Court upheld the warrantless seizure of liquor found in an open field. In Carroll v. U.S., 45 S.Ct. 280 (1925), the Court upheld the warrantless seizure (and search) of a vehicle found on a public highway. In Cooper v. California, 87 S.Ct. 788 (1967), the Court assumed the legality of a warrantless seizure of a forfeitable vehicle found in a public place, and went on to uphold a subsequent warrantless search of the seized car. In U.S. v. Watson, 96 S.Ct. 820 (1976), the Court upheld the warrantless seizure (arrest) of a felon found in a public place. In Arkansas v. Sanders, 99 S.Ct. 2586 (1979) and in U.S. v. Chadwick, 97 S.Ct. 2476 (1977), the Court approved of warrantless seizures of luggage found in public and believed to contain contraband, but disapproved of the later warrantless searches of the luggage. In G.M. Leasing Corp. v. U.S., 97 S.Ct. 619 (1977), the Court upheld the warrantless seizure for tax purposes of conveyances found in public, but disapproved of the warrantless seizure for tax purposes of property located in a private office. The Court was careful to distinguish between the "public" and "private" seizures:

> "It is one thing to seize without a warrant property resting in an open area or seizable by levy without an intrusion into privacy, and it is quite another thing to effect a warrantless seizure of property situated on private premises to which access is not otherwise available for the seizing officer." 97 S.Ct. 629–630.

In Payton v. U.S., 100 S.Ct. 1371 (1980), the Court repeated this distinction in disapproving of a warrantless entry into a home to seize (arrest) a suspected felon. The Court said:

> "It is a basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable. Yet it is also well-settled that objects such as weapons or contraband found in a public place may be seized by the police without a warrant. The seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity. The distinction between a warrantless seizure in an open area, and such a seizure of private premises, was plainly stated in G.M. Leasing Corp. v. United States, . . ."

b. Is There A Statutory Warrant Requirement?

Several courts have held that the forfeiture section of the Federal Controlled Substances Act contains a warrant requirement, even if a warrant is not always constitutionally required. See U.S. v. Pappas, 613 F.2d 324 (l Cir. 1980); U.S. v. One 1972 Chevrolet Nova, 560 F.2d 464 (1 Cir. 1977); U.S. v. Leslie, 598 F.Supp. 254 (Vt. 1984); and see O'Reilly v. U.S., 486 F.2d 208 (8 Cir. 1973) (Judge Lay, "dissenting"). They point to 21 U.S.C. § 881(b), which provides:

> Any property subject to forfeiture to the United States under this title MAY be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims . . ., except that seizure without such process MAY be made when:
>
> > (l) the seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant; (or)
> >
> > * * *
> >
> > (4) the Attorney General has probable cause to believe that the property has been used or is intended to be used in violation of this title.
>
> In the event of seizure pursuant to paragraph:
>
> > (4) of this subsection, proceedings . . . SHALL be instituted promptly. (Emphasis is not in the original).

The plain wording says that process may be obtained; it does not say shall or must be obtained. Courts believing this section requires a warrant have ignored this distinction; they treat the use of the word "may" as imposing a mandatory requirement, rather than as an option available to the government. If Congress had used only the word "may" throughout this section, there might be some logic to what these few courts are saying. After all, Congress could have confused the word "may" with the word "shall." But, Congress used the term "shall" at the end of § 881(b) to require prompt proceedings under the: statute. By using both terms in the same section, Congress indicated it understood the difference and intended the words to be interpreted differently. Minor v. Mechanic's Bank, 1 Pet. (26 U.S.) 46, 7 L.Ed. 47 (1928); U.S. ex rel Siegel v. Thoman, 15 S.Ct. 378 (1895). Therefore, section 881(b), on its face, must be interpreted as giving the government the option to obtain seizure "warrants" under the Admiralty Rules; but § 881(b) does not require warrants.

Those courts interpreting § 881(b) to require a warrant have also been forced to "re-write" subsection 881(b) (4). As written by Congress, that subsection exempts all seizures for forfeiture from any "requirement" for Admiralty Process arguably imposed by the section. See Pappas and O'Reilly cited above.

What justification do these few courts have for ignoring the plain wording of § 881(b)? Could Congress have actually intended § 881(b) to impose a mandatory warrant requirement, despite the wording of the section? It seems very unlikely.

First, Congress has written other forfeiture statutes which are still in effect and which do not require seizure warrants. See 19 U.S.C. § 1595, The Tariff Act of 1930, and 49 U.S.C. § 781, § 782, The Contraband Seizure Act. A car transporting imported marijuana is subject to forfeiture under both these laws, and under 21 U.S.C. § 881(a) (4) .= It is absurd to think that Congress has permitted the government to seize such a car under the first two statutes without obtaining a warrant, but that it has required a seizure warrant under the third statute.

Second, at the time Congress was considering the passage of section 881, the Federal courts were unanimous that warrants were not required to seize forfeitable property found in public places. Congress must have known of these court decisions.

Third, in passing section 881 as part of the Controlled Substances Act of 1970, Congress thought it was strengthening existing law enforcement authority, rather than placing new restrictions on it. See House Report No. 91-1444, 3 U.S. Code Cong. & Admin. News, p. 4566 (1970).

Fourth, the authors of this guide have read the entire legislative history of the 1970 Controlled Substances Act, including unpublished materials in the files of the library of the Drug Enforcement Administration. There is absolutely no evidence in the history of the statute that indicates Congress intended to require warrants under 21 U.S.C. § 881(b). And see Pappas, cited above (Judge Campbell, dissenting).

Finally, if Congress had intended to subject all seizures for forfeiture to judicial supervision, it would not have referred to "Admiralty Process" in section 881(b). Instead, it would have referred to Rule 41 of the Federal Rules of Criminal Procedure (traditional warrants). Admiralty "warrants!' do not meet Fourth Amendment requirements. They are issued by court clerks, not by judges, magistrates or other judicial officers. They do not require any showing of probable cause. They do not require sworn statements of the facts and circumstances supporting the seizure. They need not specify with particularity the location of the property to be seized. In short, they provide none of the protections normally associated with "true" warrants. U.S. v. 935 Cases More Or Less, 136 F.2d 523 (6 Cir. 1943). Again, see Pappas cited above (Judge Campbell, dissenting).

The conclusions to be drawn from all this are that:

1. A traditional search warrant is required to search for, and to seize, forfeitable property only when it is located in an area subject to Fourth Amendment protection;

2. No warrant of any kind is needed to make a probable cause seizure of forfeitable property, particularly a conveyance, found in a public place; and

3. The government has the option under 21 U.S.C. § 881(b) to obtain admiralty "warrants" to facilitate the seizure of land, buildings, large vessels, cargo, accounts, etc., provided the seizure does not invade privacy interests protected by the Fourth Amendment.

Authorities

1 Cir: In Re Warrant to Seize One 1988 Chevrolet Monte Carlo, 861 F.2d 307 (1988). (A showing of probable cause is sufficient for a district court to issue a seizure warrant for civil forfeiture of personal property. There need not be exigent circumstances, an earlier forfeiture judgement, or a filed complaint *in rem*. The concern is that probable cause be shown before seizure of property.) [The First Circuit takes the position that the civil forfeiture statutes requires a seizure warrant. See U.S. v. Pappas, 613 F.2d 324 (1980). However, the instant case seems to soften the statutory warrant requirement. The court does not want this requirement to cause the government to use more cumbersome judicial forfeitures instead of administrative forfeitures.]

CD CA: U.S. v. Real Property Located at 25,231 Mammoth Circle, etc., 659 F.Supp. 92 (1987). (Sec. 881 is punitive and thus the Fourth Amendment applies. As a result, judicial officer, not a mere clerk of the court, must determine probable cause before issuing a warrant.)

WD NC: U.S. v. 1678 Acres of Land, etc., 684 F.Supp. 426 (1988), under "Innocence of an Owner is No Defense to Civil Forfeiture." supra, p. 23.

CO: U.S. v. $152,160.00, 680 F. Supp. 354 (1988) (A complaint and seizure warrant approved by a judicial officer is necessary for seizure of real property.) [This is consistent with the Department of Justice policy. Some cases merely require presentation of the complaint to the clerk of the court, which means that there is no probable cause hearing prior to seizure of the real property.]

MA: In Re Application for Warrant to Seize One 1988 Chevrolet Monte Carlo and One 1988 Chevrolet Camaro, 677 F.Supp. 57 (1988). (Sec. 881(b) requires a pre-seizure complaint and warrant in non-exigent seizures. Seizure of automobiles is not exigent.) [Assuming arguendo, that Sec. 881(b) contains a statutory warrant requirement, it would seem that vehicles constitute exigent circumstances. Vehicles are by definition highly moveable assets and likely to be gone before a warrant can be issued.]

RI: U.S. v. Property Known as 6 Patricia Drive, etc., 705 F.Supp.710 (1989), under "Discussion (RE Probable Cause.)" supra, p. 10.

c. Searches of Forfeitable Conveyances

Despite the controversy over whether a warrant is needed to seize a forfeitable conveyance in public, all courts agree that once a forfeitable conveyance has been lawfully seized, it is subject to a thorough search without a warrant. In fact, once a conveyance has been lawfully seized for

forfeiture, it can be searched at any time even though there may no longer be any reason to believe it contains seizable property. Moreover, the search can be very intensive, including the dismantling of parts such as the seats, gas tank and "rocker panels." It is not limited to an inventory. See all the cases cited under "Authorities." In particular, see U.S. v. Kimak, 624 F.2d 903 (9 Cir. 1980); U.S. v. Johnson, 572 F.2d 227 (9 Cir. 1978); and U.S. v. Balsamo, 468 F.Supp. 1363 (D. Maine 1979).

d. Exclusion of Evidence

If there is enough lawfully obtained evidence to prove a conveyance is forfeitable, but a court rules the conveyance should have been seized with a warrant, the court is limited to excluding any evidence found in the conveyance as a result of the warrantless seizure. The court cannot prevent the forfeiture of the conveyance. Remember, the mere fact of illegal seizure, standing alone, does not immunize property from forfeiture. See page 43 of this guide for a discussion of this issue.

2. Tangible Personal Property

Unlike a car, most tangible personal property is not likely to be left in a public area. Therefore, seizures of cash, diamonds, deeds, and other forfeitable personal property must be made with a traditional search warrant (Rule 41, F.R.Cr.P.), or must come within one of the recognized exceptions to the Fourth Amendment's warrant requirement. Typically, forfeitable personal property can be seized from a violator without a warrant as part of a search incident to his arrest. U.S. v. 71.41 Ounces Gold Filled Scrap, 94 F.2d 17 (2 Cir. 1938). Or, it can be seized without a warrant if it is discovered in plain view during an otherwise lawful search. Or, it can be seized without a warrant by obtaining a voluntary consent for the seizure. Or, it can be seized without a warrant if it is suddenly threatened with immediate removal or destruction.

Remember, all searches and seizures are subject to the restrictions of the Fourth Amendment. Although an illegal warrantless seizure will not jeopardize the forfeiture, it will subject you to potential civil liability for a Fourth Amendment violation.

3. Accounts and Intangible Property

Traditional search warrants are neither necessary, nor suitable for seizing intangible property, such as a bank account. Attaching or levying accounts involves no invitation of privacy. See U.S. v. Miller, 96 S.Ct. 1619 (1976). Seizures by levy, or attachment, need not be made with a traditional warrant. Murray's Lessee v. Hoboken Land & Improv. Co., 18 How. (59 U.S.) 272, 15 L.Ed. 372 (1856).

Seizures of accounts and other intangible property should be accomplished under the Supplemental Rules of Certain Admiralty and Maritime Claims (28 U.S.C. Appx.). Rule C(3) and Rule C(5) provide:

> "(3) Judicial Authorization and Process. . . . In actions by the United States for forfeitures for federal statutory violations, the clerk, upon filing of the complaint, shall forthwith issue a summons and warrant for the arrest of

the vessel or other property without requiring a certification of exigent circumstances.

> "(5) Ancillary Process. In any action in rem in which process has been served as provided by this rule, if any part of the property that is the subject of the action has not been brought within the control of the court because it has been removed or sold, or because it is intangible property in the hands of a person who has been served with process, the court may, on motion, order any person having possession or control of such property or its proceeds to show cause why it should not be delivered into the custody of the marshal or paid into court to abide the judgment; and, after hearing, the court may enter such judgment as law and just may require."

If the third party in control of the account (e.g., a bank) does not immediately turn over the funds, he effectively becomes a party–defendant to the forfeiture proceedings. See Rules E(4) (c), B(3) (a) and C(6).

4. Real Property

Again, traditional warrants (Rule 41, F.R.Cr.P.) are not suitable for "seizing" real property, such as land and buildings. U.S. v. 63,250 Gallons of Beer, 13 F.2d 242 (D. Mass. 1926). As with intangible property, seizures of land and buildings should be made under the supplemental Rules for Certain Admiralty and Maritime Claims (28 U.S.C. Appx.). Rule #(4) (b) provides:

> "(b) Tangible Property. If tangible property is to be attached or arrested, the marshal shall take it into his possession for safe custody. If the character or situation of the property is such that the taking of actual possession is impracticable, the marshal shall execute the process by affixing a copy thereof to the property in a conspicuous place and by leaving a copy of the complaint and process with the person having possession or his agent."

Moreover, on October 27, 1986, P.L. 99–570 was enacted, which added the following provision to 21 U.S.C. § 881(b):

> "The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure."

Hence, although the seizure warrant authorized under P.L. 99– 570 cured the existing lack of formal authority to seize personal property subject to administrative forfeiture, it does little to cure the problem of authority to enter and search real property subject to forfeiture.

Note that these procedures make no mention of entering premises to conduct a search, nor do they mention ejecting occupants lawfully on the property. The owners or occupants do not automatically lose their privacy rights in the premises pending the outcome of the forfeiture. Nor do they lose their privacy rights as to their personal property stored on the premises. See U.S. v. Sanford, 493 F.Supp. 78 (D. D.C. 1980); Boone v. Maryland, 393 A.2d 1361 (Md. 1978); People v. Stadtmore, 382 N.Y.S.2d 807 (App. 1976); Chuze v. Florida, 330 So.2d 166 (Fla. App. 1976). For a case upholding seizure and forfeiture of currency and gold bars not named in search

warrant under "inadvertent plain view" theory. see U.S. v. $10,000 in U.S. Currency, 780 F.2d 213 (2 Cir. 1986). If probable cause exists to search the premises, obtain a separate search warrant. Do not rely on Admiralty process or a "seizure warrant" under P.L. 99-570 to search `premises incident to their "seizure." See U.S. v. Ladson, 774 F.2d 436 (11 Cir. 1985), where court holds inventory search not valid under "seizure warrant/writ of entry" for real property when "contents" not listed as subject to forfeiture. Also, see cases at page 199 of this guide which hold that warrant of arrest in rem for real property must be approved by judicial officer -- not clerk of court.

Finally, it might be necessary to file a special notice called a lis pendens in state property records concerning the seizure and pending forfeiture of real property. See 28 U.S.C. § 1964 and Winkler v. Andrus, 614 F.2d 707 (10 Cir. 1980). At this time, it is not clear whether this requirement applies in Federal forfeiture proceedings. Until the question is decided, it is probably safer to file such a notice.

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See MASFA § 6(b). Seizure of inhabited real property which is accompanied by removing or excluding its residents shall be done in most cases pursuant to an adversarial judicial determination of probable cause. However, the determination may be done *ex parte* when the state has shown exigent circumstances.

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C. DELAY OF SEIZURE IS NO DEFENSE TO FORFEITURE/STATUTE OF LIMITATIONS

Property used illegally need not be seized immediately nor at the very first opportunity. Delay in seizing forfeitable property does not affect the government's right to pursue a civil forfeiture, as long as the forfeiture proceedings are begun within the Statute of Limitations. The federal Statute of Limitations on civil forfeitures is five years.

Authorities

19 U.S.C. § 1621; 28 U.S.C. § 2462

S.Ct: U.S. v. $8,850 in U.S. Currency, 103 S.Ct. 2005 (1983) (p. 2011, N. 13); and see Calero-Toledo v. Pearson Yacht Leasing Co., 94 S.Ct. 2080 (1974) (2 month delay).

8 Cir: O'Reilly v. U.S., 486 F.2d 208 (1973) (3 month delay).

6 Cir: U.S. v. Mills, 440 F.2d 158 (1953) (seizure "at a later time").

4 Cir: Weathersbee v. U.S., 263 F.2d 324 (1958) (3 month delay).

3 Cir: U.S. v. One 1950 Buick Sedan, 231 F.2d 219 (1956).

2 Cir: See U.S. v. Pacific Finance Corp., 110 F.2d 732 (1940) (6 week delay).

1 Cir: Interbartolo v. U.S., 303 F.2d 34 (1962) (17 day delay).

AZ: In Re One 1962 VW Sedan, 464 P.2d 338 (1970); In Re One 1972 Ford Pick-up, 584 P.2d 559 (1978) (103 day delay illegal under State Statute requiring "prompt" seizure).

FL: Mosley v. State, 363 So. 2d 172 (App. 1978) (8 day delay); Knight v. State, 336 So. 2d 385 (App. 1976) (one month delay).

Discussion

Occasionally, claimants argue that forfeitable property must be seized at the moment of illegal use or the right to forfeit it is lost. This is a hollow argument.

Requiring immediate seizure might jeopardize an ongoing investigation. It might prematurely reveal the identity of agents working in an undercover capacity. It might reveal the identity of confidential informants. Requiring the seizure of property at the first sign of probable cause would also pressure agents in doubtful cases to "seize first, and resolve questions about probable cause later." This would encourage violations of the Fourth Amendment.

Fortunately, there is no constitutional requirement that forfeitable property be seized immediately. The Fourth Amendment does not require the prompt or immediate seizure of either people (arrests) or property. Hoffa v. U.S., 87 S.Ct. 408, 417 (1966):

> "There is no constitutional right to be arrested. The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon. . . . Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause. . .

In very rare cases, the Fifth Amendment Due Process clause might bar a forfeiture if the government purposely delayed a seizure in a bad faith attempt to gain a tactical advantage, and the delay seriously prejudiced an owner's ability to defend against the forfeiture. But, the burden would rest upon the claimant to prove both bad faith and prejudice before the forfeiture could be barred. See U.S.v.Lovasco, 97 S.Ct. 2044 (1977); U.S. v. Marion, 92 S.Ct. 455 (1971).

In the vast majority of cases there is no constitutional significance in a time lapse between the illegal use and the later seizure of forfeitable property. In addition, there is no federal statute that requires forfeitable property to be seized immediately. And, the state Uniform Controlled Substances Act contains nothing that requires forfeitable property to be seized promptly.

Several statutes have statutes which have been interpreted as requiring prompt seizure of forfeitable property. See In Re One 1972 Ford Pick-up, 584 P.2d 559 (ARIZ. 1978). But, even in these few states, immediate seizure is not required.

Generally, as long as seizure is made and proceedings are begun within the Statute of Limitations, mere delay of seizure is no defense to forfeiture. As the Supreme Court noted in U.S. v. Ewell, 86 S.Ct. 773, 777 (1966):

> "the applicable statute of limitations . . . is . the primary guarantee against bringing overly stale (prosecutions) .

The Statute of Limitations applicable to most federal civil forfeitures is five years (19 U.S.C. § 1621):

> "No suit or action to recover any . . . forfeiture of property accruing under the customs laws shall be instituted unless such suit or action is commenced within five years after the time when the alleged offense was discovered: . . . Provided further, That the time of the absence from the United States of the property, shall not be reckoned within this period of limitation."

Note that the time begins to run when the offense is discovered, not necessarily when it occurs. This provision is made applicable to drug-related forfeitures by 21 U.S.C. § 881(d). Also see 28 U.S.C. § 2462.

Authorities

S.Ct: U.S. v. $8,850, 103 S.Ct. 2005, 2011 (1983).

4 Cir: U.S. v. Kemp, 609 F.2d 307 (1982).

CO: U.S. v. 1979 Mercury Cougar, 545 F.Supp. 1087 (1982).

E. PRE-SEIZURE NOTICE OR HEARING ARE NOT REQUIRED

Ordinarily, the United States Constitution requires that a person be given notice and an opportunity to be heard before he is deprived of his property. Forfeiture is a traditional exception to this rule. The seizure of forfeitable property without prior notice or prior hearing is constitutionally acceptable.

Authorities

S.Ct: U.S. v. Von Neumann, 106 S.Ct. 610 (1986) (p. 614); U.S. v. $8,850 in U.S. Currency, 103 S.Ct. 2005 (1983) (p. 2011 n. 12); Calero-Toledo v. Pearson Yacht Leasing Co., 94 S.Ct. 2080 (1974).

10 Cir: See Bramble v. Richardson, 498 F.2d 968 (1974).

9 Cir: U.S. v. One 1971 BMW 4 Dr Sedan, 652 F.2d 817 (1981); U.S. v. One 1967 Porsche, 492 F.2d 893 (1974); and see Ivers v. U.S., 581 F.2d 1362 (1978).

8 Cir: U.S. v. One 1980 Red Ferrari, 875 F.2d 186 (1989). (Due process does not require a pre-seizure hearing. Sec. 881(a)(4) is not unconstitutionally vague and overbroad.)

5 Cir: U.S. v. One (l) 1972 Wood, 19 Foot Custom Boat, 501 F.2d 1327 (1974).

2 Cir: U.S. v. The Premises and Real Property at 4492 South Livonia Road, etc., 889 F.2d 1258 (1989). (When a claimant makes a sufficient showing of interest in the property through filing with the court a motion and affidavits, technical noncompliance with the procedural rules governing the filing of claims may be excused. Failure to file a claim and answer in the in rem proceeding does not necessarily preclude standing. The rationale is that there are two types of standing. Article III standing, exercised here, requires the claimant to show sufficient interest in the property to create a "case or controversy." Statutory standing requires compliance with certain procedural requirements. Only lack of Article III standing deprives the U.S. Court of Appeals of jurisdiction.)(The constitutional due process adequacy of preseizure, ex parte forfeitures under 21 U.S.C. Sec. 881 (a)(7) depends on a balancing of three considerations; namely, (1) the significance of the property interest; (2) the risk of an erroneous deprivation through the procedures used and the probable value of additional procedural safeguards; and (3) the government's interest in pre-notice seizure, including the avoidance of burdensome additional procedures. In this case, the court found no exigent circumstances justifying the preseizure, ex parte forfeiture of real property.) (Following the First Circuit, the particularity requirements of supplemental Rule E(2)(6) requires that a forfeiture complaint adequately apprise claimant of the factual circumstances underlying the forfeiture action.) (Probable cause may be supported by hearsay later deemed inadmissible.) (The court offered interesting dicta concerning a possible Fifth Amendment challenge to civil forfeitures. The theory of civil forfeiture is that the property devoted to an unlawful purpose is tainted as an instrumentality of crime and therefore must be condemned. The phrase "in any manner or part" in 21 U.S.C. Sec. 881(a)(7) may authorize forfeiture of the "whole" of the property if any "part" was used for drugs. On the other hand, at some point a forfeiture may cross the line between condemning an instrumentality of crime to actually punishing a claimant by depriving him of his estate. Where punishment is the result, the Fifth Amendment Due Process procedural protections will be needed. The civil forfeiture protections will be inadequate.) (The court also suggests that seizure warrants for real property should be issued by a judicial officer and not a mere clerk of the court.)

ED MO: Allen v. Tucker, 715 F. Supp. 266 (1989) (Pre-hearing seizure of property does not violate due process provided the claimant is eventually given an opportunity to be heard. The hearing may be incorporated into a full trial on ther merits.)

AL: Kirkland v. State, 340 So. 2d 1 (App. 1976).

AZ: State ex rel Berger v. McCarthy, 548 P.2d 1158 (1976).

GA: Blackmon v. B.P.O.E., 208 S.E.2d 483 (1974).

MA: Com. v. One 1977 Pontiac Grand Prix Auto, 378 N.E.2d 69 (App. 1978).

NB: State v. One 1970 2-Door Sedan Rambler, 215 N.W.2d 849 (1974).

NM: Matter of One Cessna Aircraft, 559 P.2d 417 (1977).

NC: State v. Richardson, 208 S.E.2d 274 (App. 1974).

TN: Fuqua v. Armour, 543 S.W.2d 64 (1976).

WA: State v. One 1972 Mercury Capri, 537 P.2d 763 (1975).

Discussion

Normally, the Due Process clauses of the Fifth and Fourteenth Amendments require governments to provide a person with notice and an opportunity to be heard before taking his property. Fuentes v. Shevin, 92 S.Ct. 1983 (1972). There are, however, "extraordinary situations" which permit governments to postpone giving notice and holding a hearing until after the seizure. These extraordinary situations all have three things in common:

1. The seizure serves an important government interest;

2. There is a need for speed; and

3. A responsible government officer initiates the seizure under a carefully worded statute (92 S.Ct. at 2000).

The seizure of forfeitable property has traditionally been recognized as one of these "extraordinary situations." See Fell v. Armour, 355 F.Supp. 1319 at 1326 (MD TENN. 1972).

First, widespread drug abuse, particularly among children and teenagers, poses a very serious threat to the well-being of society. Drug trafficking organizations that cater to this abuse are composed of three elements: (1) drugs, (2) people, and (3) money and other assets. As long as the assets remain untouched, seized drugs and arrested people can always be quickly replaced. Depriving drug traffickers of their assets and operating tools is an essential step in crippling the drug traffic.

Second, forfeitable assets must be seized quickly. In the past, owners who became aware of the impending seizure and forfeiture of their property transferred title to a relative, attorney, or some innocent third party. The instinct to alienate property to avoid forfeiture is so common that a significant body of case law has developed within the area of forfeiture law on the effect of these "fraudulent" transfers. Defense counsel seem unusually quick to take assignments of forfeitable assets in consideration for their services. U.S. v. $22,640 in U.S. Currency, 615 F.2d 356 (5 Cir. 1980); U.S. v. Praetorius, 487 F.Supp. 13 (ED NY 1980); U.S. v. $11,580 in U.S. Currency, 454 F.Supp. 376 (MD FLA. 1978); U.S. v. One 1964 MG & $17,883 in U.S. Currency, 408 F.Supp. 1025 (WD WASH. 1976); U.S. v. One 1976 Chris-Craft Boat, 423 F.2d 1293 (5 Cir. 1970); Florida Dealers Growers Bank v. U.S., 279 F.2d 673 (5 Cir. 1960); State v. Crampton, 568

P.2d 680 (Ore. 1977).

The best way to avoid the bad faith depletion of forfeitable assets, the removal of forfeitable assets, and the fraudulent transfer of forfeitable assets is to seize them quickly without prior notice of the impending proceedings.

Third, seizures for forfeiture are initiated by government officers who are specifically trained in the law of forfeiture and the law of search and seizure. They are under a duty to insure that probable cause exists to forfeit property before they initiate a seizure.

For these reasons, the seizure of forfeitable property without prior notice or prior hearing is constitutionally acceptable. Aside from this reasoning, it would seem foolish to require notice and a hearing prior to seizing the fruits and instrumentalities of a crime, but not to require notice and a hearing before seizing (arresting) the criminal.

> "It would be grossly inconsistent . . . to allow a deprivation of personal liberty by an arrest based on probable cause and yet not allow a deprivation of property without a prior hearing when there is probable cause to believe that the owner has used the property in violation of a statute providing for seizure. Certainly due process does not afford greater prosecution for property than it does for personal liberty. Due process does not entitle an individual to a hearing prior to arrest based upon probable cause. Similarly, due process does not entitle a person, who has used his property as an instrument of crime, to a hearing prior to seizure pursuant to statutory authority. To hold that due process requires a prior hearing in this situation would be to ignore the delicate process of adjustment entrusted to us by the Constitution. The interests of the government and the well being of society demand that the officers of the law be able to seize property used as an instrument of crime in violation of a statute providing for seizure." U.S. v. One 1967 Porsche, 492 F.2d 893, 894 (1974).

PROCEEDINGS

A. FORFEITURE OCCURS AT THE MOMENT OF ILLEGAL USE

When a statute provides for forfeiture, the forfeiture takes place at the moment of illegal use, unless the statute provides otherwise. At that instant all rights and legal title to the property pass to the government. Seizure and formal proceedings simply confirm, or proclaim, the forfeiture that has already taken place. No third party can acquire a legally recognizable interest in the property after the illegal use.

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> **See § 11. Judicial Proceedings Generally. Subsection (n). Property vests in the state on the commission of the conduct giving rise to forfeiture together with proceeds of the property after that time. Any property or proceeds subsequently transferred is forfeited unless the transferee acquired the**

property in good faith, for value, and was not knowingly taking part in an illegal transaction and the transferee's interest is exempt.

See also § 15. Judicial Disposition of Property. Subsection (b). Title to the forfeited property interest and its proceeds is deemed to have vested in the state on the commission of the conduct giving rise to forfeiture under the MASFA.

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Authorities

Statute: 21 U.S.C. § 881(h) (Added by P.L.98-473, 10/12/84).

S.Ct: U.S. v. Stowell, 10 S.Ct. 244 (1890) (and cases cited therein).

11 Cir: U.S. v. Bissell, 866 F.2d 1343 (1989), reh'g denied, en banc, U.S. v. Caraballo-Scandoval, 874 F.2d 821 (1989), under "Attorney Assignments." infra.

10 Cir: Eggleson v. State of Colorado, 873 F.2d 242 (1989). (Forfeiture relates back to the time the illegal act is committed. Forfeiture occurs before value is received by a vendor, i.e. while the value is still held by the purchaser, and before a sale occurs. Thus, title vests in the United States through forfeiture before a state can establish title via state tax liens. Since a state never receives title in the property, a state cannot qualify as an innocent owner.) [This appears to be a misapplication of the innocent owner defense, as a state or even a foreign country could normally qualify as an innocent owner. The issue here is the priority of claims as between a federal forfeiture and a state tax lien; 7 Fifths Old Grand-Dad Whiskey v. U.S., 158 F.2d 34 (1946).

9 Cir: U.S. v. $5,644,540 in U.S. Currency, 799 F.2d 1357 (1986); Ivers v. U.S., 581 F.2d 1362 (1978); Simons v. U.S., 541 F.2d 1351 (1976); Stout v. Green, 131 F.2d 995 (1942); The Rethalulew, 51 F.2d 646 (1931).

8 Cir: U.S. v. Trotter, 889 F.2d 153 (1989), under "Competing Governments." infra; O'Reilly v. U.S., 486 F.2d 208 (1973).

7 Cir: U.S. v. $84,000 u.S. Currency, 717 F.2d 1090 (1983) cert. den. 105 S.Ct. 131 (1984).

6 Cir: U.S. v. Mills, 440 F.2d 647 (1971).

5 Cir: U.S. v. One 1967 Chris Craft 27-Foot Fiber Glass Boat, 423 F.2d 1293 (1970); Florida Dealers and Growers Bank v. U.S., 279 F.2d 673 (1960); Wingo v. U.S., 266 F.2d 421 (1959); The Sterling, 65 F.2d 439 (1933).

4 Cir:	In the Case of One 1985 Nissan 300 ZX, etc., 889 F.2d 1317 (1989), under "Claimants (RE Standing)." infra; In Re Metmor Financial, Inc., 819 F.2d 446(1987), under "Gain is Included." supra, p. 44.;] Weathersbee v. U.S., 263 F.2d 324 (1958); Harman v. U.S., 199 F.2d 34 (1952).
2 Cir:	U.S. v. Pacific Finance Corp., 110 F.2d 732 (1940).
1 Cir:	Strong v. U.S., 46 F.2d 257 (1931).
CO:	(Contra) Eggleston v. State of Colorado, 636 F.Supp. 1312 (1986).
SD FL:	U.S. v. One Condominium Apartment, 636 F.Supp. 457 (1986); U.S. v. One (1) 43-Foot Sailing Vessel, 405 F.Supp. 879 (1975).
SD GA:	Walker v. U.S., 438 F.Supp. 251 (1977).
HW:	U.S. v. Four (4) Pinball Machines, 429 F.Supp. 1002 (1977).
ED IL:	Mayo v. U.S., 413 F.Supp. 160 (1976).
ND IL:	U.S. v. One Parcel of Land, 614 F.Supp. 183 (1985).
MA:	The Harpoon II, 71 F.Supp. 1022 (1947).
ED NC:	U.S. v. One 1954 Model Ford Victoria, 135 F.Supp. 809 (1955).
NJ:	State of New Jersey v. Moriarity, 268 F.Supp. 546 (1967).
OR:	U.S. v. One Oldsmobile Sedan, 23 F.Supp. 323 (1938).
ED PA:	U.S. v. One 1951 Oldsmobile Sedan, 129 F.Supp. 321 (1955).
ED SC:	U.S. v. One 1957 Model Tudor Ford, 167 F.Supp. 864 (1958).
MD TN:	Fell v. Armour, 355 F.Supp. 1319 (1972).
WD TX:	U.S. v. Various Pieces of Real Estate, 571 F.Supp. 723 (1983).
CA:	People v. Grant, 127 P.2d 19 (App. 1942).
NJ:	Farley v. $168,400.97, 259 A.2d 201 (1969).
OR:	State v. Crampton, 568 P.2d 680 (App. 1977).
TX:	State v. Cherry, 387 S.W.2d 149 (App. 1965).

Discussion

When does the ownership (title) of forfeitable property pass to the government? Does it pass (vest) at the moment of illegal use? Does it pass at the time of seizure? Or does it pass when a formal judgment, or declaration of forfeiture is issued by the authorities? This question may seem overly academic, but the answer has significant consequences.

Under the old common law of England, the answer depended upon the character of the property. Real property, such as land and buildings, was forfeited at the moment of its illegal use, or at the moment of the criminal act.

At that instant all rights and legal title to the property passed to the government.

Personal property, on the other hand, was not forfeited until its owner was convicted, or a judgment of forfeiture was obtained. Ownership of cash, conveyances, equipment and other personal property did not pass to the government until formal proceedings against the owner and the property were completed.

> The forfeiture of lands has relation to the time of the fact committed, so as to avoid all subsequent sales and encumbrances; but the forfeiture of goods and chattels has no relation backwards; so that those only which a man has at the time of the conviction shall be forfeited.
>
> Therefore a traitor or felon may bona fide sell any of his chattels real or personal, for the sustenance of himself and family between the fact and conviction; for personal property is of so fluctuating a nature, that it passes through many hands in a short time; and no buyer could be safe, if he were liable to return the goods which he had fairly bought, provided any of the prior vendors have committed a treason or a felony. [4 Blackstone Commentaries on the Laws of England, 388 (1765)]

The old common law rules appear in both state and United States Supreme Court decisions. See Farley v. $168,400.97, 259 A.2d 201, at 204 (NJ 1969) and U.S. v. Stowell, 10 S.Ct. 244, at 248 (1890). Today, there is no "common law" forfeiture; there can be no forfeiture in the United States unless it is specifically authorized by some statute. As a result, Congress and state legislatures are free to decide when ownership passes to the government under any particular forfeiture statute.

> Where a forfeiture is given by a statute, the rule of the common law may be dispensed with, and the thing forfeited may either vest immediately, or on the performance of some particular act, as shall be the will of the legislature. This must depend upon the construction of the statute. [U.S. v. Grundy, 3 Cranch (7 U.S.) 337, 351, 2 L.Ed. 459 (1806)(Chief Justice John Marshall)].

In the early American forfeiture statutes neither Congress nor state legislatures, bothered to specify exactly when forfeiture was to take place. As a result, the United States Supreme Court established a presumption that the forfeiture of both real and personal property takes place at the very moment of their illegal use, at the very moment of the criminal act, unless the forfeiture statute in question specifically states otherwise. US; v. Grundy, 3 Cranch (7 U.S.) 337, 2 L.Ed. 459 (1806); U.S. v. 1960 Bags of Coffee, 8 Cranch (12 U.S.) 398, 3 L.Ed. 602 (1814);

U.S. v. One Hundred Barrels Distilled Spirits, 81 U.S. (14 Wall) 44, 20 L.Ed. 815 (1872); U.S. v. Stowell, 133 U.S. t, 10 S.Ct. 244, 33 L.Ed. 555 (1890).

> . . . it must be admitted . . . beyond all doubt, that the forfeiture becomes absolute at the commission of the prohibited acts, and that the title from that moment vests in the United States in all cases when the statute in terms denounces the forfeiture of the property as a penalty for a violation of law, without giving any alternative remedy, or prescribing any substitute for the forfeiture, or allowing any exceptions to its enforcement, or employing in the enactment any language showing a different intent. . . . [U.S. v. One Hundred Barrels Distilled Spirits, 81 U.S. at 56-57, 20 L.Ed. 816-817]

This presumption is now uniformly followed in every state and federal jurisdiction. None of the following statutes specifies the time when forfeiture is to take place. Therefore, title to property forfeitable under these laws passes to the government at the moment of illegal use, at the moment of the criminal act:

> 21 U.S.C. S 881, The civil forfeiture section of the federal Controlled Substances Act.
>
> U.C.S.A. Sec. 505, The civil forfeiture section of the state Uniform Controlled Substances Act.
>
> 21 U.S.C. § 848, § 853, The criminal forfeiture sections of federal law relating to Continuing Criminal Drug Enterprises and felony forfeitures.
>
> 18 U.S.C. § 1963, The criminal forfeiture section of the Racketeer Influenced and Corrupt organizations Act (RICO).

Seizure and formal proceedings under these statutes do not change the time of forfeiture. Formal proceedings simply proclaim, or confirm, the forfeiture which has already taken place. They provide owners with an opportunity to be heard, as required by the Due Process clauses of the Fifth and Fourteenth Amendments. They memorialize, or provide a public record, of the transfer of ownership to the government. But they do not affect the time that forfeiture occurs.

Because forfeiture takes place at the moment of illegal use, no third party can acquire a legally recognizable interest in the property after the activity that subjects it to forfeiture.

1. Attorney Assignments

As noted earlier, on page 158 of this Guide, defense attorneys seem prone to taking "assignments" of their client's interests in seized property as payment for their services. If the seized property is forfeitable, these attorney-assignments are worthless. Ownership of forfeitable property passes to the government at the moment of illegal use. Thereafter, the owner of record no longer has any legal rights left to assign. An attorney who takes an assignment of forfeitable property takes nothing by the assignment. The case law on forfeiture makes this quite clear. See U.S. v. One Parcel of Land, 614 F.Supp. 183 (ED IL 1985).

While some attorneys [might not be familiar with the case law on forfeitures, all attorneys taking assignments of property lawfully held by the federal government should be familiar with 31 U.S.C. § 3727 (§ 203 before 1982), the Assignment of Claims Act. This statute bars the assignment of any interest in property being held by the federal government. It makes no difference whether the property is held as evidence, or for forfeiture, or for tax purposes, or for safekeeping. Interests in property in the possession of the United States Government cannot generally be assigned. See, for example, U.S. v. Praetorius, 487 F.Supp. 13 (ED NY 1980).

However, there is a great deal of inconsistency in the Federal Courts regarding the assignment of property subject to civil forfeiture. In the case of Merger v. Bell, 510 F.Supp. 9 (ME 1980), the court held that the Assignment of Claims Act (cited in the previous paragraph) was not complied with, and hence, the attempted assignment of drug money to an attorney was a nullity. This decision was affirmed by the First Circuit Court of Appeals on 3/6/81 in an unreported decision, # 80–1478. For contrary views: see U.S. v. $13,000 in U.S. Currency, 733 F.2d 581 (8 Cir. 1984) which holds the Assignment of Claims Act not applicable since the matter involved an "interest in property adverse to the interest held by the United States," rather than a "claim against the United states"; U.S. v. Currency Totalling $48,318.08, 609 F.2d 210 (5 Cir. 1980) where assignment was held possible, but notice of assignment was held defective; and U.S. v. $22,640 in U.S. Currency, 615 F.Supp. 356 (5 Cir. 1980) where notice of assignment was not made to the Government by the attorneys until after a default judgment on the currency was obtained.

For a case raising a collateral matter related to the civil forfeiture/assignment issue, see U.S. v. $149,345 in U.S. Currency, 747 F.2d 1278 (11 Cir. 1984) where an attorney was not successful in claiming an interest in seized currency while declining to disclose the name of the client based on attorney/client privilege; similarly see In re Grand Jury Subpoena, etc. et al., 605 F.Supp. 839 (SD NY 1985), which held the 5th and 6th Amendments do not bar disclosure of attorneys' fees in the context of a possible criminal forfeiture action.

However, the cases are much less clear in a criminal forfeiture when all of a defendant's assets have been seized under 21 U.S.C. § 853, and counsel then obtained to defend against the 21 U.S.C. § 848 and § 853 matters. A case holding that legitimate attorneys' fees are exempt from such an § 853 forfeiture is U.S. v. Reckmeyer, 631 F.Supp. 1191 (ED VA 1986). This decision refers on page 1196 to the Justice Department Guidelines on Forfeiture of Attorneys' Fees, 38 Crim.L.Rep. (BNA) 3001, 3002 (10/2/85). For a case holding attorneys' fees already paid by a CCE defendant are not forfeitable, see U.S. v. Bassett, 632 F.Supp 1308 (MD 1986). Cases excepting legitimate attorneys' fees from RICO forfeiture under § 1963, and U.S. v. Rogers, 602 F.Supp. 1332, (CO 1985) and U.S. v. Badalamenti, 614 F.Supp. 194 (SD NY 1985).

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See MASFA § 11. Judicial Proceedings Generally. Subsection (e). A person charged with a criminal offense may apply for the release of seized property that is necessary for the defense of the person's criminal charge. The court holds a probable cause hearing if the applicant establishes that:

(1) he had no opportunity to participate in a previous adversarial judicial probable cause determination;

(2) he has no access to other monies adequate for the

payment of criminal defense counsel; and
(3) the interest in property to be released is not subject to any claim other than the forfeiture.

If the court finds no probable cause, the property is released and exempt from forfeiture if it has been paid for criminal defense services actually rendered.

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Authorities

S. Ct: Caplin and Drysdale, Chartered v. U.S.; __U.S.__(1989); 109; 109 S.Ct. 2646; (Title 21 U.S.C. Sec. 848(e), regarding a continuing criminal enterprise violation, does not grant a district court the equitable discretion to allow a defendant to withhold assets to any bona fide attorney's fees. Also, Sec. 853(e) does not "immunize" non-restrained assets used for attorney's fees from subsequent forfeiture under Sec. 853 (e), concerning recapture of forfeiture assets transferred to third parties.) (Sec. 853 does not unduly burden a defendant's Sixth Amendment right to retain counsel. A defendant has no Sixth Amendment right to spend another's money, i.e. the Government's money, for attorney fees, even if those funds are the only way that the defendant will be able to retain his counsel of choice. The Sixth Amendment right to counsel does not mean an absolute right to counsel of choice; a competent attorney can always be appointed by the court for indigent defendants. As stated in Justice Brennan's concurrence, p. 2655, citing the Court of Appeals, "The modern Jean Valjean must be satisfied with the appointed counsel." Sec. 853 does not violate a defendant's Fifth Amendment right to due process. However, such a right may be violated in specific cases of prosecutorial misconduct, as for example, in certain motions to disqualify defense counsel).

S. Ct. U.S. v. Monsanto; ___U.S.___ (1989); 109 S. Ct. 2657; ___L. Ed. 2d ___. The forfeiture statute under 21 U.S.C. Sec. 853 constitutionally mandates that a District Court to enter a pretrial order freezing assets in a defendant's possession, even where the defendant wants to use those assets to pay an attorney. Since Sec. 853(a) does not specifically exclude assets that could be used to pay an attorney from its definition of forfeitable property, such assets are forfeitable. As the majority states, p. 2663, "The legislative history and congressional debates are similarly silent on the use of forfeitable assets to pay stockbroker's fees, laundry bills, or country club membership; no one could credibly argue that, as a result, assets to be used for these purposes are similarly exempt from the statute's definition of forfeitable property. The forfeiture of assets intended to pay attorney's fees is constitutional under both the Fifth and Sixth Amendments.)

2 Cir: In Re Grand Jury Subpoena, etc., et al.; Payden v. U.S., 767 F.ed 26 (1985); also see 775 F.2d 499 (1985), regarding denial of costs under Equal Access to Justice Act, 28, U.S.C. Sec. 241(a). The District Court case is cited in the Guide on p. 165. The Court of Appeals reversed the District

Court on the grounds of abuse of the grand jury process, but ignored the Sixth Amendment right to counsel argument.)

4 Cir: U.S. v. $10,694 in U.S. Currency, 828 F.2d 233 (1987), under "All Proceeds Traceable to Illicit Drug Exchanges are Subject to Federal Forfeiture." supra.

10 Cir: U.S. Nichols, 841 F.2d 1485 (1988). The plain language of Sec. 853(a) includes assets that are paid to attorneys within the definition of forfeitable property, and imposes the same conditions on attorneys as it does on any other third party seeking to defeat a forfeiture action. An exemption for attorney's as it does on any other third party seeking to defeat a forfeiture action. An exemption for attorney's fees would undermine the congressional goal of increasing the forfeiture of criminally obtained assets. The Sixth Amendment does not require an exemption for attorneys fees because the right to choice of counsel is not absolute. The right to counsel does not always mean the right to counsel of choice. Counsel can always be appointed. [As the court notes, the Department of Justice has guidelines regarding forfeiture of attorney fees. The guidelines are intended to prevent the harassment of any particular attorney.]

11 Cir: U.S. v. Bissell, 866 F.2d 1343 (1989); reh'g denied, en banc, U.S. Caraballo-Scandoval, 874 F.2d (1989), under Attorney Assignments." An attorney retained to defend of whose entire assets are alleged to be forfeitable may go uncompensated. Under the relation back theory, the government asserts a significant claim to the defendant's assets before trial. The pretrial restrain provisions in 21 U.S.C. Sec. 853 protect the government's claim by preserving those assets for possible forfeiture. As a result of the relation back theory, the defendants never owned the seized assets. All assets belonged to the government from the time they were used in or derived from criminal activities. The theory does not mean that defendants are indebted to the government such that assets seized should be applied to that indebtedness. Defendants are thus holding assets belonging to the government over which they had no more right than a thief. (Seizure of all of defendant's assets does not violate the Sixth Amendment. The Sixth Amendment requires competent representation, as by appointed counsel, but not right to counsel of choice. Only criminal defendants with legitimate, uncontested assets have the right to counsel of choice.) [The defendants did not argue that the government restrained nonforfeitable assets. They argued that sufficient funds should be exempt from seizure and formal forfeiture to pay for counsel of choice and other litigation expenses. The Department of Justice must approve seizure of attorney fees.] (The Fifth Amendment right to due process requires a post-seizure hearing on the merits which may be delayed until actual trial. However, the delay must meet the balancing test of Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed. 2d 101 (1972). Barker involved the Sixth Amendment right to a speedy trial. [The Barker test is discussed under U.S. v. $19,120.00 in U.S. Currency, 700 F. Supp. 33 (1987)]. The Speedy Trial Act, 18 U.S.C. Sec. 3161 et seq., ensures that most federal criminal proceedings will commence quickly.); U.S. v. Four Parcels of Real

Property on Lake Forest Circle, etc., 870 F.2d 586 (1989), under "Intervenors (RE Standing)." infra.

ED LA: U.S. v. A Parcel of Real Property, etc., 650 F.Supp. 1534 (1987), under "All Facilitation Moneys Significantly Connected to Any Drug Offense are Subject to Federal Forfeiture." supra.

2. Fraudulent Transfers

Faced with impending seizure and forfeiture, violators often transfer forfeitable property to relatives or friends in hopes of avoiding forfeiture. In most instances the new "owner" pays nothing and has knowledge of the criminal activities of the violator.

Because forfeiture occurs at the moment of illegal use, the "fraudulent transfers" are ineffective. By the time the attempt is made to transfer the property, ownership has already passed to the government. See U.S. v. One 1967 Chris Craft 27-Foot Fiber Glass Boat, 423 F.2d 1293 (5 Cir. 1970); Weathersbee v. U.S., 263 F.2d 324 (4 Cir. 1958); and DeBonis v. U.S., 103 F.Supp. 123 (WD PA 1952).

3. Bona Fide Purchasers For Value

Like all other transferees, innocent purchasers cannot generally take a legal interest in forfeitable property. Even though they have no knowledge that the property is forfeitable, and they pay for it in an "arms length" transaction, they do not acquire ownership to the property. They are in the same unfortunate situation as people who unwittingly buy stolen property. 77 C.J.S. Sales Sec. 295(e) (1952). Simons v. U.S., 541 F.2d 1351 (9 Cir. 1976); Florida Dealers and Growers Bank v. U.S., 279 F.2d 673 (5 Cir. 1960); Wingo v. U.S., 266 F.2d 421 (3 Cir. 1959); 7 Fifths Old Grand Dad Whiskey v. U.S., 158 F.2d 34 (10 Cir. 1946); U.S. v. One 1957 Model Tudor Ford, 167 F.Supp. 864 (ED SC 1958); U.S. v. One 1954 Model Ford Victoria, 135 F.Supp. 809 (ED NC 1955); State v. Cherry, 387 S.W.2d 149 (TX App. 1965); and see Weathersbee v. U.S., 263 F.2d 323 (4 Cir. 1958).

> By the settled doctrine of this court, whenever a statute enacts that upon the commission of a certain act specific property used in or connected with that act shall be forfeited, the forfeiture takes effect immediately . . .; and the condemnation, when obtained, relates back to that times and avoids all intermediate sales and alienations even to purchasers in good faith. [U.S. v. Stowell, 10 S.Ct. 244, 247 (1890) (emphasis not in original)]

Because of the injustice of this rule, bona fide purchasers for value (BFP's) of forfeitable property can petition the executive branch for a pardon (remission) of the forfeiture. Once granted, they are, in effect, declared to be the new owner by order of the executive branch of government. Compare Florida Dealers and Growers Bank v.U.S., 279 F.2d 673 (5 Cir. 1960) with U.S. v. One 1967 Chris Craft 27-Foot Fiber Glass Boat, 423 F.2d 1293 (5 air. 1970).

> By its nature, the remission statute assumes the validity of the forfeiture but also assumes that outstanding interests in property and bona fide claims to property are not snuffed out by the . (property's) . . . guilt. They continue viable, at least to the extent of permitting innocent persons to ask that the sovereign temper the strictness of the rule of forfeiture when there are equitable grounds for relief. [Florida Dealers and Growers Bank, cited above, at 677]

In some instances, forfeiture statutes contain specific sections protecting property purchased by BFP's from forfeiture, provided the BFP can prove his innocence in acquiring the property. See 21 U.S.C. § 881(a) (6), the Currency and Proceeds section of the federal drug forfeiture statute.

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> **See MASFA §11. Judicial Proceedings Generally. Subsection (h). Any property transferred to a person after an order of forfeiture remains forfeitable unless the transferee proves that the transferee acquired the property in good faith, for value, and was not knowingly taking part in an illegal transaction, and the transferee's interest is exempt. See also § 5. Exemptions.**

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B. POST–SEIZURE NOTICE AND HEARING ARE REQUIRED

In forfeiture cases, the constitutional right of owners to notice and a hearing is simply postponed, not erased. Although pre–seizure notice or a hearing are not required, post–seizure notice and an opportunity to be heard must be provided at a meaningful time and in a meaningful way.

Authorities

Statute:	19 U.S.C. § 1602–1612
S.Ct:	Robinson v. Hanrahan, 93 S.Ct. 30 (1972).
9 Cir:	U.S. v. One 1971 BMW 4–Door Sedan, 652 F.2d 817 (1981) (Notice to residence & advertisement with owner in jail held valid); Wiren v. Eide, 542 F.2d 757 (1976).
3 Cir:	Menkarell v. Bureau of Narcotics, 463 F.2d 88 (1972).
2 Cir:	Lee v. Thornton, 538 F.2d 27 (1976).
CD CA:	U.S. v. Eight (8) Rhodesian Stone Statues, 449 F.Supp 193 (1978).

SD FL: U.S. v. One (1) 1950 Burger Yacht, 395 F.Supp. 802 (1975).

ND MS: Holladay v. Roberts, 425 F.Supp. 61 (1977).

ED MO: One 1964 Cadillac Sedan DeVille 4-Door v. U.S., 378 F.Supp. 416 (1974).

SD NY: Jaekel v. U.S., 304 F.Supp. 993 (1969).

MD TN: Fell v. Armour, 355 F.Supp. 1319 (1972).

AL: Kirkland v. State, 340 So.2d 1121 (App. 1976).

AZ: Matter of 1974 Chev. Camaro, 589 P.2d 475 (App. 1978); One Cessna 206 Aircraft, Etc. v. Saathoff, 577 P.2d 250 (1978); State ex rel Berger v. McCarthy, 548 P.2d 1158 (1976).

CA: People v. One 1941 Chev. Coupe, 231 P.2d 832 (1951).

GA: Taylor v. State Bank of Jacksonville, 165 S.E.2d 920 (App. 1969).

IL: People v. One 1965 Oldsmobile, 284 N.E.2d 646 (1972).

MA: Com. v. One 1977 Pontiac Grand Prix Auto, 378 N.F.2d 69 (App. 1978).

MI: People v. One 1973 Pontiac Auto, 269 N.W.2d 537 (App. 1978).

NE: State v. One 1970 2-Door Sedan Rambler, 215 N.W.2d 849 (1974).

NJ: Kutner Buick, Inc. v. Strelecki, 267 A.2d 549 (Superior 1970).

NM: Matter of one Cessna Aircraft, 559 P.2d 417 (1977).

SD: State v. One Pontiac Auto, 270 N.W.2d 362 (1978); State v. Miller, 248 N.W.2d 377 (1976).

TX: State v. Cherry, 387 S.W.2d 149 (App. 1965); State v. Richards, 301 S.W.2d 597 (1957).

WA: State v. One 1972 Mercury Capri, 537 P.2d 763 (1975); City of Everett v. Slade, 515 P.2d 1295 (1 973).

Discussion

The Due Process clauses of the United States Constitution (in the 5th and 14th Amendments) require that a person be given notice and an opportunity to be heard before he is deprived of his property, or of any important interests. Memphis Light, Gas & Water Div. v. Craft, 98 S.Ct. 1554 (1978)(loss of utilities); Goss v. Lopez, 95 S.Ct. 729 (1975)(suspension from public school); Fuentes v. Shevin, 92 S.Ct. 1983 (1972)(repossession of furniture); Bell v. Burson,

91 S.Ct. 1586 (1971)(loss of driver's license); Goldberg v. Kelly, 90 S.Ct. 1011 (1970)(loss of welfare benefits); Sniadach v. Family Finance Corp., 89 S.Ct. 1820 (1969)(garnishment of wages).

In forfeiture cases no preseizure notice of hearing need be given; but post-seizure notice and hearing are absolutely required.

1. Notice

The right to a hearing is meaningless without notice of the proceedings. Walker v. Hutchinson, 77 S.Ct. 200, 202 (1956).

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. [Mullane v. Central Hanover Bank & Trust Co., 70 S.Ct. 652, 657 (1950)].

Authorities

ND GA: In the Matter of $89,000, Plus or Minus, etc., 691 F.Supp. 1411 (1988). (Petitioners filed a motion under Rule 41(e) of the Federal Rules of Criminal Procedure alleging insufficiency of notice. They never filed a claim in the civil forfeiture action. Notice of pending forfeiture proceeding was attempted in three ways. First, DEA mailed notice to the addresses the petitioners gave the DEA agents who seized the property. Second, DEA mailed notice to the jail where petitioners were housed after their arrest. Third, DEA published notice in *USA Today* for three consecutive weeks. Petitioners provided a fictitious address to the seizing DEA agents. Petitioners never received notice in the jail. Also, the cognizant DEA agent received a letter from petitioner's counsel stating his availability to accept service of process. However, DEA never mailed notice to petitioners' attorney. The court stated that there is no suggestion of criminal proceedings, as in a civil forfeiture action, a Criminal Rule 41(e) motion is construed as a suit in equity rather than one under the Federal Rules of Criminal Procedure. The court then utilized a four-prong, nonexclusive test to determine the applicability of equity jurisdiction. The first factor is whether or not the government agents callously disregarded petitioner's constitutional rights. The second factor is whether or not the petitioner has an individual interest in and need for the seized property. The third factor is whether or not the petitioner would be irreparably injured by forfeiture of the property. The final factor is whether or not the petitioner has an adequate remedy at law. A defense to invoking equity jurisdiction is the doctrine of unclean hands, meaning that "he who comes into equity must come with clean hands." Providing DEA agents with false information constitutes unclean hands. As a result, the court declined to exercise equity jurisdiction.)

a. Method of Delivery

Several methods of delivering notice to interested parties may be acceptable, depending upon the facts of the case. The Constitution requires a method of delivery that is most likely to reach all interested parties. People v. One 1941 Chrysler 6 Touring Sedan, 180 P.2d 780 (CA App. 1947).

1) Mere Seizure Is Not Notice

The mere seizure of property is not considered acceptable notice. Seizure certainly informs an owner that some government action is being taken against his property, but it does not give him the information he needs to contest the seizure in a hearing, such as who seized it, under what law, for what activity, etc. Windsor v. McVeigh, 93 U.S. 274 (1876); U.S. v. One Parcel of Real Property, 763 F.2d 181 (5 Cir. 1985); Fell v. Armour, 355 F.Supp. 1319, 1327 (MD TN 1972); and see Scott v. McNeil, 14 S.Ct. 1108 (1894); (f The Mary, 9 Cranch (U.S.) 126, 3 L.Ed 678 (1815).

2) Oral Notice Is Inadequate

Given the importance of notice, the amount of information which it must contain, and the inability of most persons to remember new facts, some form of written notice seems required. Verbally informing someone of a seizure and pending forfeiture proceedings is not constitutionally acceptable. Jaekel v. U.S., 304 F.Supp. 993 (SD NY 1969).

3) Publication of Notice

Publication of notice in a newspaper of general circulation is acceptable only as to persons who are missing or unknown. Mullane, cited above. Although the likelihood of their being informed by publication is very remote, "the world must move on. . . ." Proceedings cannot be held up indefinitely until all missing or unknown parties are found. Case of Broderick's Will, 21 Wall (U.S.) 503, 509 (1874).

When permitted, courts generally prefer and state statutes often require that publication be made in the county where the seizure took place. See Menkarell v. Bureau of Narcotics, 463 F.2d 88 (3 Cir. 1972). But the Constitutional requirement of due process seems flexible enough to permit publication in other counties within the same judicial jurisdiction. Security Bank v. California, 44 S.Ct. 108, 111 (1923).

Notice by publication is constitutionally inadequate as to interested persons whose names and addresses are known or are easily obtained. Mullane, cited above; Robinson v. Hanrahan, 93 S.Ct. 30 (1972); Menkarell, cited above; Holladay v. Roberts, 425 F.Supp. 61 (ND MS 1977); Fell v. Armour, 355 F.Supp. 1319 (MD TN 1972); Jaekel, cited above. As to known parties, some form of written, personal notice is required, such as a letter.

4) Registered or Certified Mail

"However it may have been in former times, the mails today are recognized as an efficient and inexpensive means of communication." Mullane v. Central Hanover Bank & Trust Co., 70 S.Ct. 652, 660 (1950). As such, notice given in the form of a letter is constitutionally acceptable. Failure to send notice by mail when address is known to seizing. agency voids forfeiture,

regardless of publication. Winters v. Working, 510 F.Supp 14 (WD TX 1980).

Actual receipt of the notice need not be shown. Tyler v. Judges of the Court of Registration, 55 N.E. 812, 814 (MA 1900). But, a reasonable effort must be made to determine the "true" address of interested parties. For example, mailing notice to an owner's home address when it is easy to learn that he is in prison is not an acceptable method of notice. Robinson v. Hanrahan, 93 S.Ct. 30 (1972). Contra, see U.S. v. One 1971 BMW 4-Door Sedan, 652 F.2d 817 (9 Cir. 1981) where DEC system of registered mail to residence of jailed owner was held reasonable. Similarly, if notice is mailed to an owner of record, and he responds by saying he sold the property to a third party, a reasonable effort must be made to give notice to the newly identified owner. One Cessna 206 Aircraft, Etc. v. Saathoff, 577 P.2d 250 (AZ 1978).

Authorities

1 Cir: U.S. v. Mosquera, 845 F.2d 1122 (1988). (Correspondence from claimant's spouse to the government indicating receipt of notice to the spouse does not necessarily serve as notice to the claimant. If notice is inadequate, then claimant can file an action under 28 U.S.C. Sec. 1331. for return of forfeited property).

2 Cir: Weignor v. City of New York, 852 F.2d 646 (1988); cert. denied, ___U.S.___ (1989). (The government may use any reasonable means of notice consistent with an intention to actually inform the claimant. Thus, regular, first-class mail plus publicaiton were sufficient notice even though claimant denied having received notice). [DEA uses certified mail and publication, which arguably goes beyond the notice constitutionaliaty requirements.]

7 Cir: Eshweiler v. U.S., 877 F.2d 634 (1989). (In a case involving a jeopardy assessment by the IRS under 26 U.S.C. Sec. 6861(a), the phrase "last known address" means the address where the government reasonably believes the taxpayer wished be reached when notice was sent. The IRS need only exercise reasonable diligence in attempting to determine this address).

5) Personal Service

Personal service of a summons and complaint upon interested parties advising them of a forfeiture action undoubtedly satisfies the constitutional requirement of notice. Personal service is a classic form of notice which is always adequate in any type of proceedings. Mullane, cited above, at 657; see Holladay v. Roberts, 425 F.Supp. 61, 69 (ND MS 1977).

6) Actual Notice

Persons who have actual notice of forfeiture proceedings, who have the opportunity to participate, and who take full advantage of that opportunity, should not be permitted to attack the adequacy of the method of which they were notified. The Merino, 9 Wheat (U.S.) 391, 6 L.Ed. 118 (1824), Wiren v. Eide, 542 F.2d 757, 763 (9 Cir. 1976); Com. v. One 1977 Pontiac Grand Prix Auto, 378 N.E.2d 69 (MA App. 1978); State v. Cherry, 387 S.W.2d 149 (TX App. 1965).

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See MASFA § 8. Commencement of Forfeiture Proceedings, Property Release Requirements. Subsection (a)(3). Notice shall be given:

(1) by personal service or certified mail, return receipt requested, if the owner's or interest holder's name and current address are known;
(2) by certified mail, return receipt requested to a name and address of record, if the owner's or interest holder's name and address are unknown; or
(3) by publication if the owner's or interest holder's name and address are unknown and not on record.

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b. Content

Due process does not require a notice to be in any special format. The content is what is critical. "The contents of the notice must be such as to insure that the owner of the seized . . . [property] . . . be afforded the constitutionally required meaningful opportunity to be heard." Fell v. Armour, 355 F.Supp. 1319, 1329 (MD TN 1972). In general, the following information is required.

1) Description of Seized Property

The seized property must be described in such detail that a person can tell whether it is his; otherwise, the notice is inadequate. Boswell's Lessee v. Otis, 9 How (U.S.) 336 (1850). And see U.S. v. Eight (8) Rhodesian Stone Statues, 449 F.Supp. 193 (CD CA 1978).

Persons having an interest in the property need not be identified in the notice, Castillo v. McConnico, 18 S.Ct. 229 (1898), unless their names are reasonably need to identify the object.

2) Identity of Responsible Official(s)

Interested parties have a right to know who seized their property (what agency of government) and who they must deal with to try to get it back (officials in the decision--making process). U.S. v. Eight (8) Rhodesian Stone Statues, 449 F.Supp. 193 (CD CA 1978).

3) Time and Place of Seizure

The time and place of seizure ,must be specified, because it affects where and when the forfeiture proceedings will take place. Parties need this information to prepare. U.S. v. Eight (8) Rhodesian Stone Statues, cited above.

4) Citations of Legal Authority

A statement of the legal authority under which the seizure was made is also required. Holladay v. Roberts, 425 F.Supp. 61 (ND MS 1977); Fell v. Armour, 355 F.Supp. 1319 (MD TN 1972).

In a democracy, it is a cardinal principle that when the government undertakes action affecting the rights of a citizen to liberty or property, it must announce the authority under which it is acting. For example, one who is arrested has the right to know the charge; one who is immediately deprived of possession of his property by a declaration of taking in a condemnation proceeding is entitled to know the legal authority for the condemnation. 40 U.S.C. Sec. 258a. And even a traffic or parking ticket contains a statement of the ordinance or law alleged to have been violated. To know the legal basis for the government's action is the indispensable predicate for a citizen to exercise his right to contest the validity of that action. Cf. Groppi v. Leslie, 404 U.S. 496, 502, 92 S.Ct. 582, 30 L.Ed.2d 632 (1972). In the context of a forfeiture, the citizen can neither adequately prepare his petition for remission nor exercise other legal remedies which may be available to him unless he is aware of what law he is alleged to have broken. [U.S. v. Eight cited above, at 202 (8) Rhodesian Stone Statues.

5) Available Procedures

Interested parties must be provided with an opportunity to be heard. Therefore, the procedures for challenging the seizure, and for seeking relief, must be identified in the notice. Menkarell v. Bureau of Narcotics, 463 F.2d 88 (3 Cir. 1972); U.S. v. Eight (8) Rhodesian Stone Statues, Holladay v. Roberts, and Fell v. Armour, cited above.

6) Appraised Value

If the proceedings are in any way dependent upon the value of the seized property, then the government's appraisal of value must be in the notice. Menkarell v. Bureau of Narcotics, cited above.

7) Time Limits

Any limitations placed upon the time periods allowable in which to respond, or to challenge the seizure, or to seek relief, must be contained in the notice. Holladay v. Roberts, and Fell v. Armour, cited above.

8) Penalty for Inaction

The penalty for failure to file within the time limits must also be stated. Holladay v. Roberts, and Fell v. Armour, cited above.

There may be minor errors in the notice, as long as the resulting notice adequately advised persons of these basic elements. Grannis v. Ordean, 34 S.Ct. 779 (1914).

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See MASFA Section 8(a)(4). Notice of pending forfeiture shall include a description, the date and place of seizure, the conduct giving rise to forfeiture, and procedural rights.

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2. Some Kind of "Hearing"

In the case of Calero-Toledo v. Pearson Yacht Leasing Co., 94 S.Ct. 2080 (1974), the United States Supreme Court held that the constitutional right to notice and a hearing in forfeiture actions could be postponed until after seizure.

It did not hold it could be totally eliminated. Just a few months after the Calero decision, Mr. Justice White summed it up in Wolf v. McDonnell, 94 S.Ct. 2963, 2975 (1974):

> The Court has consistently held that some kind of hearing is required at some time before a person is finally deprived of his property interests.

Although the need for post-seizure notice and hearing in forfeiture cases is clear, a question remains as to what kind of hearing is required--a full trial, a personal appearance before the decision maker, a mere opportunity to submit written evidence, or simply a chance for a claimant to tell his side of the story in writing or by phone? The term "hearing" is a flexible term; it does not necessarily mean a full-scale judicial-type trial. Memphis Light, Gas & Water Div. v. Craft, 98 S.Ct. 1554 (1978); Mathews v. Eldridge, 96 S.Ct. 893 (1976); Goss v. Lopez, 95 S.Ct. 729 (1975); and see Friendly, "Some Kind of Hearing," 123 U.Pa.L.Rev. 1267-1317 (1975).

Judge Henry J. Friendly of the United States Court of Appeals for the Second Circuit has identified eleven (11) possible "building blocks" of a hearing (123 U.Pa.L.Rev. at 1279):

1) An unbiased decision maker;

2) Notice of the proposed action and the government's reasons for it;

3) An opportunity to explain why the action should not be taken;

4) A right to call witnesses;

5) A right to know evidence against you;

6) A right to have the decision based only on the evidence presented;

7) A right to be represented by counsel;

8) The making of a record;

9) A statement of reasons for the decision;

10) Public attendance; and

11) Potential court review.

Of course, not all, not even most of these elements are required in every case. In Mathews v. Eldridge, cited above, the Supreme Court recognized three factors to consider, or "balance," in determining which of the hearing safeguards should be imposed:

1) The importance of the private rights affected by the government's action;

2) The risk of mistake associated with the form of hearing used; and

3) The burden on the government of imposing additional hearing requirements.

Because there are three distinct types of forfeiture proceedings (Summary, Judicial, and Administrative), these factors must be applied to each.

Summary forfeiture proceedings are used exclusively for property characterized as contraband per se, such as marijuana, heroin, molotov cocktails, moonshining stills, and so forth. Summary forfeiture is really no "proceedings" at all; none of the eleven (11) hearing safeguards are granted. No notice is given, beyond the mere fact of seizure. No opportunity is provided to challenge the destruction of such property.

Despite the total lack of any notice or hearing, attacks against Summary forfeiture proceedings are rare. Very few people are willing to complain that "their" heroin, "their" bomb, or "their" sawed-off shotgun is being illegally held. The likelihood of successfully challenging Summary forfeiture seems remote. First, the right to possess contraband per se is nonexistent. Second, the risk of mistakenly destroying contraband per se is small. Third, the burden on the government of conducting hearings before destroying contraband per se, particularly the large number of weapons and drugs seized every day, would be great. Therefore, it seems certain that no notice or hearing is required under the Constitution. See Moore v. Brett, 137 P.2d 539 (OKL. 1943).

Judicial forfeiture proceedings consist of a full civil trial. They contain all the eleven (11) safeguards identified by Judge Friendly as elements of a hearing. Therefore, it seems certain that Judicial forfeiture proceedings satisfy the due process right to notice and a hearing.

The debate over the right to a hearing in forfeiture cases centers on so-called "Administrative" forfeiture proceedings. See Clark, Penalties & Forfeitures, 60 Minn. L.R. 379 at 49[illegible] (1976). Because a discussion of this issue depends upon an understanding of the details of th[illegible]e proceedings, it is reserved for the end of the Administrative forfeiture section of this chapt[illegible].

See also U.S. v. Bissel, 866 F.2d 1343 (1989), reh'g denied, en banc, U.S. v. Caraballo-Scandoval, 874 F.2d 821 (11th Cir.) (1989), under "Attorney Assignments" supra.

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See MASFA § 11. Judicial Proceedings Generally.

See also § 12. *In Rem* Proceedings and § 13. *In Personam* Proceedings.

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C. UNREASONABLE DELAY IN STARTING PROCEEDINGS AFTER SEIZURE IS UNLAWFUL

Civil forfeiture actions must be started as soon as practicable after seizure. Unnecessary delay between the seizure and the start of formal proceedings violates owner's rights to prompt post–seizure notice and hearings. Although courts differ on the effect of delay, they all agree that any unreasonable delay is unconstitutional.

In 1983, the U.S. Supreme Court decided the case of U.S. v. $8,850 in U.S. Currency, 103 S.Ct. 2003, which had a significant impact on the issue of delay in forfeiture cases. The case involved the forfeiture of currency by Customs for violation of currency reporting requirements in 31 U.S.C. § 1101. The defendant claimed that an 18–month delay between seizure and filing of civil proceedings for forfeiture violated the defendant's right to due process of law. The Supreme Court held that delay by the Government was supported by substantial reasons and justified.

The Court drew analogy to four speedy trial factors in Barker v. Wingo, 92 S.Ct. 2182 (1972), as applying: (1) length of delay, (2) reason for delay, (3) defendant's assertion of his right, and (4) prejudice to the defendant. As reasons for delay, the court then included the following as elements to be considered, although none are controlling: (1) time to investigate the case to see "whether the facts entitle the Government to forfeiture so that, if not, the Government may return the money without formal proceedings," (2) whether a decision on a petition for remission will obviate the need for judicial proceedings, and (3) pending criminal proceedings.

On page 2014 of the decision, the Court highlighted that in addition to the civil forfeiture proceeding at issue in the case, the criminal indictment of the defendant sought forfeiture as part of the sentence, and that if the Government had prevailed in the criminal forfeiture, the civil forfeiture would have been rendered unnecessary. (The important analogy here is a concurrent civil forfeiture under 21 U.S.C. § 881 and a criminal forfeiture under 21 U.S.C. § 853 (CCE), with the civil forfeiture allowing the seizure of the property to avoid the defendant disposing of the property after indictment under 21 U.S.C. § 853.)

In 1986, the U.S. Supreme Court applied the Barker v. Wingo test in U.S. v. Von Neumann, 106 S.Ct. 610 (1986) (below 729 F.2d 657 (1984), a Customs case involving a delay of 36 days in ruling on a petition for remission or mitigation of forfeiture. The Court held that the claimant was not prejudiced by the delay of 36 days, and hence, there was no denial of due process. The Court also distinguished the constitutional distinction between forfeiture and remission by stating at p. 615, "remission proceedings are not necessary to a forfeiture determination, and therefore are not constitutionally required."

Authorities

Statutes:	21 U.S.C. § 881(b); U.C.S.C. § 505(c) 19 U.S.C. §§ 1602, 1603, 1604
S.Ct.:	U.S. v. Thirty–Seven (37) Photographs, 91 S.Ct. 1400 (1971) (more than 14 days unreasonable in First Amendment cases).
11 Cir:	U.S. v. $160,916.25, 750 F.2d 900 (1985)(14–month delay upheld under $8,850 case and Barker test––active criminal case).

10 Cir: White v. Acree, 594 F.2d 1385 (1979)(9-month delay not unreasonable); Sarkisian v. U.S., 472 F.2d 468 (1973) (14-month delay unreasonable).

9 Cir: U.S. v. 66 Pieces of Jade, 760 F.2d 930 (1985)(19-month delay upheld under $8,850 case and Barker test--pending criminal charges (1984); U.S. v. 47,980. in Canadian currency, 689 F.2d 858 (1984), rev. 726 F.2d 532 (14-month delay justified under $8,850 test); U.S. v. 13 Machine Guns, 689 F.2d 861, rev. 726 F.2d 535 (1984); U.S. v. One 1971 BMW 4-Door Sedan, 652 F.2d 817 (1981) (2.5-month delay reasonable); Ivers v. U.S., 581 F.2d 1362 (1978) (18-month delay not unreasonable); U.S. v. One 1970 Ford Pickup, 564 F.2d 864 (1977) (It-month delay unreasonable); U.S. v One 1972 Mercedes-Benz 250, 545 F.2d 1233 (1976) (6-week delay not unreasonable).

8 Cir: US. v. $18,505.10, 739 F.2d 354 (1984) (25-month delay upheld--money held by State for 24 months as evidence); U.S. v. One 1973 Buick Riviera Auto, 560 F.2d 897 (1977) (5-month delay not unreasonable).

5 Cir: US. v. $23,407.69 in U.S. Currency, 715 F.2d 162 (1983) (6-month delay by DEA without explanation fatal under $8,850 case and applying of Barker test); US. v. One 1951 Douglas DC-6 Aircraft, 667 F.2d 502 (1981); Castleberry v. A.T.F., 530 F.2d 672 (1976) (38-day delay not unreasonable); U.S. v. One (1) 1972 Wood, 19-Foot Custom Boat, 501 F.2d 1327 (1974) (9-month delay not unreasonable).

4 Cir: US. v. $18,505.10, 739 F.2d 354 (1984) (25-month delay reasonable via Barker test); States Marine Lines, Inc. v. Shultz, 498 F.2d 1146 (1974).

3 Cir: US. v. Premises Known As 608 Taylor Ave., 584 F.2d 1297 (1978) (7-month delay seriously suspect).

2 Cir: U.S. v. Banco Cafetero Panama, 797 F.2d 1154 (1986); US. v. Dunn, 802 F.2d 646 (1986) (Civil forfeiture available after jury in criminal forfeiture case declines to forfeit); Lee v. Thornton, 538 F.2d 27 (1976); In Re Behrens, 39 F.2d 561 (1930).

1 Cir: US. v. One Motor Yacht Named Mercury, 527 F.2d 1112 (1975) (12.5-month delay unreasonable; Shea v. Gabriel, 520 F.2d 879 (1975).

CD CA: U.S. v. Eight (8) Rhodesian Stone Statues, 449 F.Supp. 193 (1978) (18-month delay unreasonable); U.S. v. One Volvo 2-Dr. Sedan, 393 F.Supp. 843 (1975) (2-month delay not unreasonable); U.S. v. A Quantity of Gold Jewelry, 379 F.Supp. 283 (1974) (22-month delay unreasonable); U.S. v. One 1971 Opel G.T., 360 F.Supp. 638 (1973)(13.5-month delay unreasonable).

ND CA: U.S. v. $831,160.45 United States Currency, 607 F.Supp 1407 (1985) (16-month delay justified).

SD FL: U.S. v. M/V Christy Lee, 640 F.Supp 667 (1986) (not unreasonable delay); U.S. v. One (1) Stapelton Pleasure Vessel, Etc., 575 F.Supp. 473 (1983) (10-month delay did not violate due process--7 months involved petition); U.S. v. One (1) 43-Foot Sailing Vessel, 405 F.Supp. 879 (1975)(11-month delay not unreasonable).

SD GA: U.S. v. One (1) Douglas A-26B Aircraft, 436 F.Supp. 1292 (197[illegible] (11.5-month delay unreasonable).

ED MI: U.S. v. One 1973 Dodge Van, 416 F.Supp. 43 (1976) (6-month delay not unreasonable).

NV: U.S. v. One 1973 Ford LTD, 409 F.Supp. 741 (1976) (14-month delay not unreasonable).

SD NY: U.S. v. One 1978 Cadillac Sedan DeVille, 490 F.Supp. 725 (79 Civ 601 WCC, 1/7/80) (4.5-month delay not unreasonable).

WD NY: U.S. v. Dunn, 630 F.Supp. 1035 (1986) (no § 881 forfeiture possible if jury in criminal forfeiture concludes property not forfeitable--reversed in appeal; see 2 Cir., above).

SD OH: Boston v. Stephens, 395 F.Supp. 1000 (1975) (6-month delay unreasonable).

PR: U.S. v. $152,000 in U.S. Currency, 592 F.Supp. 1017 (1984) (7-month delay upheld under $8,850 case and Barker test).

WD WA: U.S. v. One 1964 MG, 408 F.Supp. 1025 (1976) (8-month delay not unreasonable).

AL: Kirkland v. State, 340 So.2d 1121 (App: 1 976) (16-day delay not unreasonable).

AZ: State ex rel Berger v. McCarthy, 548 P.2d 1158 (1976) (61-day delay unreasonable).

IL: People v. 1963 Cadillac Coupe, 231 N.E. 2d 445 (1967) (3.5-month delay unreasonable).

IA: State v. One Hundred Twenty-Six Dollars, 2St N.W.2d 216 (1977) (9-month delay unreasonable).

MD: Geppi v. State, 310 A.2d 768 (App. 1973) (9-month delay unreasonable); Gatewood v. State, 301 A.2d 498 (App. 1973) (4-month delay not unreasonable).

MI: People v. One 1973 Pontiac Auto, 269 N.W. 2d 537 (App. 1978)(5-week delay not unreasonable).

NJ: State v. One (I) Ford Van, 381 A.2d 387 (App. 1 977) (14-month delay unreasonable).

WA: City of Everett v. Slade, 515 P.2d 1295 (1973) (2-month delay unreasonable).

Discussion

Both statutes and the Constitution prohibit unreasonable delay in beginning forfeiture proceedings after seizure.

1. Due Process demands speed

The constitutional right to post-seizure notice and hearing is meaningless, unless it is provided within a reasonable time. Every court to consider the issue has held that unreasonable delay in the initiation of civil forfeiture proceedings after seizure, violates the Due Process rights of owner-claimants. See Authorities cited above.

2. Statutes require speed

The constitutional need for speed is reflected in most forfeiture statutes which, either expressly or by interpretation, impose a duty of prompt action on officials involved with forfeiture.

For example, most warrantless seizures of forfeitable property made under the drug laws are made under U.C.S.A. Sec. 505(b) (4) and 21 U.S.C. § 881(b) (4). Both of these state and federal provisions end with the directive:

> In the event of seizure pursuant to paragraph. (4) of this subsection, PROCEEDINGS under subsection (d) of this section SHALL BE INSTITUTED PROMPTLY. [Emphasis not in original].

Therefore, the forfeiture provisions of both state and federal drug laws prohibit unreasonable delay.

The reference to subsection (d) in the federal Controlled Substances Act refers to 21 U.S.C. § 881(d), which states:

> All provisions of law relating to the seizure . and condemnation of property for violation of the customs laws . . . shall apply . . . insofar as applicable and not inconsistent. .

This reference over, or link to, the customs laws imposes an additional need for speed in federal cases. Section 1602 of the customs laws (19 U.S.C.) states:

> It shall be the duty of any officer, agent, or other person authorized by law to make seizures . . . to report every such seizure IMMEDIATELY to the appropriate . . . officer. . . . [Emphasis not in original]

Section 1603 (19 U.S.C.) provides:

> Whenever a seizure . . . is made . . . and legal proceedings by the United States attorney in connection with such seizure . . . are required, it shall be the duty of the appropriate . . . officer to report PROMPTLY such seizure . . . to the United States attorney . . . and to include in such report a statement of all the facts. . . . [Emphasis not in original]

Finally, Section 1604 (19 U.S.C.) provides:

> It shall be the duty of every United States attorney IMMEDIATELY to inquire into the facts of cases reported to him . . . and if it appears probable that any . . . forfeiture has been incurred . for . . . which the institution of proceedings in the United States district court is necessary, FORTHWITH to cause the proper proceedings to be commenced . . . WITHOUT DELAY. . . . [Emphasis not in original)

Unreasonable delay at any stage in the initiation of civil forfeiture proceedings violates the express wording of these statutes.

Statutes which fail to expressly require speed have been, and should be, interpreted to require prompt action. U.S. v. Thirty-Seven (37) Photographs, 91 S.Ct. 1400 (1971); Ivers v. U.S., 581 F.2d 1362 (9 Cir. 1978); Lee v. Thornton, 538 F.2d 27 (2 Cir. 1976); States Marine Lines, Inc. v. Shultz, 498 F.2d 1146 (4 Cir. 1974); Sarkisian v. U.S., 472 F.2d 468 (10 Cir. 1973).

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> **See MASFA § 8(a)(1). If the state fails to initiate forfeiture proceedings by notice of pending forfeiture within ninety days against seized property, or if the state fails to pursue forfeiture of the property upon which a proper claim has been timely filed, by filing a judicial forfeiture proceeding within 90 days after notice of pending forfeiture, the property shall be released pending further proceedings.**

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3. What is unreasonable delay?

The chorus of decisions has not produced a harmonious answer.

11 Cir: U.S. v. Bissell, 866 F.2d 1343 (1989), reh'g denied, en banc, U.S. v. Caraballlo-Scandoval, 874 F.2d 821 (1989), under "Attorney Assignments." supra.

SD CA: Brantz v. U.S., 724 F. Supp. 767 (1989). (Under 881-1(c), a delay of 21 days between seizure of a vehicle and issuance of seizure notice was unreasonable when DEA had already determined ownership, and knew the legal and factual basis for the seizure at the time of seizure. The appropriate remedy is that claimant could obtain his vehicle providing he posts sufficient bond. A Rule 41(e) Motion is not appropriate for seeking recovery of property pending a civil forfeiture action. However, a motion invoking the court's general equity jurisdiction would be appropriate.); Dwyer v. U.S., 716 F. Supp. 1337 (1989). (Under 21 U.S.C. Sec. 881-1(c), a district court has discretion to permanently return a claimant's vehicle when an agency fails to send a seizure notice at the earliest practicable time after determining ownership. In this case, notice was sent sixty-two days after seizure); Stafford v. U.S., No. 89-115-GT (May 15, 1989) (unpublished). (Following U.S. v. $83,310.78, etc., 851 F.2d 1231 (9th Cir. 1988), filing a civil forfeiture complaint precludes filing a Federal Rules of Criminal Procedure Rule 41(e) Motion for Return of Property because the claimant has alternative remedies.) [Chief Judge Gordon Thompson wrote Brantz, infra; Dwyer, infra; Stafford, infra.;and Williamson, infra. He narrowly construes the Sec. 881-1(c) time requirement for notice in all cases. In this case, the court declined to consider the Sec.881-1(c) argument because of a pending civil forfeiture action The court did state that claimant is probably entitled to have his vehicle returned because of the fifty-four day delay between seizure and notice. The court instructed claimant to raise this issue in his civil forfeiture action.

The language "alternative remedies" in Williamson suggest that Chief Judge Thompson's major premise is the election of remedies. However, a Rule 41(e) Motion is an equitable remedy used when evidence for a criminal proceeding is withheld An equitable remedy should only be used in the absence of an adequate remedy at law. Here, a forfeiture complaint provides an adequate remedy at law. Thus the Rule 41(e) Motion should not be available.

The problem occurs in the Stafford situation, when the government seizes property and then indefinitely delays sending notice. Perhaps claimant can file a Writ of Mandamus compelling the government to file a civil forfeiture complaint. Even so, the Rule 41 (e) Motion does not appear to be the proper procedure for resolving the problem.]

ND GA: U.S. v. $19, 120.00 in U.S. Currency, 700 F. Supp. 33 (1989). (There is a four-prong test for determining whether a delay in filing the forfeiture complaint violates a claimant's due process rights; namely, (1) length of delay; (2) reason for delay (3) claimant's assertion of his rights; and (4)

resulting prejudice to claimant. [This test originates in Barker v. Wingo, 407 U.S. 514; 33 L.Ed. 2d 101; 92 S.Ct. 2182 (1972).] (The complaint for forfeiture must be pled with enough particularity that claimants, without moving for a more definite statement, may start investigating the facts and prepare a responsive pleading. The mere pendency of an arrest warrant is sufficient probable cause for seizure even if it does not state probable cause for the forfeiture hearing because claimants can begin investigating. However, at the forfeiture hearing, a higher level of probable cause is required.);

U.S. v. One(1) 1984 Nissan 300 ZX, etc., 711 F.Supp. 1570 (1989). An eighteen month delay between seizure of a vehicle and filing the forfeiture complaint violates the Fifth Amendment Due Process rights. The court stressed that a vehicle is a wasting asset, that the government had no credible reason for the delay, and that claimant vigorously asserted his right to judicial hearing. The court applied the due process balancing test of Barker v. Wingo, 407.

NC: U.S. v. $199,514 in U.S. Currency, 681 F. Supp. 1109 (1988), under "Libel – Complaint." infra, p. 74

MN: Kiefer v. United States, 687 F. Supp. 1363 (1988). (A four–monty delay between seizure of a vehicle and initiation of forfeiture proceedings does not violate due process.

a. Flexibility of Limits

How much delay is unreasonable seems to be a question to be decided in the light of the facts of each case. In U.S. v. Thirty–Seven (37) Photographs, the Supreme Court noted "that constitutionally permissible limits may vary in different contexts. . . ." 91 S.Ct. 1400 at 1407 (1971). Also, see the four Barker v. Wingo tests set forth by the court in the $8,850 case, as previously mentioned. Nevertheless, some generalizations are possible.

1) Literary Material

Books, photographs and other literary materials can, in rare instances, be subject to forfeiture. For example, 19 U.S.C. 1305(a) provides for the forfeiture of illegally imported obscene materials. And 21 U.S.C. § 881 (a) (5) and U.S.C.A. § 505(a) (5) provide for the forfeiture of books and records kept by drug violators. Because of the possible clash between the forfeiture of writings and the constitutional rights to Freedom of Speech, Freedom of the Press, and the Right to Privacy, the Supreme Court has held that forfeiture proceedings of such material must be started within 14 days and completed within 60 days after seizure. U.S. v. Thirty–Seven (37) photographs, cited above.

2) Vehicles at the Border

Seizure of vehicles and other means of personal transportation at the border creates special problems. A person deprived of his car at a remote border point will probably be stranded until a decision is made on the validity of the seizure. Balancing the harshness to the owner of any delay, against the cost to the government in holding an immediate hearing, the United States

Court of Appeals for the Second Circuit held in Lee v. Thornton, 538 F.2d 27 (1976) that requests by an owner for relief must be answered within 24 hours, and if they are not granted, a hearing (including an oral appearance) must be provided within 72 hours.

3) Other Conveyances

Given the pervasive use of vehicles by our society, and the increased dependence upon private transportation which accompanies such use, the seizure of any vehicle or conveyance is likely to work a hardship on the private owner. See Tedeschi v. Blackwood, 410 F.Supp. 34 at 44 (D CT 1976). Moreover, a vehicle is a "wasting asset"; it can depreciate by as much as 25 percent per year. See U.S. v. One 1971 Opel G.T., 360 F.Supp. 638 at 641 (CD CA 1973). Therefore, although the seizure of a vehicle within the United States does not involve the same certainty of extreme hardship associated with seizure at the border, forfeiture proceedings must still be started promptly.

On the other hand, given the various officials involved (seizing officer, his supervisor, government custodian, administrative personnel, prosecuting attorney, etc.), some delay in the process of starting forfeiture seems inevitable. Balancing these factors, all but two of the more than thirty state and federal courts to rule on this issue have held delays of up to two months not to be unreasonable. Delays of less than two months are not per se unlawful.

CAUTION: The two-month rule is merely a "guesstimate" of what is likely to be considered acceptable; it is not a license to unnecessarily delay cases for up to two months.

4) Non-wasting Assets (Money)

Longer delays might be acceptable when the seized property is gold, cash, land or some other non-wasting asset. See Ivers v. U.S., cited above (cash); White v. Acree, cited above (jewelry).

b. How is it measured?

Generally, courts examine the period of time from the seizure of the property to the final act needed to initiate the proceedings. In judicial forfeiture cases, courts will scrutinize any delay up to the filing of the complaint for forfeiture. In administrative cases, they might examine the entire process, but delay in providing notice to interested parties seems to be the critical point.

c. Must delay cause harm?

Courts split over whether delay must cause harm before it can be considered illegal. Several have suggested that delay in beginning forfeiture is not unreasonable unless it causes economic injury or prejudices the ability to defend against the forfeiture. White v. Acree, 594 F.2d 1385 at 1390 (10 Cir. 1979); Ivers v. U.S., 581 F.2d 1362 at 1373 (9 Cir. 1978); U.S. V. One 1973 Ford LTD, 409 F.Supp. 741 at 743 (D NV 1976); U.S. v. One 1978 Cadillac Sedan Deville, 490 F.Supp. 725 (SD NY 1/7/80, No. 79, Civ. 601 WCC).

At least one court has held that delay can be considered unreasonable, and a violation of due process, without any proof that the delay caused harm. U.S. v. Eight (8) Rhodesian Stone Statues, 449 F.Supp. 193 at 205 (CD CA 1978). The authors of this Guide believe this decision to be the correct view. The United States Supreme Court has held that a person denied the right to a hearing can receive damages in a lawsuit without establishing he was harmed.

Carey v. Piphus, 98 S.Ct. 1042 at 1054 (1978). In the words of the High Court:

> Because the right to procedural due process is "absolute" in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed, . . . we believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury.

4. Can delay be excused?

Assuming delay has occurred and it appears to be unreasonable, it could be excusable.

a. By claimant's tactics

The United States Supreme Court has said: "No seizure or forfeiture will be invalidated for delay . . . where the claimant is responsible for extending either administrative action or judicial determination beyond the allowable time limits. . . . " U.S. v. Thirty-Seven (37) Photographs, 91 S.Ct. 1400 at 1407 (1971). Based upon this statement, courts have excused delay caused by a claimant's tactics. Ivers v. U.S., 581 F.2d 1362 (9 Cir. 1978); U.S. v. One (I) 43-Foot Sailing Vessel, 405 F.Supp. 879 (SD FL 1975).

b. By a prosecution

Frequently, property seized for civil forfeiture will also have the status as evidence in a related criminal prosecution. This is especially true of drug money. In such cases, can the initiation of the civil forfeiture proceedings be delayed until after the criminal case is completed?

Although the courts have yet to decide, the probable answer is "no." For a number of reasons, civil forfeitures should be started even when criminal proceedings are pending. First, an owner's right to notice and hearing in a civil forfeiture action is theoretically unrelated to any criminal proceedings. We have already seen, at page 6 of this Guide, that a civil forfeiture action is considered to be totally independent of any criminal action taken against anyone.

Second, the need for speed in civil forfeiture cases is created by statutes, as well as by the Constitution. None of these statutes contains any language permitting delay because of a related prosecution.

Third, assuming property seized as evidence is also subject to civil forfeiture, or to some other government claim, fundamental fairness requires that government put an owner on notice of what claims it intends to pursue. How else could an owner begin to prepare a defense to such claims? And, if government never intends to return property, shouldn't it alert the owner, rather

than deceiving him into believing his property is being held "temporarily" as evidence? Congress has already required that the federal government put notice in a criminal indictment if it intends to criminally forfeit property as a result of a conviction. Rule 7(c) (2), Fed.R.Cr.P.; U.S. v. Hall, 521 F.2d 406 (9 Cir. 1975). Although this criminal rule does not apply to civil forfeiture (Rule 54(b) (5) Fed.R.Cr.P.), the underlying reasoning of giving fair warning to claimants applies to all forfeitures.

Finally, in many cases neither the government nor claimants will be prejudiced by pursuing a criminal prosecution and a civil forfeiture simultaneously. If good cause should exist for avoiding simultaneous litigation, the proper approach would be to file the civil forfeiture promptly and move to stay the forfeiture action pending the outcome of the criminal prosecution. This puts claimants on notice of the government's intent to seek forfeiture of property held as evidence. It permits the courts to scrutinize the government's reasons for delaying the civil litigation. It allows claimants time to begin preparing their defense to forfeiture and to preserve needed evidence for the civil proceedings. And it protects the criminal action from civil discovery that would be made in the forfeiture action.

When both civil and criminal proceedings arise out of the same or related transactions, both sides are, for good cause shown, entitled to a stay of the civil action until disposition of the criminal matter. See 21 U.S.C. § 881(i) for stay upon Government's motion. Campbell v. Eastland, 307 F.2d 478 (5 Cir. 1962); U.S. v. One 1967 Buick Hardtop Electra, 304 Fed.Supp. 1402 (WD PA 1969); U.S. v. One 1967 Ford Galaxie, 49 F.R.D. 295 (SD NY 1970); U.S. v. One 1964 Cadillac Coupe DeVille, 41 F.R.D. 352 (SD NY 1966); U.S. v. Bridges, 86 F.Supp. 931 (SD CA 1949); U.S. v. 30 Individually Cartoned Jars . . . "Ahead Hair Restorer. . .," 43 F.R.D. 181 (D DE 1967); U.S. v. $2,437 U.S. Currency, 36 F.D.R. 257 (ED NY 1964); Kaeppler v. Jas. H. Matthews & Co., 200 F.Supp. 229 (ED PA 1961); Perry v. McGuire, 36 F.R.D. 272 (SD NY 1964); and see U.S. v. Currency, et al., 626 F.2d 11 (6 Cir. 7/14/80, 78-1162). Also see U.S. v. 57,261 Items of Drug Paraphernalia; 869 F.2d (6th Cir. 1989); cert. denied; __U.S.__ __ L.Ed 2d __, 110 S.Ct. 324; under "Drug 'Use' Objects are Not Forfeitable." U.S. v. Parcel of Land and Residence and Improvements Located Thereon at 5 Bell Rock Road, etc., No. 88-1581-Mc. (MA 1989)(unpublished), under "Civil v. Criminal." supra.

DO NOT DELAY FILING A CIVIL FORFEITURE UNTIL CRIMINAL PROCEEDINGS HAVE ENDED

5. Effect of Delay

Although all courts agree that unreasonable delay is unconstitutional, they differ on its effects.

a. Mandamus

If unreasonable delay occurs, a claimant can bring an action, in the nature of Mandamus, to force the government to begin forfeiture proceedings or abandon the seizure. See page 238 of the Guide for a more detailed discussion of this issue.

To some courts, Mandamus is the only remedy they will grant based upon delay. Castleberry v. A.T.F., 530 F.2d 672 (5 Cir. 1976); In Re Behrens, 39 F.2d 561 (2 Cir. 1930).

b. Damages

As already noted, denial of due process can result in a lawsuit for money damages. Carey v. Piphus, 98 S.Ct. 1042 (1978).

Unreasonable delay can subject the Federal Government to damages under the Tucker Act, 28 U.S.C. § 1346(a) (2).

State governments and state officers can be sued for damages for delay, under the Civil Rights Acts. 42 U.S.C. § 1983, 28 U.S.C. § 1343(3).

Federal agents can be personally sued for damages for delay under the doctrine of Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 91 S.Ct. 1999 (1971); States Marine Lines v. Shultz, 498 F.2d 1146 (4 Cir. 1974).

c. Bar to Forfeiture

In the vast majority of courts, unreasonable delay is treated as a complete defense to forfeiture; it totally bars the right to forfeit the property.

E. JUDICIAL FORFEITURE

Judicial forfeiture proceedings consist of a full civil trial. The Government is the plaintiff. The forfeitable property is the defendant. Persons claiming rights in the property can appear in the proceedings to defend their interests.

Judicial forfeiture proceedings are required under the federal drug laws whenever the property subject to civil forfeiture is appraised at more than $100,000 in value. 21 U.S.C. § 881(d); 19 U.S.C. § 1610.

This section briefly discusses the discretion of prosecutors relative to civil forfeitures, the jurisdiction of federal courts, the official court documents used in the proceedings, discovery of an opponent's evidence before trial, intervention of proper parties, the right to jury trial, the rules of evidence, and the unusual burdens of proof in civil forfeiture cases.

1. Prosecutorial Discretion

All prosecutors have wide discretion in pursuing criminal charges. State prosecutors have a similarly wide discretion in pursuing civil forfeitures. Matter of One 1965 Ford Econoline Van, 591 P.2d 569 (AZ App. 1979); State v. One 1968 Buick Electra, 301 A.2d 297 (Del. Sup. Ct. 1973); People v. One 1965 Oldsmobile, 284 N.E.2d 646 (IL 1972); Prince George's County v. One (1) 1969 Opel, 298 A.2d 168 (MD App. 1973); State v. Crampton, 568 P.2d 680 (OR 1977).

The discretion of federal prosecutors is considerably more restricted in regard to civil forfeitures. Section 1604 of the customs laws (19 U.S.C.) provides:

> It shall be the duty of every United States Attorney if it appears probable that any forfeiture has been incurred . . . for the recover of which the

> institution of proceedings in the United States district court is necessary, forthwith to cause the proper proceedings to be commenced and prosecuted without delay . . . unless . . . (he) . . . decides that such proceedings can not probably be sustained or that the ends of public justice to not require that they should be instituted or prosecuted. . . ."

Despite the discretion seemingly granted at the end of this provision, both the Executive Branch and Congress have always taken the position that federal officials must pursue all civil forfeitures that have a probability of success and that do not clearly conflict with the public interest. Read as a whole, the forfeiture statutes emphasize accountability and central control over seized property. See 19 U.S.C. §§ 1602, 1603, 1604, 1617, and 18 US.C. § 1915.

For this reason, the Department of Justice has restricted the power of United States Attorneys to compromise civil forfeiture claims in seized property, both before and after forfeiture proceedings have been filed. The compromise of more than $200,000 of a civil forfeiture claim must be approved by the Asset Forfeiture Office of the Criminal Division, or in precedential cases by the Assistant Attorney General of the Criminal Division. The compromise or settlement of claims involving more than $750,000 must be approved by the Deputy Attorney General. 28 CFR Subpart Y, 0.160, as amended by Criminal Division Directive No. 116, and Deputy Attorney General Memorandum to U.S. Attorneys dated December 13, 1985; 19 U.S.C. § 1617; 21 U.S.C. § 881(d). The power to compromise less than $200,000 of a civil forfeiture claim has been delegated to all United States Attorneys.

But, a check has been placed on even this limited power. If the agency which seized the property objects in writing to the proposed compromise of a civil forfeiture claim by the United States Attorney, the matter must be referred to Washington, D.C., to obtain the approval of the Assistant Attorney General of the Criminal Division; the United States Attorney loses his power to effect a compromise. 28 CFR Appendix to Subpart Y, Criminal Division Directive No. 116, Paragraph (d). Compromises made in violation of these regulations are void; they do not bind the United States. See Roe v. U.S. Attorney, 489 F.Supp. 4 (ED NY 1979), aff'd 618 F.2d 980 (2 Cir. 1980). Cert.den. 101 S.Ct. 152 (1980). For this reason, the U.S. Attorneys Manual cautions attorneys to consult with seizing agencies before compromising a civil forfeiture. U.S. Attorneys Manual 9–38.000.

The purpose of all these provisions is to prevent federal attorneys from routinely bargaining away the rightful property claims of the United States. The Justice Department has gone so far as to apply these restrictions to the return of civilly forfeitable property as part of a criminal plea bargain. In a telegraphic message to all U.S. Attorneys on March 1, 1978 (reprinted in DOJ Narcotics Newsletter, Vol. II, No. 4, p. 6), then–Assistant Attorney General Benjamin Civiletti cautioned:

> United States Attorneys are reminded that vehicles, aircraft, vessels, and other property seized for civil forfeiture pursuant to the provisions of the Comprehensive Drug Abuse Prevention and Control Act are not normally subject to return to a violator under a plea bargaining agreement. In all cases where it is essential to include the return of the . . . (property) . . . as a part of the pleas prior approval of the head of the section having jurisdiction of the forfeiture is required.

Every official involved with property seized for forfeiture, including federal attorneys, requires explicit authority before he can relieve the property from the civil forfeiture claims of the United States. It is a criminal offense to relieve seized property from forfeiture without such authority:

> Whoever, being an officer of the United States, without lawful authority compromises or abates or attempts to compromise or abate any claim of the United States . . . for any . . . forfeiture, or in any manner relieves or attempts to relieve any person, vessel, vehicle merchandise or baggage therefrom, shall be fined not more than $5,000 or imprisoned not more than two years or both. [18 U.S.C. § 1915].

2. Jurisdiction

Once a decision has been made to begin judicial forfeiture proceedings, the next issue is what court has jurisdiction over the property.

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> **See MASFA § 2. Jurisdiction and Venue. Subsection (a). The court has jurisdiction over: (1) all property interests if the property is within the state at the time action is filed; or (2) the interest of an owner or interest holder if the owner or interest holder is subject to personal jurisdiction.**

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Federal Jurisdiction

State courts have no power or authority over property that has been seized for federal forfeiture. Actions concerning property held for federal forfeiture can be filed only in federal court. 28 U.S.C. §§ 1345, 1355; Gelston v. Hoyt, 3 Wheat (U.S.) 246, 4 L.Ed. 381 (1818); Heidritter v. Elizabeth Oil Cloth Co, 5 S.Ct. 135 (1884).

3. Pleadings

"Pleadings" are the formal written statements containing the claims and defenses of the parties to a lawsuit. Pleadings provide the court with jurisdiction over the case. They set limits to the number of issues that will be argued. They give each party notice of the controversy and an opportunity to prepare a defense. In civil cases, the two basic pleadings are called the "complaint" (filed by the plaintiff, or suing party), and the "answer" (filed by the defendant).

a. Libel--Complaint

A judicial forfeiture action begins when the Government files a pleading called a "complaint." 36 Am.Jur.2d, Forfeitures & Penalties, Sec. 37; 28 U.S.C. 2461. Generally, a complaint must contain:

1) A verification on oath or solemn affirmation of the truth of its contents. cf U.S. v. 935 Cases of Tomato Puree, 136 F.2d 523 (6 Cir. 1943); U.S. v. Banco Cafetero Intern, 608 F.Supp. 1394 (1985)(verification by Customs Agent) and U.S. v. Parcel of Real Property, 636 F.Supp. 142, (ND IL 1986) (verification by police officer).

2) A description of the property to be formally arrested. A detailed description is desirable, but more general descriptions are legally acceptable. The particularity of a search warrant is not required. Continental Grain Co. v. The Barge FBL-585, 80 S.Ct. 1470, 1474 (1960).

3) A statement that the property has been seized, or will be shortly seized, within the territorial jurisdiction of the court. The Brig Ann, 9 Cranch (U.S.) 289 (1815); Continental Grain Co, cited above; Internatio-Rotterdam, Inc. v. Thomsen, 218 F.2d 514 (4 Cir. 1955); 28 U.S.C. 1395.

4) Whether the seizure was on land, or on navigable waters, or outside the United States. This determined whether the case will be handled as part of the court's Admiralty jurisdiction, or whether it will be a common law suit with a possible jury trial. U.S. v. The Antoinetta, 156 F.2d 138 (3 Cir. 1946); 28 U.S.C. 1395.

5) A statement of the offense justifying forfeiture. In this regard, sufficient facts must be presented to satisfy the requirements of Rule E(2)(a) of the Supplemental Rules for Certain Admiralty and Maritime Claims, which reads as follows:

> (a) Complaint. In actions to which this rule is applicable the complaint shall state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading.

For cases highlighting the need to satisfy Rule E(2)(a) to delineate in detail the factual basis on which the civil forfeiture is based, as opposed to "notice pleading," see U.S. v. $3,9,000 in Canadian Currency, 801 F.2d 1210 (10 Cir. 1986); and U.S. v. One 1980 Ford Mustang, 648 F.Supp. 1303 (ND IN 1986).

For example, a satisfactory statement of an offense under the "Exchange" money section of 21 U.S.C. § 881(a) (6) would be "that on or about October 10, 1986, at Denver, Colorado, said $50,000 in United States Currency was furnished by John Jones in exchange for a controlled substance (cocaine) in violation of 21 U.S.C. §§ 841(a) (1) and 881(a) (6)."

The conte of a complaint in federal forfeiture actions is now governed by the Supplemental R: For Certain Admiralty and Maritime Claims (28 U.S.C. Appendix, F.R.Civ.P.). See ..ule A; also see Rule 81(a) (2), F.R.Civ.P.; U.S. v. $5,372.85 In U.S. Coin & Currency, 283 F.Supp. 904 (SD NY 1968); U.S. v. $3,976.62 In Currency, 37 F.R.D. 564 (SD NY 1975). Rules C(2) and E(2)(a) discussed above codify all of the above principles.

Once a complaint is filed, the clerk of the court issues a warrant of arrest for the property. The warrant orders the United States Marshall to formally attach the property and detain it in his custody until further order of the court, and to give notice to all persons having anything to say why the property should not be forfeited. Rules C(3) and (4) (Supplemental Rules); Bryan v. Ker, 32 S.Ct. 26 (1911); Re Cooper, 12 S.Ct. 453 (1892)J. For cases which hold that a Federal Judge or magistrate must approve complaints involving real property, see U.S. v. Certain Real Estate Property, 612 F.Supp. 1492 (SD FL ND 1985); Application of Kingsley, 614 F.Supp. 219 (MA 1985) and 802 F.2d 571 (1 Cir. 1986) and U.S. v. $128,035 in U.S. Currency, etc., 628 F.Supp. 668 (SD OH 1986); and for other property see U.S. v. Life Ins. Co. of Virginia, 647 F.Supp. 732 (WD NC 1986).

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See MASFA § 12. *In Rem* Proceedings. An *in rem* proceeding is brought pursuant to a notice of pending forfeiture or verified complaint. See also §13. *In personam* Proceedings.

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Authorities

11 Cir: U.S. v. $38,000 in U.S. Currency (1987), 816 F.2d 1538, (1987). (A complaint lacking sufficient facts to establish probable cause for forfeiture violates the particularity requirements of Supplemental Rule E(2) and should be dismissed.

ED NC: U.S. v. $199,514 in U.S. Currency, 681 F. Supp. 1109 (1988). A complaint is sufficiently specific under Rule E(2)(a) of the Supplemental Admiralty and Maritime Claims when it states the following: (1) the amount of money found; (2) that the money was in cash; (3) the suspicious surrounding circumstances; and (4) that traces of cocaine were found on the currency. A six–monthly delay between seizure of the currency and filing of the forfeiture action is not unreasonable when the delay is justified and the claimant suffered no prejudice. Probable cause for seizure of currency exists in the following circumstances: (1) $199,514 in cash was hidden under the car's seats and in the spare tire; (2) the car was a rental; (3) the car was on I–95, a known drug courier routes, and the driver was speeding; (3) the driver and occupants were Hispanics driving north from Miami; (4) the driver claimed that he did not know who owned the money or where it had come from; (5) the driver did not state his destination; and (6) there was no luggage.

ED PA: U.S. v. 1625 S. Delaware Avenue, etc., 661 F.Supp. 161 (1987). A complaint containing wholly conclusion allegations is insufficient.

RI: Property Known as 6 Patricia Drive, etc., 705 F.Supp. 710 (1989), under "Discussion (RE Probable Cause)." supra.

b. Claim & Answer

Only persons claiming a right to possession of the seized property can file an answer in defense of forfeiture. To establish their right to file an answer they must file a "claim" asserting an ownership or possessory interest in the property. Rule C(6) of the Supplemental Rules. Exactly who qualifies as a claimant is discussed in the next section. For the necessity of a claim being filed with the Court, see U.S. v. 1982 Yukon Delta Houseboat, 774 F.2d 1432 (9 Cir. 1985); U.S. v. One 1980 Ford Mustang, 648 F.Supp. 1305 (ND IN 1986); U.S. v. $2,857 U.S. Currency, 754 F.2d 208 (7 Cir. 1985); U.S. v. One 1978 BMW, 624 F.Supp. 491 (D MA 1985);U.S. v. Properties Described in Complaints, 612 F.Supp. 465 (ND GA 1984); U.S. v. 1979 Oldsmobile Cutlass Coupe, 589 F.Supp. 477 (ED GA 1984); U.S. v. 1967 Mooney M20-F Aircraft, 597 F.Supp. 531 (ND GA 1983); and U.S. v. One Gray Samsonite Suitcase, 637 F.Supp. 1162 (ED MI 1986).

The answer to the libel is similar in form to an answer under the Federal Rules of Civil Procedure. Facts alleged in the libel and not denied in the answer will be taken as true by the court. Strong v. U.S. 46 F.2d 257 (1 Cir. 1931).

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See § 10. Claims. Subsection(a). Only an owner of or interest holder in seized property may file a claim.

See also § 12(c). Only an owner of or an interest holder in property who has timely filed a proper claim may file an answer to an *in rem* action.

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Authorities

1 Cir: U.S. v. One Urban Lot, 882 F.2d 587 (1989). (Federal Rules of Civil Procedure Rule 60(b) is a discretionary remedy reviewed under an abuse of discretion standard. An appellant wishing to preserve the original judgment for appeal on the merits must file two documents simultaneously: (1) a Rule 60(b) motion before the district court; and (2) a notice of appeal to the court of appeals. Both documents must be filed within sixty days of a court's forfeiture default decree), U.S. One Urban Lot Located at 1 Street A-1, etc., 885 F.2d 994 (1989), and the companion case of U.S. v. One Rural Lot No. 55,221 Located at Sierra Taina Ward No. 8, Bayamon, Puerto Rico, et. al., (Civ. No. 88-1276) (September 22, (1989)). A timely, verified answer containing all the information required in the claim confers standing and acts as both claim and answer. [The underlying res was real property held as a tenancy by the entireties. The court interpreted the filing requirements liberally in part to protect the allegedly innocent owner's interests. Also, Circuit Judge John R. Brown wrote an extremely humorous opinion.]

ED NY: U.S. v. U.S. Currency in the Amount of Seven Thousand Five Hundred Thirty-One Dollars ($7,531), etc., 716 F.Supp. 92 (1989). Federal Rules of Civil Procedure Rule 60(b)(1) allows a default judgment to be vacated upon demonstrating "mistake, inadvertence, surprise, or excusable neglect." The court's discretion turns on three factors: (1) whether the default was willful; (2) whether defendant has a meritorious defense; and (3) any prejudice to the non-defaulting party if relief is granted. The court vacated a default judgment against a claimant who never filed a claim and answer for over two years even though he was granted two time extensions. However, claimant was incarcerated throughout most of this time and was pro se.

MA: U.S. v. One 1982 Jaguar SJ-6, 868 F.Supp. 364 (1988). (A claimant who failed to file a claim filed an answer to the government's complaint for a Sec. 881(a)(4) vehicle forfeiture lacks standing to challenge the seizure. The government obtained a summary judgment). [There is a split in jurisdictions as to whether or not a timely answer containing all the information required in the claim can serve as both claim and answer, thereby conferring standing.]

ED NC: U.S. v. Premises Known as Lots 14, 15, and 16, etc., 682 F.Supp. 288 (1987). (A claimant who files and answer and then files an untimely claim lacks standing to file an answer unless he shows excusable neglect).

4. Standing of the Parties

Not everyone has the right to defend property from forfeiture. Only parties with good faith interests in the property can contest forfeiture. These parties are characterized by lawyers as having "Standing"; in other words, they have a personal stake in the outcome of the case. Parties without standing have no business in the proceedings.

a. Claimants

Parties who have a possessory interest in seized property have standing to contest forfeiture; they are referred to as "claimants." 19 U.S.C. §§ 1608, 1613 and 1615. Owners generally qualify as claimants. They usually have an immediate, or some future, right to possession of their property. Boyd v. U.S., 6 S.Ct. 524, 536 (1886).

If, on the other hand, an owner is merely a "strawman," if he is merely a "paper owner," if total possession and control belong to another, he does not have standing as a claimant. See U.S. v. One 1976 Lincoln Continental Mark IV, 584 F.2d 266 (8 Cir. 1978); U.S. v. One Douglas C-54, 604 F.2d 27 (8 Cir. 1979), 647 F.2d 864 (8 Cir. 1981). Cert den. 102 S.Ct. 1002; U.S. v. One 1971 Lincoln Continental Mark III, 460 F.2d 273 (8 Cir. 1972); U.S. v. One 1967 Chris Craft 27-Foot Fiber Glass Boat, 423 F.2d 1293 (5 Cir. 1970); U.S. v. One 1977 36-Foot Cigarette Ocean Racer, 624 F.Supp. 290 (SD FL 1985); U.S. v. One 1971 Porsche Coup Auto, 364 F.Supp. 745 (ED PA 1973); U.S. v. One 1954 Model Ford Victoria Auto, 135 F.Supp. 809 (ED NC 1955); U.S. v. One 1981 Datson 280ZX, 563 F.Supp. 470 (ED PA 1983).

A person can have a right to possess property without necessarily being the owner. Remember the old saw: "Possession is nine points of the law." See Cribbet, Principles of the Law of Property, (F.P. Inc. 1962). The mere right to possess seized property gives a party standing to contest its forfeiture as a claimant. Berkowitz v. U.S., 340 F.2d 168 (1 Cir. 1965). Contra, see U.S. v. One Gray Samsonite Suitcase, 637 F. Supp. 1162 (ED MI 1986).

The possessory interest of a claimant must be in the seized property itself. It is not enough to merely assert an interest in the area (house, car, container, etc.) from which the property is seized. For example, a party who asserts a right to a safety deposit box, but does not assert a possessory interest in money found in the box, does not have standing as a claimant to prevent the forfeiture of the money. U.S. v. Fifteen Thousand Five Hundred Dollars, 588 F.2d 1359 (9 Cir. 1977). Similarly for a case holding that owners of a residence do not have standing to contest forfeiture of currency concealed in their basement without their knowledge, see U.S. v. $501,958, 633 F.Supp. 1300 (ND IL 1986). For a case involving an alleged loan to a son, which held that parents did not have a legal or equitable interest in currency used by son in violation of § 881 (a) (6), see U.S. v. $47,875 in U.S. Currency, 746 F.2d 291 (5 Cir. 1984).

The possessory interest of a claimant must have existed before the seizure of the property. No one can take a recognizable possessory interest in property once it has been seized by the Government. (The property is said to be in custodia legis.) U.S. v. One 1967 Chris Craft 27-Foot Fiber Glass Boat, 423 F.2d 1293 (5 Cir. 1970); and see U.S.v. One 1964 MG, Etc., 408 F.Supp. 1025 (WD WA 1976); U.S. v. $11,580 in U.S. Currency, 454 F.Supp. 376 (MD FL 1978); U.S.v. One 1954 Model Ford Victoria Auto, 135 F.Supp. 809 (ED NC 1955).

Claimants are entitled to file an answer to the libel, to discover the Government's evidence and to demand a jury trial. In effect, they make themselves defendants to the suit. Rule C(6), Supplemental Rules.

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See § 10. Claims. Subsection (a). Only an owner or interest holder may file a claim.

See also § 1. Definitions. Paragraphs (3) and (5). Interest holder means a secured party, a mortgagee, lien creditor, or the beneficiary of a security interest or encumbrance pertaining to an interest, whose interest would be perfected against a good faith purchaser for value. The definition excludes agents, nominees, or those not in substantial compliance with recording statutes. Owner means a person, other than an interest holder, who has an interest in property. The definition excludes agents, nominees, or those not in substantial compliance with recording states.

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Authorities

1 Cir: U.S. v. One Urban Lot Located a 1 Street A-1, Valpariso, Bayamon, Puerto Rico, etc., et al., 885 F.2d 994 (1989), and the companion case of U.S. One Rural Lot no. 55,221, Located at Siera Taina Ward No. 8, Bayamon, Puerto Rico, et al., (Civ. No. 88-1276 (September 22, (1989)), under "Claim and Answer." supra.

2 Cir: U.S. v. The Premises and Real Property at 4492 South Livonia Road, etc., 889 F.2d 1258 (1989), (November 17, 1989), under "Pre-Seizure Notice or Hearing Are Not Required."

3 Cir: U.S. v. Parcel of Real Property Knows as 6109 Grubb Road, etc., 886 F.2d 618 (1989), under "Innocence of an Owner is no Defense to a Civil Forfeiture." supra.

4 Cir: One 1985 Nissan 300 ZX, etc., v. U.S., 889 F.2d 1317 (1989). (The claimant's death does not abate a Sec. 881 (a)(6) forfeiture action. Abatement is a privilege granted to some criminal defendants, but does not automatically extend to civil defendants. Under the relation back doctrine of Sec. 881(h), title to the property vests in the government at the time illegal act is committed. Therefore, the claimant's estate takes nothing, not even a future interest).

5 Cir: U.S. v. $321,470.00, U.S. Currency, 874 F.2d 289 (1989). (Standing requires a colorably lawful interest in the property. Unexplained naked possession alone does not constitute standing. Thus, a courier carrying cash from an unknown owner to an unknown recipient under suspicious circumstances lacks standing to attack the forfeiture proceeding. A claimant must prove standing before the government needs to prove probable cause for forfeiture); U.S. One Parcel of Real Property...Known as the Rod and Reel Fish Camp, etc., 831 F.2d 566 (1987). (Real property per se. lacks standing to contest its forfeiture. An owner-claimant is the proper party. The attorney who brought this frivolous action was held liable for excess costs). [In an *in rem* action, the property is the defendant. The alleged owner is the claimant. The alleged owner is the one who may contest a forfeiture and thus the one to whom standing is important.]

6 Cir: U.S. v. Premises Known as 526 Liscum Drive, etc., 866 F.2d 213 (1989). Legal title alone does not establish standing. A claimant must also show dominion and control or other indications of true ownership. [The issue of standing is separate from the issue of innocent ownership. Standing must be demonstrated before reaching any other issue. However, proof of standing is independent of proof of innocent ownership.]

ND IL: U.S. v. One 1985 BMW 318i, etc., 696 F. Supp. 336. An alleged innocent owner lacks standing regarding the possible encroachment of a third party's rights when that party was arrested in the seized vehicle and drugs were seized.

ED MI: Horne v. Office of U.S. Attorney General, 662 F. Supp. 237 (1987). (A claimant's death does not abate a civil *in rem* forfeiture under Sec. 881 (a)(4) because the civil forfeiture is independent of a criminal prosecution. However, a claimant's death will abate a criminal *in personam* forfeiture).

SD NY: U.S. v. $134, 752.00 in U.S. Currency, More or Less, F. Supp. 1075 (1989). (A mere possessory interest in the property confers standing. Proof of legal ownership is not required). [In a related IRS termination assessment case, the government argued that the seized funds were income taxable to the claimant. The government thus inconsistently claimed that claimant had standing in the IRS action, but not in the forfeiture action. Thus, standing is another reason to coordinate forfeiture cases with tax lien cases.]

ED NC: U.S. v. Premises Known as Lots 14, 15, and 16, etc., 682 F. Supp. 288 (1987), under "Claim and Answer." supra.

ND OH: U.S. v. One Black 1985 Cadillac Eldorado, No.4:89-CV1142 (October 23, 1989) (unpublished). (The following factors establish straw ownership of a vehicle despite bare legal title: (1) a third party having exclusive use of the vehicle; (2) personalized license plates in a third-party's name; (3) no documentation other than title and registration, i.e. no records regarding insurance, loans, or repairs; and (4) admission by an individual with bare legal title that a third party drove the vehicle from the purchase to the seizure. Such an individual fails to show dominion or control sufficient to confer standing to contest the forfeiture).

WD OK: U.S. v. One 1989 Oldsmobile Cutlass, 709 F. Supp. 1542 (1989). (A lienholder lacks standing to challenge a civil forfeiture under Sec. 881(a)(4). The appropriate remedy is through the statutory remission procedures).

MA: U.S. v. One 1982 Jaguar SJ-6, 868 F. Supp. 364 (1989), under "Claim and Answer". supra, p. 76.

b. Intervenors

Parties with non-possessory interests in seized property, such as lienors, do not qualify as claimants; they cannot file an answer, engage in discovery or demand a jury trial. Missouri Investment Corp. v. U.S., 32 F.2d 511 (6 Cir. 1929).

But, they should be permitted to intervene, under Rule 24 of the Federal Rules of Civil Procedure, to protect their limited interests. U.S. v. One 1961 Cadillac Hardtop Auto, 207 F. Supp. 693 (ED TN 1962). The distinction between a "claimant" and an "intervenor" was neatly stated in The Two Marys, 12 Fed. 152 (SD NY 1882):

> A "claimant" . . . is a person who assumes the position of a defendant and demands the redelivery to himself of the vessel arrested. An "intervenor" Is one who, without demanding the redelivery . . . seeks only the protection of his interest. .

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See MASFA § 13. *In Personam* Proceedings. Subsection (b). Except as provided in § 11(c), no claimant may intervene in a trial or appeal of a criminal action or in an *in personam* civil forfeiture action.

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Authorities

11 Cir. U.S. v. A Single Family Residence, 803 F.2d 625 (1986) (no standing by bare legal title with no dominion or control); U.S. v. $500,000, 730 F.2d 1437 (1984) (no standing established by money exchanges).

ND GA: U.S. v. All That Tract & Parcel of Land, 602 F. Supp. 307 (1985)(Lienholder given standing under 21 U.S.C. § 881(a) (6).

SD NY: U.S. v. Sonal, Inc., 573 F.Supp. 1126 (1983); lack of standing in money exchange matters.

c. Suppression of Evidence

Claimants have standing to contest the admissibility of evidence that was obtained in violation of their Fourth or Fifth Amendment rights. Boyd v. U.S. 6 S.Ct. 524 (1886); Plymouth Sedan v. Pennsylvania, 85 S.Ct. 12466; Berkowitz v. U.S., 340 F.2d 168 (1 Cir. 1965).

Courts disagree whether claimants in forfeiture cases have standing to contest the admissibility of evidence obtained in violation of someone else's rights. Compare U.S. v. One 1976 Cadillac Seville, 477 F.Supp. 879 (ED MI 1979); with U.S. v. 0n e Gardner Roadster, 35 F.2d 777 (WD WA 1929); U.S.v. One Fargo Truck, 46 F.2d 171 (SD TX 1930); U.S. v. One t963 Cadillac, 250 F.Supp. 183 (WD MO 1966). In Rakas v. Illinois 99 S.Ct. 421 (1978), the Supreme Court held that only those persons whose rights are violated have standing to suppress illegally obtained evidence. Unless the Supreme Court changes its views, claimants should not be able to suppress evidence in forfeiture proceedings that was not obtained in violation of their rights.

5. Discovery

Discovery of an opponent's evidence before trial is controlled by Rules 26 through 37 of the Federal Rules of Civil Procedure. U.S. v. One 1965 Buick, 392 F.2d 672 (6 Cir. 1968); U.S. v. One 1961 Lincoln Continental Sedan, 360 F.2d 467 (8 Cir. 1966); Utley Wholesale Co. v. U.S., 308 F.2d 157 (5 Cir. 1962).

Because civil forfeiture proceedings are not criminal actions, the discovery rules followed in criminal proceedings do not apply. Rule 54(b) (5), F.R.Crim.P.; U.S. v. 110 Bars of Silver, 508 F.2d 799 (5 Cir. 1975) (Jenck's Act does not apply to civil forfeiture actions).

Any party can, for good cause, move to stay discovery in civil forfeiture cases, particularly if discovery will interfere with a related criminal proceeding.

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See MASFA § 12. In Rem Proceeding. Subsection (f) for expedited discovery rules.

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6. Evidence

Earlier we saw that hearsay is admissible in forfeiture proceedings to the same extent that it is admissible in any "probable cause" hearing. Even hearsay from informants can be admitted to establish probable cause for forfeiture. See page 20 of this Guide for a discussion and list of authorities.

As to other evidentiary matters, the Federal Rules of Evidence apply in civil forfeiture proceedings. Rule 1101(e) of the Rules states:

> In the following proceedings these rules apply to the extent that matters of evidence are not provided for in the statutes which govern procedure therein (including):
>
> * * *
>
> actions for fines, penalties, or forfeitures under the Tariff Act of 1930 (19 U.S.C.5 1581–1624). . . ."

Drug–related forfeitures come under these provisions. 21 U.S.C § 881(d).

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See MASFA § 11. Judicial Proceedings Generally. Subsection (i). In making any determination of probable cause or reasonable cause the court may consider all evidence admissible in determining probable cause at a preliminary hearing or pursuant to search warrant laws.

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7. Burden of Proof

A party bringing a civil lawsuit has the burden of producing enough evidence to persuade the judge that he has a legally sufficient case which could be acceptable to a jury. If he fails, the judge will quickly dismiss the suit; the jury will never be permitted to consider it. Once he satisfies this initial burden, the defendant is permitted to produce evidence in his defense. In the

end, the party bringing the suit must persuade the jury of the truth of his claim. If the jury remains undecided (i.e., "it's a toss-up"), the suing party loses.

Note that the burden of producing evidence shifts during the trial from the suing party to the defendant. On the other hand, the burden of persuasion never shifts; it is always on the party bringing the suit. He is said to have the "burden of proof." Sweeney v. Erving, 33 S.Ct. 416 (1913).

In civil forfeiture cases, the burden of proof is on the Government to produce enough evidence to persuade the judge that probable cause exists to believe the property is forfeitable. In this regard, the burden of proof in civil – forfeiture cases is the same as in all other civil cases. Once the judge determines that probable cause for forfeiture has been shown, the burden of proof (including the burden of producing evidence and the burden of persuasion) shifts to the defendant, or claimant! 19 U.S.C. § 1615. Page 24 contains a string of cases on point. Also see U.S. v. Banco Cafetero Intern, 608 F.Supp. 1394 (SD NY 1985), which holds that: "Ultimately, the government must show that it had probable cause at the time of the commencement of the actions. It need not establish this, however, until the forfeiture trial." Affirmed by Court of Appeals, U.S. v. Banco Cafetero Panama, 797 F.2d 1154 (2 Cir. 1986).

This makes civil forfeiture cases significantly different than other civic actions. Once the Government establishes probable cause for forfeiture, as determined by the judge, the defendant must produce some evidence in defense of the property. If he does not, the judge must direct a verdict in favor of the Government. Buckley v. U.S., 45 U.S. (4 How) 251, 259, 11 L.Ed 961 (1846); Taylor v. U.S., 44 U.S. (3 How) 197, 211, 11 L.ed 559 (1845); U.S. v. One 1976 Mercedes Benz 2805, 618 F.2d 453 (7 Cir. 1980).

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See MASFA § 12. *In Rem* Proceedings. Subsection (g). The state has the initial burden of showing probable cause for forfeiture of the property. If the state shows probable cause, the claimant must prove by a preponderance of the evidence that the claimant has an interest that is subject to forfeiture.

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Authorities

See Sec. IE of this Guide re: probable cause and burden of proof.

11 Cir: U.S. v. A single Family Residence, 803 F.2d 625 (1986)(Pre-seizure hearing not required constitutional issues-Government attorney's fees assessed against a claimant and her attorneys).

8 Cir: U.S. v. U.S. Currency $31,828, 760 F.2d 228 (1985).

6 Cir: U.S. v. $50,000 U.S. Currency, 757 F.2d 103 (1985).

Cir: U.S. v. $250,000 in U.S. Currency, 808 F.2d 895 (1987) (burden of proof met by Government, various claims notwithstanding).

ND AL: U.S. v. Nixon, 629 F. Supp. 857 (1986)(evidence developed after seizure used todetermine probable cause at time of seizure).

SD FL: U.S. v. One Condominium Apartment, 636 F. Supp. 457 (1986)(Post-seizure interest disallowed by court in § 881(a)(6); U.S. v. MN Christy Lee, 640 F. Supp. 667 (1986); and U.S. v. All Interests of E. Escobar, 600 F.Supp. 88 (1984) (post seizure interest denied).

ND GA: U.S. v. All That Tract & Parcel of Land, 602 F. Supp. 307 (1985) (post seizure interest mandated by Court via § 881(a)(6).

WD KY: U.S. v. One 1977 Cadillac Seville, 641 F. Supp. 738 (1986).

MD: U.S. v. $23,530 in U.S. Currency, 601 F.Supp. 179 (1985); U.S. v. $33,000 U.S. Currency, 640 F. Supp. 898 (1986).

SD OH: U.S. v. United States Currency: $24,927, 635 F. Supp. 475 (1986).

MA: U.S. v. One Parcel of Real Property, 648 F. Supp. 436 (1986)(claimant failed to establish legal sources of funds).

ED PA: U.S. v. Premises Known as 2639 Meetinghouse, 633 F. Supp. 979 (1986).

SC: U.S. v. 8.4 Acres of Land 648 F. Supp. 79 (1986) (Post-seizure interest & attorney's fees denied by court).

ED VA: U.S. v. Taylor, 640 F. Supp. 35 (1986).

JUDICIAL REVIEW

A. JUDICIAL FORFEITURES

A final judgment in a judicial forfeiture proceeding is subject to appeal, just as any other civil action. 28 U.S.C.§ 1291. Generally, the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure (28 U.S.C.) apply to the review of federal judicial forfeitures. U.S. v. One 1972 Chevrolet Blazer, 563 F.2d 1386 (9 Cir. 1977); U.S. v. One Twin Engine Beech Airplane, 533 F.2d 1106 (9 Cir. 1976); U.S. v. One 1965 Buick, 392 F.2d 672 (6 Cir. 1968); U.S. v. One 1961 Linc. Cont. Sedan, 360 F.2d 467 (8 Cir. 1966); Utley Wholesale Co. v. U.S., 308 F.2d 157 (5 Cir. 1962).

Findings of fact made by the trial court will not be set aside unless they are clearly erroneous. Rule 52(a), F.R.Civ.P; 443 Cans of Egg Product, 33 S.Ct. 50 (1912); The Olinde Rodrigues, 19 S.Ct. 851 (1899).

When the Government appeals it must move to stay any lower court order on returning the property. Continued possession of forfeitable property (the res) is essential to the appellate courts' jurisdiction.

DISTRIBUTION OF PROCEEDS FROM THE SALE OF FORFEITED PROPERTY

Survey[1] of State Drug Control Statutes

GENERAL SUMMARY

States generally use proceeds from the sale of forfeited property to pay forfeiture and sale costs. These include expenses of investigation, seizure, security, repair, storage, maintenance, transportation, advertising, and court proceedings. After relevant expenses have been paid, states satisfy the interests of innocent third parties, including purchasers, mortgagors, lienholders and conditional sales vendors. Some states, such as New York, also require payment of restitution, reparation or damages to victims of the crime on which the forfeiture action is based.

While distribution of the remaining proceeds varies among states, certain patterns clearly emerge. Of forty–four (44) states authorizing the use of proceeds for law enforcement[2] purposes, fifteen (15) require all proceeds to be: (1) deposited into a special law enforcement fund; (2) distributed to law enforcement agencies; and/or (3) specifically reserved for law enforcement activities. These moneys are to be used only for enforcement activities.

Alabama
Arizona
Arkansas
Delaware
Hawaii
Idaho
Illinois
Louisiana
Michigan
Nevada
New Jersey
Pennsylvania
South Dakota
Virginia
West Virginia

Six (6) additional states may expend all proceeds for law enforcement purposes if particular circumstances exist.

Maine
Mississippi
New Mexico
Texas
Utah
Wyoming

Discretion of the appropriate judicial or governmental authority in Maine and Wyoming determines law enforcement's share of the proceeds. More objective circumstances decide the distribution in Mississippi, New Mexico, Texas, and Utah.

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1 Survey information current through May 15, 1991. Survey analysis includes only statutory language.

2 Includes prosecutorial activities and excludes educational services, such as DARE.

For example, if multiple Mississippi law enforcement agencies participated in a seizure, proceeds are divided among the agencies. If there was only one seizing agency, fifty percent (50%) of the proceeds is deposited into the state general fund.

Under Texas' Forfeiture of Contraband Act, proceeds are placed into one or more law enforcement funds if (1) no locality requests funds for prevention and treatment services; and (2) a distribution agreement exists between the prosecuting attorney and other law enforcement agencies. If there is no agreement, proceeds are deposited into the state treasury to the credit of the general revenue fund.

Maine, New Mexico, and Utah also require any proceeds not disbursed to law enforcement agencies to be transferred into the appropriate general fund.

According to a survey by the Office of National Drug Control Policy, Maine and Utah in practice expend at least ninety (90%) of forfeiture proceeds for law enforcement activities. The same was found true of Colorado, Florida, Iowa, Minnesota, Massachusetts, Oklahoma, Oregon, Rhode Island, South Carolina, and Tennessee.[3]

Of the forty-four (44) states authorizing law enforcement uses, twenty-two (22) specifically require or permit funding of **drug** enforcement activities. This allocation becomes more critical as drug enterprises grow in size and complexity. Unraveling complicated structures designed to expand distribution, increase wealth, and conceal profits requires a commitment of resources over several months or even years.

Connecticut	Nevada
Georgia	New Hampshire
Idaho	New Mexico
Illinois	North Dakota
Kansas	Oklahoma
Kentucky	Pennsylvania
Louisiana	Rhode Island
Michigan	South Carolina
Mississippi	South Dakota
Montana	Tennessee
Nebraska	Washington

Idaho, Michigan, Nevada, Pennsylvania, and South Dakota use all proceeds to enforce state drug laws. In several other states proceeds which have been reserved for enforcement activities must be used for investigating, apprehending, and prosecuting drug offenders.

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[3] State Drug Control Status Report, An Office of National Drug Control Policy White Paper, November, 1990.

Thirty-one (31) states establish a special fund, account or pool for all or part of the proceeds designated for law enforcement purposes.

Arizona
Arkansas
California
Delaware
Florida
Georgia
Hawaii
Idaho
Illinois
Kansas
Kentucky
Louisiana
Massachusetts
Montana
Nebraska
Nevada
New Hampshire
New York
North Dakota
Ohio
Oklahoma
Oregon
Pennsylvania
Rhode Island
South Carolina
South Dakota
Tennessee
Texas
Virginia
Washington
West Virginia

In Arkansas, Kansas, South Dakota and Texas the attorney general or other attorney representing the state administers the distribution of proceeds to various enforcement agencies or funds. In Hawaii, Louisiana, and Oklahoma, the attorney general or local prosecuting attorney actually maintains the special fund. The attorneys general of North Dakota and New Hampshire approve expenditures from their respective funds.

Prosecutorial supervision over the use of proceeds is found in several other states. In New Jersey proceeds become the property of the entity funding the prosecuting agency which shares the moneys with other law enforcement agencies. The district attorney or attorney general in Pennsylvania is responsible for using proceeds to enforce state drug laws. The attorneys general in Maine, Iowa and Wyoming approve the disposition of proceeds.

Seventeen (17) states also provide funding for drug education and treatment services from proceeds.

California
Connecticut
Florida
Georgia
Iowa
Kansas
Kentucky
Massachusetts
Montana
New Hampshire
New York
Ohio
Oklahoma
Oregon
Rhode Island
Texas
Washington

California, Connecticut, Kentucky, New Hampshire, New York and Rhode Island automatically provide specific amounts for substance abuse services. Texas provides a specific amount which must be requested by a locality for prevention and treatment services. However, except for New York, these states reserve the majority of proceeds for law enforcement functions.

Florida, Georgia, Kansas, Montana, Ohio, Oklahoma, Oregon, and Washington specifically cite education and treatment as an appropriate use of proceeds. Iowa includes drug education as a law enforcement purpose.

Some states distribute proceeds for purposes in addition to law enforcement and education and treatment. Colorado, Iowa, and Massachusetts allocate funds to local crime victim compensation, victim reparation, citizen reward and neighborhood programs. Washington uses proceeds to provide public safety and education services while Nebraska deposits substantial proceeds into local school funds. Tennessee and Kentucky use proceeds from sale of real property for prison construction and incarceration programs. California helps defray administrative costs of the Office of Criminal Justice Planning with its proceeds. Maryland, Minnesota, New York, South Carolina, and Tennessee place proceeds into the general fund of the state or local political subdivision seizing the property.

Only six (6) states disburse all proceeds for non–law enforcement activities. Three constitutionally mandate the transfer of proceeds into the state or county school fund: Indiana, North Carolina, and Wisconsin. Alaska, Missouri and Vermont place the proceeds into the state or local general fund.

DISTRIBUTION OF PROCEEDS FROM THE SALE OF FORFEITED PROPERTY [1]

Survey*
of
State Drug Control Statutes

ALABAMA

Controlled Substances. Ala. Code 20-2-1 to 20-2-144 (1990).

20-2-93

Proceeds[2] are distributed to the municipal and/or county and/or state law enforcement agencies which participated in the investigation resulting in the seizure. Proceeds allocated to a county or municipal law enforcement agency are deposited in the respective general funds and made available to the law enforcement agency upon requisition by the agency's chief law enforcement official.

ALASKA

Controlled Substances. Alaska Stat. 17.30.010 - 17.30.900 (1983).

17.30.122

Proceeds are deposited into the state general fund.

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*Survey information current through May 15, 1991. Survey analysis includes only statutory language.

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[1] "Proceeds" refer to those proceeds remaining subsequent to payment of: (1) expenses of forfeiture and sale; (2) interests of innocent third parties; and (3) restitution, reparation, or other statutorily required disbursements.

[2] Forfeited moneys distributed according to same formula or procedures.

ARIZONA

Forfeiture. Ariz. Rev. Stat. Ann. 13-4301 to 13-4315 (1989).

13-4315

Proceeds[3] are deposited into the anti-racketeering fund of the state or of the political subdivision seizing the property or prosecuting action. If there is no anti-racketeering fund, proceeds are deposited into the appropriate state or local general fund and used for the investigation and prosecution of racketeering offenses.

ARKANSAS

Controlled Substances Act. Ark. Stat. Ann. 5-64-101 to 5-64-608 (Advance Code Service 1990-1991).

5-64-505

Proceeds[4] shall be deposited in the Drug Control Fund which the attorney for the state administers. Moneys may be used only for law enforcement and prosecutorial purposes and are distributed as follows:

1. Any balance under $250,000 shall be distributed to the local or state enforcement or prosecutorial agencies participating in activities leading to the seizure or forfeiture or deposit of moneys;

2. Any balance over $250,000 shall be forwarded to the State Police to be transferred to the State Treasury for deposit in the Special State Assets Forfeiture Fund.

CALIFORNIA

Controlled Substances Act. Cal. Health and Safety Code 11000-11651 (Deering Supp. 1991).

11489

Ninety percent (90%) of the proceeds[5] is distributed as follows:

1. Eighty-five percent (85%) is distributed to the state and/or local law enforcement agencies participating in the seizure. Funds allocated to the Department of Justice are deposited into the Department of Justice Special

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[3] Forfeited moneys distributed according to same formula or procedures.

[4] Forfeited moneys distributed according to same formula or procedures.

[5] Forfeited moneys distributed according to same formula or procedures.

Deposit Fund – State Asset Forfeiture Account for law enforcement purposes.

2. Fifteen percent (15%) is distributed to the prosecutorial agency.

Ten percent (10%) is distributed to the Asset Forfeiture Distribution Fund which the Office of Criminal Justice Planning administers. Of these moneys, $1.5 million is allocated to the State Department of Mental Health. The remaining moneys may be distributed as follows:

1. $1 million in 1989 and 1990 to the Los Angeles Office of Education to fund grants and administer the Gang Risk Intervention Pilot Program.

2. Maximum of five percent (5%) to the Office of Criminal Justice Planning for administrative costs.

3. Eighty-five percent (85%) of the balance is distributed to the Peace Officers' Training Fund and fifteen percent (15%) is available to provide education, training, and research for prosecutors.

COLORADO

Contraband Forfeiture Act. Colo. Rev. Stat. 16-13-501 to 16-13-511 (1990).

16-13-506

Proceeds[6] are distributed as follows:

1. Ten percent (10%) is deposited into the state general fund for appropriation to the judicial department for costs of forfeiture proceedings. If the seizing agency is a state agency, allocated proceeds are distributed directly to the agency.

2. Ten percent (10%) is deposited into the state general fund for appropriation to the public safety department for law enforcement purposes.

3. One and one-half percent (1 1/2%) is distributed to the district attorney as fees for bringing the action.

4. Remaining moneys are distributed to the seizing agency and persons suffering bodily injury or property damage. The seizing agency receives a portion of the moneys to pay costs of property storage, maintenance, security and forfeiture.

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6 Forfeited moneys distributed according to same formula or procedures.

CONNECTICUT

Seized Property,
Conn. Gen. Stat. Ann. 54-36a to 54-36h (Supp. 1991).

54-36h

Proceeds[7] are deposited into the drug assets forfeiture revolving fund and distributed as follows:

1. Seventy percent (70%) is distributed to the department of public safety and local police departments. Of this amount, fifteen percent (15%) is used for drug education and eighty-five percent (85%) for the investigation, apprehension, and prosecution of drug offenders.

2. Twenty percent (20%) is allocated to the alcohol and drug abuse commission for treatment and education programs.

3. Ten percent (10%) is distributed to the division of criminal justice for prosecution of drug offenders.

DELAWARE

Controlled Substances Act. **Del. Code Ann. tit. 16 4701-4796 (Supp. 1990).**

4784

Proceeds[8] are deposited into the Special Law Enforcement Assistance Fund and used for purposes which the Attorney General deems to be in the interest of law enforcement.

DISTRICT OF COLUMBIA

Controlled Substances. **D.C. Code Ann. 33-501 to 33-567 (Supp.1990).**

33-552

Proceeds are used to finance law enforcement activities of the D.C. Police Department with any remaining balance used to finance programs to rehabilitate drug addicts, educate citizens, or prevent drug addiction.

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[7] Forfeited moneys distributed according to same formula or procedures.

[8] Forfeited moneys distributed according to same formula or procedures.

FLORIDA

Contraband Forfeiture Act. Fla. Stat. Ann. 932.701-932.705 (West Supp.1991).

932.704

If the seizing agency is:

1. a local agency, proceeds[9] are deposited into the special law enforcement trust fund established by the court commissioners or governing body of the municipality. Moneys are used for school resource officers, crime prevention, drug education or other appropriate law enforcement purposes.

2. the Department of Law Enforcement, proceeds are deposited into the Forfeiture and Investigative Support Trust Fund.

3. the Department of Natural Resources, proceeds are deposited into the Motorboat Revolving Trust Fund to be used for law enforcement purposes.

4. a state agency other than the Department of Law Enforcement or Natural Resources, proceeds are deposited into the General Revenue Fund.

5. a state attorney's office, proceeds are deposited into the State Attorney's Forfeiture and Investigative Support Trust Fund for the investigation and prosecution of criminals.

GEORGIA

Forfeitures. H.B.72, 1991, amending Controlled Substances. Ga. Code Ann. 16-13-1 to 16-13-56 (1988).

16-13-49

A pool is established consisting of forfeited moneys, sale proceeds, and the fair market value of other forfeited property. The pool is distributed pro rata to the state and local governments whose law enforcement officers seized the money or property. However, the state may receive a maximum of 50% of the amount distributed.

A local government shall deposit its share of the pool into the general fund. Fund moneys shall be distributed to the local law enforcement agency until the sum equals 33⅓% of the agency's appropriated funds for the fiscal year. The moneys may be used for any official law enforcement purpose. The local government may expend remaining pool funds for law enforcement, drug education and treatment purposes, or other drug abuse programs.

The state shall deposit its share of the pool into the general fund and expend the moneys for law enforcement programs, particularly advanced drug investigation training for officers.

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[9] Forfeited moneys distributed according to same formula or procedures.

HAWAII

Forfeiture.
Hawaii Rev. Stat. 712A–1 to 712A–20 (Supp. 1990).

712A–16

A $3 million yearly maximum of proceeds[10] is distributed as follows:

1. One quarter (1/4) is allocated to the state or local governmental units whose officers conducted the investigation and caused the arrest of the person whose property was forfeited. The government authority is to use the proceeds for law enforcement purposes.

2. One quarter (1/4) is distributed to the prosecuting attorney instituting the action.

3. One half (1/2) is distributed to the criminal forfeiture fund which the attorney general administers. The attorney may expend funds for payment of:

    a. expenses of seizure, detainment, appraisal, inventory, or forfeiture.

    b. awards for information or assistance.

    c. supplemental sums to state and local law enforcement agencies.

    d. expenses related to training and education of law enforcement officers.

IDAHO

Controlled Substances. Idaho Code 37–2701 to 37–2751 (Supp. 1990).

37–2744; 37–2744A (real property)

Proceeds are distributed to the director for credit to the drug enforcement donation account.

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[10] Forfeited moneys distributed according to same formula or procedures.

Drug Asset Forfeiture Procedure Act. (H.B. 3610, P.A. 86-1382) 86th General Assembly,1990, amending Controlled Substances Act. Ill. Ann. Stat. ch. 56½ 1100-1603 (Smith-Hurd Supp. 1990).

1505

Proceeds[11] shall be distributed as follows:

1. Sixty-five percent (65%) shall be distributed to the metropolitan enforcement group, local, municipal, county, or state law enforcement agencies who participated in the investigation.

Proceeds shall be used for the enforcement of cannabis and controlled substances laws.

2. (a) In counties with a population over 3,000,000 twenty-five percent (25%) is distributed to a special fund in the county treasury and appropriated to the State's Attorney's Office for use in enforcing cannabis and controlled substances laws.

   (b) In counties with a population less than 3,000,000:

   (i) Twelve and ½ percent (12.5%) shall be distributed to the Office of the State's Attorney of the county instituting the forfeiture. The monies are deposited in a special fund in the county treasury and appropriated to the State's Attorney for use in enforcing cannabis and controlled substances laws.

   (ii) Twelve and ½ (12.5%) shall be distributed to the Office of the State's Attorneys' Appellate Prosecutor and deposited into the Narcotics Profit Forfeiture Fund. Proceeds are used for the investigation, prosecution and appeal of cannabis and controlled substances cases.

3. Ten percent (10%) shall be retained by the State Police for expenses related to the administration and sale of seized and forfeited property.

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[11] Forfeited moneys distributed according to same formula or procedures.

INDIANA[12]

Forfeiture of Vehicles and Other Property Used in Violation of Certain Statutes. Ind. Code Ann. 34-4-30.1-1 to 34-4-30.5-6 (West Supp. 1990).

34-4-30.1-4; 34-4-30.1-6

Proceeds[13] are deposited into the general fund of the state or the unit that employed the law enforcement officers seizing the property. Excess moneys over law enforcement costs are transferred to the state treasurer for deposit into the Common School fund. Ind. Const. art VIII, Section 2 requires proceeds to be deposited into the Common School fund.

IOWA

Disposition of Seizable and Forfeitable Property. Iowa Code Ann. 809.1-809.21 (West Supp. 1991).

809.13; 809.17

Proceeds are delivered to the department of justice. The attorney general may authorize disposition of the proceeds consistenty with law enforcement purposes, including drug education. Proceeds may also be transferred in whole or in part to the victim reparation fund at the discretion of the recipient agency, political subdivision, or department.

KANSAS

Controlled Substances. S.B. 151, H.B. 2105, 1991, amending Forfeitures; Procedure. Kan. Stat. Ann. 65-4171 to 65-4175 (West Supp. 1990)

65-4173

A maximum of 10% of the proceeds[14] may be used to pay the forfeiture action's prosecution costs, including reasonable attorney's fees. The moneys are deposited into the county treasurer and credited to the special prosecutors trust fund and shall be expended to aid the prosecution of forfeiture actions or to devleop, implement, or maintain drug prevention or enforcement programs.

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[12] Related Statute – Enforcement of Pharmacy Laws and Regulations. Ind. Code Ann. 16-6-8.5-1 to 16-6-8.5-8 (West 1984) Section 16-6-8.5-5.1 (controlled substances; raw materials, instruments, devices; property used as containers; books, records, research products) – Proceeds are paid into the Common School fund.

[13] Forfeited moneys distributed according to same formula or procedures.

[14] Forfeited moneys distributed according to same formula or procedures.

If the seizing agency is the Kansas bureau of investigation or highway patrol, or department of corrections, proceeds are deposited into the state treasury and credited to the state special asset forfeiture fund administered by the attorney general. If the seizing agency is a county or city agency, proceeds are deposited into the respective treasury and credited to the special law enforcement trust fund. Moneys in the special fund are to be used only for appropriate law enforcement purposes.

KENTUCKY

Controlled Substances. Ky. Rev. Stat. Ann. 218A. 010 – 218A. 991 (Supp. 1990).

218A. 420; 218A. 435

Seizing agencies retain ninety percent (90%) of the first 50,000 of proceeds[15] and forty-five percent (45%) of the amount above 50,000. The monies are used for direct law enforcement purposes. Ten percent (10%) of the first $50,000 is distributed to the commonwealth's attorney or county attorney prosecuting the forfeiture actions.

Other proceeds shall be deposited into the asset forfeiture trust fund which the Office for Investment and Debt Management manages and the Justice Cabinet administers. Fund monies shall be distributed as follows:

1. Eighteen percent (18%) shall be allocated to the Attorney General to be disbursed to commonwealth's attorneys or county attorneys participating in the forfeiture case;

2. Thirty-six percent (36%) shall be allocated to the cabinet for Human Resources to be used solely for drug education, prevention, and treatment;

3. Thirty-six percent (36%) shall be allocated to the Corrections Cabinet to be used solely for drug enforcement and incarceration programs; and

4. Ten percent (10%) shall be allocated to the Justice Department for asset forfeiture training; training materials, payments to state or local agencies for crime prevention, drug abuse prevention, general law enforcement, or similar drug enforcement purposes.

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[15] Forfeited moneys distributed according to same formula or procedures.

LOUISIANA

Seizure and Controlled Dangerous Substances Property Forfeiture Act of 1989, La Rev. Stat. 40:2601 – 40:2622 (West. Supp. 1991).

2616

Proceeds[16] are deposited into the Special Asset Forfeiture Fund administered by the office of the district attorney. Moneys are distributed as follows:

1. Sixty percent (60%) is distributed to the law enforcement agency making the seizure for drug enforcement efforts.

2. Twenty percent (20%) is distributed to the criminal court fund.

3. Twenty percent (20%) is distributed to the district attorney's office pursuing the forfeiture action. The district attorney may expend the moneys for public purposes including prosecution and rewards.

MAINE

Asset Forfeiture. Me. Rev. Stat. Ann. tit. 15, 5821–5825 (Supp. 1990).

5822

With the attorney general's written consent the court may distribute as much of the proceeds[17] as is appropriate to a municipal, county or state agency making a substantial contribution to the investigation of the related criminal case. Remaining proceeds are deposited into the state general fund.

MARYLAND

Controlled Dangerous Substances. Md. Ann. Code art. 27 276–303 (Supp. 1990).

297

If a local law enforcement agency seized the property, the proceeds are deposited into the local law enforcement fund, or if none, into the general fund of the political subdivision. If the state agency seized the property, proceeds are deposited into the state general fund.

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16 Forfeited moneys distributed according to same formula or procedures.

17 Forfeited moneys distributed according to same formula or procedures.

MASSACHUSETTS

Controlled Substances Act. Mass. Ann. Laws ch. 94C 1-48 (Law. Co-op. Supp. 1991).

47

Proceeds[18] are distributed equally between the prosecuting district attorney or attorney general and the city, town, state or metropolitan police department seizing the property. Moneys allocated to the various agencies are deposited into the special law enforcement trust funds and used for appropriate law enforcement purposes. The district attorney or attorney general may expend a maximum of ten percent (10%) of the proceeds for drug rehabilitation, drug education or neighborhood programs which further law enforcement purposes.

MICHIGAN

Controlled Substances. Mich. Stat. Ann. 14.15 (7101) to 14.15 (7545) (Callaghan Supp. 1990-1991).

14.15 (7524)

Proceeds[19] are distributed to entities having budgetary control over the seizing agencies and used to enhance drug law enforcement efforts.

MINNESOTA

Forfeitures. Minn. Stat. Ann. 609.531 - 609.532 (West Supp. 1991).

609.5315

Proceeds[20] are distributed as follows:

1. Seventy percent (70%) is forwarded to the appropriate agency as a supplement to its operating or similar fund and used for law enforcement purposes.

2. Twenty percent (20%) is distributed to the county attorney or other prosecuting agency handling the forfeiture as a supplement to its operating or similar fund and used for prosecutorial purposes.

3. Ten percent (10%) is forwarded to the state treasury and credited to the state general fund.

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[18] Forfeited moneys distributed according to same formula or procedures.

[19] Forfeited moneys distributed according to same formula or procedures.

[20] Forfeited moneys distributed according to same formula or procedures.

MISSISSIPPI

Controlled Substances Law. Miss. Code Ann. 41-29-101 to 41-29-185 (Supp. 1990).

41-29-181

If one law enforcement agency participated in the underlying criminal case:

1. Fifty percent (50%) of the proceeds[21] is distributed to the state treasurer for deposit in the state general fund.

2. Fifty percent (50%) is deposited and credited to the budget of the participating law enforcement agency.

If multiple law enforcement agencies participated in the underlying case:

1. Fifty percent (50%) of the proceeds is deposited and credited to the budget of the law enforcement agency initiating the criminal case.

2. Fifty percent (50%) is distributed among the other law enforcement agencies.

All property credited to the Bureau of Narcotics is forwarded to the state treasurer for deposit into a special fund for the Bureau's use.

MISSOURI[22]

Criminal Activity Forfeiture Act. Mo. Ann. Stat. 513.600 – 513.645 (Vernon Supp. 1991).

513.623

Proceeds are deposited into the state general revenue fund.

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[21] Forfeited moneys distributed according to same formula or procedures.

[22] Related statute. Comprehensive Drug Control Act of 1989. Mo. Ann. Stat. 195.005 – 195.375 (Vernon Supp. 1991). Section 195.145 (vehicles, vessels, or aircraft) – Proceeds are deposited into the state general revenue fund.

MONTANA

Seizures Related to Controlled Substances. Mont. Code Ann. 44-12-101 to 44-12-206 (1989)

44-12-206

Proceeds are forwarded to the treasurer of the city, town, or county where the property was seized and deposited into a drug forfeiture account for drug enforcement and education purposes. If a state agency seized the property, proceeds are deposited into a special revenue fund to the credit of the Department of Justice (DOJ) and used for drug law enforcement.

NEBRASKA

Drugs. Neb. Rev. Stat. 28-1437 to 28-1439.05 (1985)

28-1439.02

Proceeds[23] are forwarded to the treasurer of the county where the propertyb was seized and distributed as follows:

1. Fifty percent (50%) of moneys forfeited and all proceeds from conveyance sales are distributed in the manner provided for disposition of fines, penalties, and license money under the state constitution. Neb. Const. art, VII, section 5 requires fines, penalties and license money to be paid to the counties whre they ma be levied or imposed for the use and suppor tof common schools.

2. Fifty percent (50%) of moneys forfeited are deposited into the respective County Drug Law Enforcement Fund for appropriate drug enforcement purposes.

NEVADA

Forfeitures. Nev. Rev. Stat. 179.1156-179.121 (Supp. 1989)

179.118

Proceeds are deposited into the special forfeiture accounts of the law enforcement agencies involved in the seizure and forfeiture. Moneys must be used to enforce controlled substances laws.

NEW HAMPSHIRE

Controlled Drug Act. N.H. Rev. Stat. Ann. 318-B:1 to 318-B:30 (Supp 1990)

318-B:17-b

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[23] Forfeited moneys distributed according to same formula or procedures.

Proceeds[24] are distributed as follows:

1. Of the first $200,000:

   (a) Forty-five percent (45%) is distributed to the fiscal officers of the municipalities or counties where the seizing agencies are located for deposit in a special fund and used primarily for expense of drug related investigations.

   (b) Ten percent (10%) is deposited into a special nonlapsing account in the treasurer's office for alcohol and drug abuse prevention. Moneys excess of $400,000 are deposited into the general fund.

   (c) Forty-five percent (45%) is deposited into a revolving forfeiture fund administered by the attorney general and used for the costs of drug related investigations and drug control law enforcement programs. Moneys in excess of $1,000,000 are credited to the general fund.

2. Of the balance:

   (a) Ten percent (10%) is deposited into the special nonlasping account for alcohol and drug abuse prevention.

   (b) Ninety percent (90%) is deposited into the revolving fund.

NEW JERSEY

Forfeiture. **N.J. Stat. Ann. 2C:64-1 to 2C:63-9 (West Supp. 1990)**

2C:64-6

Proceeds become the property of the entity funding the prosecuting agency. The attorney general or other prosecutor involved divides the proceeds with the entity whose law enforcement agency participated in the surveillance, investigation, arrest or prsecution. Moneys allocated to law enforcement are for the exclusive enforcement uses of the respective agencies.

NEW MEXICO

Controlled Substances. **N.M. Code Ann. 30-31-1 to 30-31-41 (1989).**

30-31-35

Proceeds revert to the general fund of the appropriate state, county or municipality unless the law enforcement agencies use the monkeys to enforce the Controlled Substances Act.

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[24] Forfeited money distributed according to same formula or procedures.

NEW YORK[25]

Proceeds of a Crime – Forfeiture. N.Y. Civ. Prac. Law 1310–1352 (McKinney Supp. 1991) and Penal Law 480.00–480.35 (McKinney Supp. 1991).

1349; 480.20

Proceeds are distributed as follows:

1. Fifteen percent (15%) is distributed to the claiming authority to pay costs and expenses of the investigation, preparation, and litigation of the forfeiture action.

2. Five percent (5%) is distributed to the claiming agent to pay actual costs of protecting, maintaining, and forfeiting the property.

3. Forty percent (40%) is deposited into the substance abuse service fund.

4. Of the balance:

   a. Seventy–five percent (75%) is deposited into a law enforcement subaccount of the general fund of the state if the claiming agent is a state agency, or of the local political subdivision of which the claiming agent is a part.

   b. Twenty–five percent (25%) is deposited into a prosecution services subaccount of the general fund of the state if the attorney general is the claiming authority or of the political subdivision where the local claiming authority is located. Subaccount monies are to be used to enhance law enforcement efforts.

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[25] Related statute. Controlled Substances. N.Y. Public Health Law 3300–3397 (McKinney Supp. 1991). Section 3388 (vehicles, vessels or aircraft) – If the state police seize the property, proceeds are deposited into the state general fund. If the property is seized in New York City, Yonkers, Rochester or Buffalo, proceeds are deposited into the general funds of the respective cities. Proceeds from other seizures are deposited into the general fund of the county where the seizure occurred.

NORTH CAROLINA

Controlled Substances Act. N.C. Gen. Stat. 90–86 to 90–113.8 (1990).

90–112

Proceeds[26] are paid to the treasurer or officer authorized to receive fines and forfeitures and used for the school fund of the county in which the property was seized. N.C. Const. art IX, Section 7 requires proceeds to be deposited into the appropriate county school fund.

NORTH DAKOTA

Controlled Substances Act. N.D. Cent. Code 19–03.1–01 to 19–.03.1 43 (Supp. 1989). Assets Forfeiture Fund. N.D. Cent. Code 54–12–14 (1989).

19–03.1–36; 54–12–14

If a city or county agency seized the property, proceeds are deposited into the local assets forfeiture fund, or if none, the city or county general fund. If a state agency seized the property, proceeds are deposited into the attorney general assets forfeiture fund and used for drug enforcement purposes including obtaining evidence and paying awards for information or assistance. At the end of each fiscal year, the excess of $500,000 in the attorney general fund is deposited into the state general fund.

OHIO

Drug Offenses, Ohio Rev. Code Ann. § 2925.01–2925.51 (1987, Supp. 1990).

2925.42 (Criminal); 2925.43 (Civil); 2925.44; 2933.43

Proceeds[27] are deposited into the law enforcement trust fund of the prosecuting attorney and to the law enforcement trust fund of the county sheriff or the local political subdivision whose agency seized the property. If the prosecuting attorney declines to accept proceeds, the monies are deposited into the law enforcement fund which relates to the seizing agency.
If the State Highway Patrol seized the property, proceeds are deposited into the State Highway Patrol Contraband, Forfeiture and other Fund. If the Board of Pharmacy seized the property, proceeds are deposited into the Board of Pharmacy Drug Law Enforcement Fund. If any other state agency seized the property, proceeds are distributed to the state treasurer for deposit into the Peace Officer Training Council Fund.

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[26] Forfeited moneys distributed according to same formula or procedures.

[27] Forfeited moneys distributed according to same formula or procedures.

Monies in the State Highway Patrol and law enforcement funds are used for appropriate law enforcement purposes and educational services, such as DARE.

OKLAHOMA

Controlled Dangerous Substances Act. Okla. Stat. Ann. tit 63, 2-101 to 2-101 to 2-608. (West Supp. 1991).

2-506

Proceeds are deposited into a revolving fund in the treasurer's office of the county where the property was seized. The district attorney maintains the fund and uses moneys solely for drug law enforcement, prevention and education.

OREGON

Seizure and Forfeiture of Certain Property Relating to Illegal Drug Activity. 1989 Or. Laws H.B. 2282.

Proceeds are credited to the general fund of the local political jurisdiction operating the forfeiting agency. If the political subdivision is a county, moneys are used for criminal justice services, including enforcement and prosecution of criminal and juvenile laws; correction facilities and programs; drug treatment; and drug education programs. If the political subdivision is not a county, proceeds are deposited into the subdivision's general fund. A portion of the moneys is used for prosecution. All proceeds may be used for removing toxic substances from locations where illegal substances have been manufactured.

When the Department of Justice is the sole seizing/forfeiting agency or has entered into an agreement with another agency or a political subdivision, proceeds are distributed as follows:

(a) One hundred percent (100%) of the first $200,000 is deposited into the Criminal Justice Revolving Account.

(b) Seventy-five percent (75%) of the next $200,000 is deposited into the Criminal Justice Revolving Account. The balance is deposited into the Special Crime and Forfeiture Account and used for criminal justice services, including enforcement and prosecution of criminal laws; drug treatment; and drug education.

(c) Fifty percent (50%) of the next $200,000 is deposited into the Criminal Justice Revolving Account and the balance is deposited into the Special Crime and Forfeiture Account.

(d) Twenty-five percent (25%) of the next $200,000 is deposited into the Criminal Justice Revolving Account and the balance is deposited into the Special Crime and Forfeiture Account.

(e) One hundred percent (100%) of additional sums is deposited into the Special Crime and Forfeiture Account.

When the State Police is the sole seizing/forfeiting agency or has entered into an agreement with another agency or a political subdivision, proceeds are distributed as follows:

(a) One hundred percent (100%) of first $600,000 is deposited into the State Police Account.

(b) Seventy-five percent (75%) of the next $300,000 is deposited into the State Police Account and the balance is deposited into the Special Crime and Forfeiture Account.

(c) Fifty percent (50%) of the next $200,000 is deposited into the State Police Account and the balance is deposited into the Special Crime and Forfeiture Account.

(d) Twenty-five percent (25%) of the next $200,000 is deposited into the State Police Account and the balance is deposited into the Special Crime and Forfeiture Account.

(e) One hundred percent (100%) of additional sums is deposited into the Special Crime and Forfeiture Account.

PENNSYLVANIA[28]

Controlled Substances Act. Pa Stat. Ann. tit. 42, 6801-6802 (Purdon Supp. 1991).

6801

If the seizing agency has local or county jurisdiction, proceeds[29] are deposited into the operating fund of the county in which the district attorney is elected. If the seizing agency has statewide jurisdiction, the attorney general retains the proceeds. The district attorney and attorney general use the moneys to enforce the Controlled Substances, Drug, Device and Cosmetic Act.

RHODE ISLAND[30]

Controlled Substances Act. R.I. Gen. Laws 21-28-1.01 to 21-28-6.02 (1989).

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[28] Related statute. Forfeiture and Condemnation of Vehicles. Pa. Stat. tit. 35, 831.1-831.5 (Purdon Supp. 1989) Section 831.4 - Proceeds are paid to the county treasurer for the county's use.

[29] Forfeited moneys distributed according to same formula or procedures.

[30] Related statute. Controlled Substances Act. R.I. Gen lLaws 21-28-1.01 to 21-28-5.07 (1989). Section .-28-5.05 (controlled substances, related materials and other property, equipment and records) - Proceeds are paid to the general treasurer.

21-28-5.04

Of the first $200,000 proceeds[31] are distributed as follows:

1. Twenty percent (20%) is forwarded to the attorney general for deposit in the asset forfeiture fund and used for drug law enforcement and treatment of drug abuse victims.

2. Seventy percent (70%) is allocated to state and local law enforcement agencies in proportion to their contribution to the investigation of the criminal activity resulting in forfeiture. Each agency's proceeds are maintained in a separate account by the general, city or town treasurer and used for law enforcement purposes and violations of the drug act.

3. Ten percent (10%) is distributed to the department of mental health, retardation, and hospitals for substance abuse treatment programs.

Fifty percent (50%) of the moneys in excess of $200,000, not to exceed $200,000, shall be used to fund the Police Officer's Training Account.

SOUTH CAROLINA

Narcotics and Controlled Substances.
S.C. Code Ann. 44-53-110 to 44-53-588 (Supp. 1990).

44-53-530

The seizing law enforcement agency keeps the first $1,000 of cash unless the agency and prosecutor agree on another disposition. Additional cash, negotiable instruments, securities, and proceeds from the sale of forfeited property are distributed as follows:

1. Seventy-five percent (75%) is distributed to the seizing agencies and retained by the local governing body or state treasurer in a special amount in the name of each appropriate agency. Monies are used for drug enforcement purposes.

2. Twenty percent (20%) is distributed to the prosecuting agency and retained by the local governing body or State Treasurer in a special account in the name of each appropriate agency. Monies are used for prosecution of drug offenses and litigation of drug related matters.

3. Five percent (5%) is remitted to the State Treasurer for deposit into the state general fund.

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[31] Forfeited moneys distributed according to same formula or procedures.

SOUTH DAKOTA

Drugs and Substances Control. S.D. Codified Laws Ann.. 34-20B-1 to 34-20B-114 (1986, Supp. 1991).

34-20B-64; 34-20B-89

Proceeds[32] are deposited into the drug control fund which is administered by the attorney general. Moneys in excess of $250,000 may be distributed for drug enforcement efforts.

TENNESSEE[33]

Forfeiture of Property for Certain Conduct Relating to Controlled Substances, H.B. 628, 1990, amending Drug Control Act. Tenn. Code Ann. 39-17-401 to 39-17-427 (Supp. 1990); 53-11-301 to 53-11-415; 53-11-451 (Supp. 1990).

39-17-420; 53-11-451

Proceeds from the sale of forfeited real property which are allocated to a state agency are distributed as follows:

1. Fifty percent (50%) is paid to the state treasurer and used only for agency purposes as appropriated by the general assembly.

2. Forty percent (40%) is paid to the state treasurer and used only for operation, maintenance and construction of prisons under control of the Department of Correction as such funds are appropriated by the general assembly.

3. Ten percent (10%) is paid into the special drug case investigation fund and used for investigations of complex drug cases involving civil forfeitures.

Proceeds from the sale of forfeited real property which are allocated to local law enforcement agencies are paid into the treasury of the local government and appropriated for public purposes.

Proceeds from the sale of other forfeited property inure to the benefit of the county or city whose law enforcement agency seized the property and are used for the local drug enforcement program.

Proceeds resulting from bureau of investigation actions are paid to the state treasurer and used only as the general assembly appropriates.

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[32] Forfeited moneys distributed according to same formula or procedures.

[33] Related statute. Disposition of Forfeited Property. Tenn. Code Ann. 39-11-116 (Supp. 1990) (moneys or other things of value offered or received in violation of any statute or as an inducement to violate any statute) – Unless otherwise provided for, proceeds are deposited into the state general fund.

TEXAS

H. B. 1185, 1991, amending Forfeiture of Contraband. Tex. Code Crim. Proc. Ann. art. 59.01 – 59.10 (Supp. 1991).

59.06

A maximum of 10% of proceeds may be used for local prevention and treatment services if the locality requests the funds. If a local agreement exists between the attorney representing the state and law enforcement agencies, remaining proceeds are deposited into one or more of the following funds:

1. a special fund in the county treasury to be used for the official purposes of the office of the attorney representing the state;

2. a special fund in the municipal treasury if distributed to a municipal law enforcement agency, to be used for law enforcement purposes;

3. a special fund in the county treasury if distributed to a county law enforcement agency, to be used for law enforcement purposes;

4. a special fund in the state law enforcement agency if distributed to a state law enforcement agency, to be used for law enforcement purposes.

If no agreement exists, proceeds are deposited into the state treasury to the credit of the general revenue fund.

UTAH

Controlled Substances. Utah Code Ann. 58-37-1 to 58-37-19 (Supp. 1990).

58-37-13

Proceeds are distributed to the Division of Finance for deposit into the general fund unless the participating law enforcement agencies request use of moneys.

VERMONT

Possession and Control of Regulated Drugs. Vt. Stat. Ann. tit. 18, 4201-4248 (Supp. 1990).

4247

Proceeds are deposited into the state general fund.

VIRGINIA

Forfeiture in Drug Cases; Distribution of Assets, H.B. 1308, 1991, amending Forfeitures in Drug Cases Va. Code. 19.2-386.1 to 19.2-386.13 (1990), and adding § 19.2 - 386.14.

19.2-386.12; 19.2 - 386.14

Proceeds[34] are deposited into a special treasury fund of the Department of Criminal Justice Services. The Department shall retain ten percent in the Asset Sharing Administrative Fund for administrative and operational costs of the asset sharing program. Funds remaining shall be used to promote state or local law enforcement activities.

Federal, state, or local agencies directly participating in activities leading to the seizure and forfeiture may petition the Department for a share of the remaining 90% of the proceeds. If the petitioning agency is eligible and all participating agencies agree on the respective shares, the Department shall distribute shares to each agency's treasury. If there is no agreement, the Criminal Justice Services Board shall determine the shares according to specified criteria. Proceeds shall be used to promote law enforcement activities.

WASHINGTON

Controlled Substances Act. Wash. Rev. Code Ann. 69.50.101 to 69.50.607 (Supp. 1991).

69.50.505

Proceeds[35] totalling less than $5,000 are deposited into the general fund of the governmental unit of the seizing agency and used for narcotics enforcement efforts.

Proceeds totalling more than $5,000 are distributed as follows:

1. Twenty-five percent (25%) derived from the forfeiture of real property and seventy-five percent (75%) derived from the forfeiture of personal property are deposited in the general fund of the state, county and/or city of the seizing agency and used for law enforcement services.

2. Twenty-five percent (25%) derived from the forfeiture of real property and twenty-five percent (25%) derived from the forfeiture of personal property are forwarded to the state treasurer for deposit into the public safety and education account.

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[34] Forfeited moneys distributed according to same formula or procedures.

[35] Forfeited moneys distributed according to same formula or procedures.

3. Until July 1, 1995, fifty percent (50%) derived from the forfeiture of real property is deposited into the drug enforcement and education account. After July 1, 1995, the fifty percent is deposited into the general fund of the state, county and/or city of the seizing agency and used for law enforcement services.

WEST VIRGINIA

Controlled Substances Act. W.Va. Code 60A-1-101 to 60A-7-707 (1989).

60A-7-706; 60A-7-707

Proceeds[36] are distributed as follows:

1. Ten percent (10%) is distributed to the prosecuting attorney initiating the forfeiture proceeding.

2. The balance is deposited into a special law enforcement investigation fund for appropriate law enforcement purposes.

WISCONSIN[37]

Controlled Substances Act. Wis. Stat. Ann. 161.001-161.62 (1989, Supp. 1990).

161.55

At least fifty percent (50%) of sale proceeds and all forfeited moneys are deposited into the school fund. Wis. Const. art. 10 section 2 requires proceeds to be deposited into the school fund.

WYOMING

Controlled Substances. Wyo. Stat. 35-7-1001 to 35-7-1057 (1988).

35-7-1049

The attorney general typically orders proceeds distributed to the seizing agencies.

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[36] Forfeited moneys distributed according to same formula or procedures.

[37] Related statute. Forfeiture of Property Derived From Crime and Certain Vehicles. 973.075 - 973.077 (1985, Supp. 1990) (vehicles and real or personal property derived or realized from any crime) Section 973.075 - At least fifty percent (50%) of sale proceeds and all forfeited moneys are deposited into the school fund. Wis. Const. art 10, Section 2 requires proceeds to be deposited into the school fund. Section 973.075

FORFEITURE OF SUBSTITUTE ASSETS

Survey*
of
State Drug Control Statutes

GENERAL SUMMARY

Since 1983, states have increasingly enacted substitute assets provisions as tools to rid criminals of their undeserved wealth. Eleven (11) states now allow the forfeiture of a civil or criminal defendant's non-drug related assets when his or her forfeitable property is unavailable because of specified circumstances. The substitute assets are forfeited only to the extent of the value of the property subject to forfeiture.

Arizona	(1986)	Kentucky	(1990)
Arkansas	(1991)	Louisiana	(1989-1990)
Delaware	(1984)	Ohio	(1990)
Florida	(1989)	Rhode Island	(1987)
Georgia	(1991)	Wisconsin	(1989-1990)
Hawaii	(1988)		

These states permit forfeiture of substitute assets when the forfeited property (1) cannot be located; (2) has been transferred or conveyed to, sold to, or deposited with a third party; or (3) has been placed beyond the jurisdiction of the court.

All but Delaware permit forfeiture of substitute assets when the forfeitable property has been diminished in value or commingled with property which cannot be easily divided. Arizona, Florida, Hawaii, Kentucky, Ohio and Rhode Island require that the decrease in value be attributable to the defendant's act or omission. Arkansas, Georgia, Louisiana, and Wisconsin require that the decrease in value occur while the forfeitable property is not in the actual physical custody of the law enforcement or prosecutorial agency.

Only Louisiana and Arkansas authorizes forfeiture of substitute assets if the forfeitable property is also subject to an interest exempt from forfeiture. This provision helps defeat the common forfeiture avoidance technique of using leased or mortgaged property, or titling property in the names of relatives or friends. The state may still recover the value of the property used in illegal activity by forfeiting other assets of the drug dealer.

*Survey information current through May 15, 1991. Survey analysis includes only statutory language.

FORFEITURE OF SUBSTITUTE ASSETS

Survey*
of
State Drug Control Statutes

ARIZONA

Forfeiture. Ariz. Rev. Stat. Ann. 13-4301 to 13-4315 (1989).

13-4313

The court shall order the forfeiture of any other property of an in personam civil or criminal defendant up to the value of the subject property if the property:

(1) cannot be located;
(2) has been transferred or conveyed to, sold to, or deposited with a third party;
(3) has been placed beyond the jurisdiction of the court;
(4) has been substantially diminished in value by any act or omission of the defendant; or
(5) has been commingled with other property which cannot be divided without difficulty.

ARKANSAS

Asset Substitution in Drug Offense Forfeiture, S.B. 341,78th General Assembly, Reg. Sess., 1991, amending Controlled Substances Act. Ark. Stat. Ann. 5-64-101 to 5-64-608 (Advance Code Service, 1990 - 1991)

5-64-505

The court shall order the forfeiture of any other property of a claimant or defendant up to the value of the claimant's or defendant's property found by the court to be subject to forfeiture if any of the forfeitable property had remained under the control or custody of the claimant or defendant and:

(1) Cannot be located;
(2) Was transferred or conveyed to, sold to, or deposited with a third party;
(3) Is beyond the jurisdiction of the court;
(4) Was substantially diminished in value while not in the actual physical custody of the seizing agency;
(5) Was commingled with other property that cannot be divided without difficulty; or
(6) Is subject to any interest exempted from forfeiture.

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*Survey information current through May 15, 1991. Survey analysis includes only statutory language.

DELAWARE

Controlled Substances Act. Del. Code Ann. tit. 16, 4701–4796 (Supp. 1990).

4784

To the extent assets, interests, profits and proceeds forfeitable under this section:

(i) cannot be located;
(ii) have been transferred, sold to or deposited with third parties; or
(iii) have been placed beyond the jurisdiction of the state,

the court, following conviction of the individual charge, may direct forfeiture of such other assets of the defendants as may be available, limited in value to those assets that would otherwise be forfeited under the paragraph. Upon defendant's petition, the court may authorize redemption of assets forfeited provided the assets described are surrendered or otherwise remitted by such defendant to court's jurisdiction.

FLORIDA

Contraband Forfeiture Act. Fla. Stat. Ann. 932.701–932.705 (West Supp. 1991).

932.703

If property:

(a) cannot be located;
(b) has been transferred to, sold to, or deposited with a third party;
(c) has been placed beyond the jurisdiction of the court;
(d) has been substantially diminished in value by any act or omission of the defendant; or
(e) has been commingled with any property which cannot be divided without difficulty,

the court shall order forfeiture of any other property of the defendant up to the value of any property subject to forfeiture under 932.703.

A substitute assets provision is also found in 893.12 of the Comprehensive Drug Abuse Prevention and Control Act, 893.01–893.20 (West Supp. 1990)

GEORGIA

Forfeitures, H.B. 72, 1991, amending Controlled Substances. Ga. Code Ann. § 16–13–1 to 16–13–56 (1988).

16–13–49

The court shall order the forfeiture of any property of a claimant or defendant up to the value of property found by the court to be subject to forfeiture if any of the forfeited property:

(A) cannot be located;
(B) has been transferred or conveyed to, sold to, or deposited with a third party;
(C) is beyond the jurisdiction of the court;
(D) has been substantially disminished in value while not in the actual physical custody of the receiver or governmental agency directed to maintain custody of the property; or
(E) has been commingled with other property that cannot be divided without difficulty.

HAWAII

Hawaii Rev. Stat. 712A-1 to 712A-20 (Supp. 1990).

712A-14

The court shall order forfeiture of any other property of an in personam civil or criminal defendant up to the value of the subject property if any of the property subject to forfeiture:

(a) cannot be located;
(b) has been transferred or conveyed to, sold to, or deposited with a third party;
(c) has been placed beyond the jurisdiction of the court;
(d) has been substantially diminished in value by any act or omission of a defendant, or a defendant's agent or assignee; or
(e) has been commingled with other property which cannot be divided without difficulty.

KENTUCKY

Controlled Substances, Ky. Rev. Stat. Ann. 218A.010-218A.991 (Supp. 1990).

218A.410

If any of the property:

(1) cannot be located;
(2) has been transferred to, sold to, or deposited with a third party;
(3) has been placed beyond the jurisdiction of the court;
(4) has been substantially diminished in value by any act or omission of the defendant; or
(5) has been commingled with any property which cannot be divided without difficulty,

the court shall order the forfeiture of any other property of the defendant up to the value of any property subject to forfeiture under this section.

LOUISIANA

Seizure and Controlled Dangerous Substances Property Forfeiture Act of 1989. La. Rev. Stat. Ann. 40:2601–40:2622 (Supp. 1991).

40:2614

The court shall order the forfeiture of any other property of a claimant or owner up to the value of property found by the court to be subject to forfeiture if any of the property:

(1) cannot be located;
(2) has been transferred or conveyed to, sold to, or deposited with a third party;
(3) is beyond the jurisdiction of the court;
(4) has been substantially diminished in value while not in the actual physical custody of the seizing agency, district attorney, or his designee;
(5) has been commingled with other property making it incapable of petition in–kind without great detriment to other property; or
(6) is subject to any interest exempted from forfeiture under provision of Chapter 40.

OHIO

S.B. 258, 118th General Assembly, Reg. Sess., 1990 Ohio Laws, amending Drug Offenses. Ohio Rev. Code Ann. 2925.01 – 2925.51 (Page Supp. 1990).

2925.42 (Criminal Forfeiture)

If property is the subject of an order of forfeiture because of an act or omission of the person who is convicted of or pleads guilty to the felony drug abuse offense that is the basis of the order of forfeiture, or an act or omission of the juvenile found by a juvenile court to be a delinquent child for an act that, if committed by an adult, would be a felony drug abuse offense and that is the basis of the forfeiture, cannot be located upon the exercise of due diligence, has been transferred to, sold to, or deposited with a third party, has been placed beyond the jurisdiction of the court, has been substantially diminished in value, or has been commingled with other property that cannot be divided without difficulty, the court that issues the order of forfeiture shall order the forfeiture of any other property of the offender up to the value of any forfeited property described in this division.

RHODE ISLAND

Controlled Substances Act. R.I. Gen. Laws 21–28–1.01 to 21–28–6.02 (1989).

21–28–5.04.1 (Criminal Forfeiture)

If any of the property:

(1) cannot be located;
(2) has been transferred to, sold to or deposited with a third party;

(3) has been placed beyond the jurisdiction of the court;
(4) has been substantially diminished in value by any act or omission of the defendant; or
(5) has been commingled with other property which cannot be divided without difficulty,

the court shall order the forfeiture of any other property of the defendant up to the value of the subject property.

WISCONSIN

Controlled Substances Act. Wis. Stat. Ann. 161.001–161.62 (Supp. 1990).

161.555

The court may order the forfeiture of any other property of a defendant up to the value of property found by the court to be subject to forfeiture if the property subject to forfeiture:
(a) cannot be located;
(b) has been transferred, conveyed to, sold to or deposited with a third party;
(c) is beyond the jurisdiction of the court;
(d) has been substantially diminished in value while not in the actual physical custody of the law enforcement agency; or
(e) has been commingled with other property that cannot be divided without difficulty.

A substitute assets provision is also found in Section 973.076 of Forfeiture of Property Derived from Crime and Certain Vehicles, 973.075–973.007 (1985) as amended by 1989–1990 Wis. Act. 121.

FORFEITURE OF REAL PROPERTY USED TO COMMIT OR FACILITATE THE COMMISSION OF A DRUG OFFENSE

Survey* of State Drug Control Statutes

GENERAL SUMMARY

Drug enterprises depend on real property to perpetuate their activities. Dealers use it (1) to warehouse drugs; (2) to run crackhouses, methamphetamine labs, and distribution centers; (3) to grow marijuana for sale; and (4) to conceal illegal proceeds through investments in land and expensive homes. These are but a few of its numerous illicit uses.

Recognizing real property's integral link to drug activities, forty–three (43) states now permit the forfeiture of real property used to commit or facilitate the commission of a drug offense. Of these states, twenty–three (24) have enacted this new forfeiture authority since 1987.

Specific circumstances in which real property can be forfeited varies among states. For example, Florida's Contraband Forfeiture Act allows real property to be forfeited only if it has been used in the commission of a felony. Eleven (11) additional states require the underlying offense to either be a felony or punishable by more than one year of imprisonment.

Hawaii	Ohio
Idaho	Oklahoma
Indiana	Texas
Kansas	Washington
New Hampshire	West Virginia
New York	

Under certain circumstances, Georgia and Tennessee also require the underlying offense to be a felony or punishable for more than one year. Virginia requires the offense to be punishable by at least a five year term of imprisonment while Montana requires a term of imprisonment of more than five years.

Twenty (20) states allow forfeiture of real property only for specific activities, including distribution, sale, and manufacture of controlled substances, or violations of particular controlled substances provisions. (Violations of these provisions may also be punishable as felonies.)

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*Survey information current through May 15, 1991. Survey analysis includes only statutory language.

Alabama	New Hampshire
California	New York
Connecticut	Rhode Island
Delaware	South Carolina
Illinois	South Dakota
Indiana	Tennessee
Maine	Utah
Maryland	Virginia
Massachusetts	Washington
Minnesota	Wyoming

Similarly, Florida's Comprehensive Drug Abuse Prevention and Control Act allows real property forfeiture only for violations involving Schedule I or II drugs.

California, Kansas, Maryland and Massachusetts provide a forfeiture exemption for all or part of real property which is used as the primary residence of the defendant or the defendant's family. New York allows a court to terminate only the defendant's interest in a leasehold or tenancy and to continue the occupancy for lawful residents.

Several states also explicitly prohibit the forfeiture of real property for the commission of certain drug offenses. For example, Arkansas, Delaware, Maryland, Nevada, Oregon, and Washington, prohibit the forfeiture of real property for certain possession offenses. Six (6) states, Kentucky, Maine, Massachusetts, Oregon, South Dakota, and Washington, exclude some or all of marijuana offenses from the category of crimes on which real property forfeitures may be based.

Additionally, Minnesota and Utah, in particular circumstances, authorize real property forfeitures only when the value of the contraband, controlled substances or specified sales activities amounts to at least $1,000.

FORFEITURE OF REAL PROPERTY USED TO COMMIT OR FACILITATE THE COMMISSION OF A DRUG OFFENSE

Survey *
of
State Drug Control Statutes

ALABAMA

Controlled Substances. **Ala. Code 20-2-1- to 20-2-144 (1990).**

20-2-93

Real property or fixtures are subject to forfeiture if they are used or intended to be used for the manufacture, cultivation, growth, receipt, storage, handling, distribution or sale of any controlled substance in violation of any state controlled substances law.

ALASKA

Controlled Substances. **Alaska Stat. 17.30.010 - 17.30.900 (1983).**

Real property used to commit or facilitate the commission of a drug offense is not subject to forfeiture.

ARIZONA

Forfeiture. **Ariz. Rev. Stat. Ann. 13-4301 to 13-4315 (1989).**

13-4304

All property, including all interests in such property, described in a statute providing for its forfeiture is subject to forfeiture. For the forfeiture of real property, see Ariz. Rev. Stat. Ann. 13-2301 to 13-2317 (1989) on organized crime and racketeering offenses.

ARKANSAS

Controlled Substances Act. **Ark. Stat. Ann. 5-64-101 to 5-64-608 (Advance Code Service, 1990-1991).**

5-64-505

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*Survey information current through May 15, 1991. Survey analysis includes only statutory language.

Real property may be forfeited if it substantially assisted in, facilitated in any manner, or was used or intended for use in the commission of any prohibited act.
However, real property is not subject to forfeiture for a violation of 5-64-401 (c) (Unlawful possession of a controlled substance or counterfeit substance).

CALIFORNIA

Controlled Substances Act. Cal. Health and Safety Code 11000-11651 (Deering Supp. 1991).

11470

Real property related to a violation of 11366 (Opening or maintaining place for trafficking in controlled substance); 11366.5 (Providing room for manufacture or distribution of controlled substance; fortifying building to suppress law enforcement entry); 11366.6 (Use of building designed to suppress entry for sale of controlled substance); or 11379.6 (Manufacture of controlled substances by chemical extraction or chemical synthesis), whether or not charged, is subject to forfeiture.

However, an interest not to exceed $100,000 in real property which is used as a family residence and which is owned by two or more persons shall not be subject to forfeiture.
The exemption is unavailable if the claimant knew or should have known of the unlawful use of the property.

COLORADO

Contraband Forfeiture Act. Colo. Rev. Stat. 16-13-501 to 16-13-511 (1990).

Real property used to commit or facilitate the commission of a drug offense is not subject to forfeiture.

CONNECTICUT

Seized Property. Conn. Gen. Stat. Ann. 54-36a to 54-36h (Supp. 1991).

54-36h

All property is subject to forfeiture if it is used or intended for use, in any manner or part, to commit or facilitate the commission of a violation for pecuniary gain of Section 21a-277 (Penalty for illegal manufacture, distribution, sale, prescription, or dispensing), or Section 21a-278 (Penalty for illegal manufacture, distribution, sale, prescription or administration by non drug-dependent person).

DELAWARE

H.B. 502, 135th General Assembly, 1990, amending Controlled Substances Act. Del. Code Ann. tit. 16 4701–4796 (1974, Supp. 1990).

4784

Real property used, or intended for use, to store, grow, manufacture, compound, process, deliver, import or export any controlled substances is subject to forfeiture.

However, no real property shall be subject to forfeiture for a violation of 4753 (possession of a controlled or counterfeit substance which is a narcotic drug); 4754 (possession of a controlled or counterfeit substance which is not a narcotic drug), 4754A (possession of a noncontrolled prescription drug); 4755 (registration requirements and maintenance of building for using, keeping, or delivering controlled substances); 4757 (possession or delivery of hypodermic needles); or 4758 (keeping drugs in original containers).

DISTRICT OF COLUMBIA

Controlled Substances. D.C. Code Ann. 33–501 to 33–567 (Supp. 1990)

Real property used to commit or facilitate the commission of a drug offense is not subject to forfeiture.

FLORIDA

Contraband Forfeiture Act. Fla. Stat. Ann. 932.701–932.705 (West Supp. 1991)

932.701

Any real property or any interest in real property is subject to forfeiture if it has been or is being employed as an instrumentality in the commission of, or in aiding or abetting in the commission of, any felony.

Comprehensive Drug Abuse Prevention and Control Act. 893.01–893.20 (West Supp. 1991).

893.12

All real property, including any right, title, leasehold interest and other interest in the whole of any lot or tract of land and any appurtenances or improvements, is subject to forfeiture if it is used, or intended to be used, in any manner or part, to commit or to facilitate the commission of a violation related to a controlled substance described in Schedule I or II.

GEORGIA

Forfeitures. H.B. 72, 1991, amending Controlled Substances. Ga. Code. Ann. 16-13-1 to 16-13-56 (1988).

16-13-49

The following are contraband and no person shall have a property right in them:

...

(2) All property which is, directly or indirectly, used or intended for use in any manner to facilitate a violation of Article 2.

(3) All property located in the state which was, directly or indirectly, used or intended for use in any manner to facilitate a violation of Article 2 or of federal drug law or the drug law of other states which is punishable by imprisonment for more than one year.

Property means anything of value and includes any interest in anything of value, including real property or any fixtures thereon.

HAWAII

Forfeiture. Hawaii Rev. Stat. 712A-1 to 712A-20 (Supp. 1990).

712A-5

All property described in a statute authorizing its forfeiture is subject to forfeiture. Also, property used or intended for use in the commission of, attempt to commit, or conspiracy to commit a covered offense, or which facilitated or assisted such activity, is subject to forfeiture. Section 712A-1 defines property to encompass real property, including things growing on, affixed to, and found on land.

However, real property or an interest therein may be forfeited only in cases in which the covered offense is chargeable as a felony.

IDAHO

Controlled Substances. Idaho Code 37-2701 to 37-2751 (Supp. 1990).

37-2744A

Any real property, including any interest therein and any appurtenances thereto or improvements thereon, is subject to forfeiture if it is used in any manner or part, to commit or to facilitate the commission of a violation punishable by more than one (1) year of imprisonment.

ILLINOIS

Drug Asset Forfeiture Act. H.B. 3610, (P.A. 86-1382),86th General Assembly, 1990, amending Controlled Substances Act. Ill. Ann. Stat. ch. 56 ½ 1100-1603 (Smith-Hurd Supp. 1990).

1505

All real property, including any right, title, and interest (including, but not limited to, any leasehold interest or the beneficial interest in a land trust) in the whole of any lot or tract of land, any appurtenances or improvements, which is used or intended to be used, in any manner or part, to commit, or in any manner facilitate the commission of, any violation or act that constitutes a violation of Section 401 (unauthorized manufacture or delivery) or 405 (criminal drug conspiracy) or that is proceeds of any violation or act that constitutes a violation Section 401 or 405.

INDIANA

Forfeiture of Vehicles and Other Property Used in Violation of Certain Statutes. Ind. Code Ann. 34-4-30.1-1 to 34-4-30.5-6 (West Supp. 1990).

34-4-30.1-1

Real property owned by a person who uses it to commit any of the following as a Class A felony, Class B felony or a Class C felony is subject to forfeiture:

(a) dealing in cocaine or a narcotic drug (35-48-4-3)
(b) dealing in a Schedule I, II or II controlled substance (35-48-4-2)
(c) dealing in a Schedule IV controlled substance (35-48-4-3)
(d) dealing in marijuana, hash oil, or hashish (35-48-4-10)

IOWA

Disposition of Seizable and Forfeitable Property. Iowa Code Ann. 809.1-809.21 (West Supp. 1991).

809.1

Forfeitable property means property which has been used or is intended to be used to facilitate the commission of a criminal offense or to avoid detection or apprehension of a person committing a criminal offense.

KANSAS

Controlled Substances Act. Kan. Stat. Ann. 65-4101 to 65-4141 (Supp. 1990).

65-4135

All real property, including any building or structure thereon, is subject to forfeiture if it is used or intended for use in violation of the act, if such violation constitutes a felony.

However, a homestead shall not be subject to forfeiture unless the claimant of the homestead has been convicted of a violation of the uniform controlled substances act, K.S. A. 65-4101 et seq. and amendments thereto, or a comparable federal law violation, if such violation constitutes a felony which involves the unlawful manufacturing, compounding, selling, offering for sale, possessing with intent to sell, processing, importing or exporting of a controlled substance, or has been convicted of conspiracy or attempt to commit such a violation. The homestead shall be subject to forfeiture if forfeiture proceedings and the conviction arise from the same violation, act, conduct or transaction and, in that event, claimant so convicted shall be presumed to have consented to forfeiture of the homestead by commission of the violation. Additionally, real property is not subject to forfeiture for a violation of K.S.A. 65-4123 (Dispensing; Schedule I designated prescription substance), and amendments thereto.

KENTUCKY

Controlled Substances. Ky. Rev. Stat. Ann. 281A.010-218A.991 (Supp. 1990).

218A.410

All real property, including any right, title, and interest in the whole of any lot or tract of land and any appurtenances or improvements, is subject to forfeiture if it is used or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of the Chapter 218A, excluding any misdemeanor offense relating to marijuana.

LOUISIANA

Seizure and Controlled Dangerous Substances Property Forfeiture Act of 1989, La. Rev. Stat. Ann. 40:2601 - 40:2622 (West Supp. 1991).

40:2604

All property that is used or intended to be used in any manner to facilitate conduct giving rise to forfeiture is subject to forfeiture. Section 40:2601 defines property to include the whole of any lot or tract of land.

MAINE

Asset Forfeiture. Me. Rev. Ann. tit. 15, 5821–5825 (Supp. 1990).

5821

Except otherwise provided, all real property including any right, title or interest in the whole of any lot or tract of land and any appurtenances or improvements, is subject to forfeiture if it is used or intended for use, in any manner or part, to commit or to facilitate the commission of a violation of Title 17–A, Section 1103 (Unlawful trafficking in scheduled drugs) or 1105 (Aggravated trafficking or furnishing scheduled drugs), which is a Class A, Class B or Class C crime, with the exception of offenses involving marijuana.

MARYLAND

Controlled Dangerous Substances, Md. Ann. Code art 27 276–303 (Supp. 1990).

297

Except otherwise provided, an interest in real property may be forfeited if used in connection with a violation of 286 (Unlawful manufacture, distribution, etc.; counterfeiting, etc.; manufacture, possession, etc. of certain equipment for illegal use; keeping common nuisance); 286A (Bringing into state in excess of certain amounts); 286B (Distribution of noncontrolled substance as controlled dangerous substance); 286C (Using minors for manufacture, delivery or distribution of controlled dangerous substances); or 290 (Attempts, endeavors and conspiracies).

However, except under specified circumstances, real property used as a principal family residence by husband and wife and held as tenants by the entirety and used in connection with a violation of Sections 286, 286A, 286B, 286C, or 290, may not be forfeited unless both the husband and wife are convicted of one or more of these offenses.

Additionally, real property may not be forfeited for a violation of 287 (Unlawful possession or administering to another; obtaining, etc., substance or paraphernalia by fraud, forgery, misrepresentation, etc.; affixing forged label; altering, etc. label; unlawful possession or distribution of controlled paraphernalia; penalties), or 287A (Drug Paraphernalia).

MASSACHUSETTS

Controlled Substances Act. Mass Ann. Laws ch. 94C 1–48 (Law Co-op. Supp. 1991).

47

All real property, including any right, title, and interest in the whole of any lot or tract of land, any appurtenances or improvements thereto, is subject to forfeiture if it is used in any manner or part, to commit or facilitate commission of a violation of 32 (Unauthorized

manufacture, distribution etc. of Class B substances); 32B (Unauthorized manufacture, distribution, etc. of Class C substances); 32C (Unauthorized manufacture, distribution etc. of Class E substances); 32E (Unauthorized trafficking in marijuana, cocaine, heroin, etc.); 32F (Unauthorized manufacture, distribution); 32G (Counterfeit substances); 32I (Sale of drug paraphernalia); 32J (Violations on or near schools); or 40 (Conspiracy).

No real property used to facilitate or possess with intent to unlawfully manufacture, dispense, or distribute marijuana or a non-controlled substance containing marijuana may be forfeited if the net weight of the substance is less than ten (10) pounds in aggregate.

The owner of real property which is the principal domicile of the immediate family of the owner and which is subject to forfeiture may file a petition for a homestead exemption. Court may allow the petition exempting from forfeiture an amount allowed under Section one of Chapter 188. Value of the balance shall be forfeited.

MICHIGAN

Controlled Substances. Mich. Stat. Ann. 14.15 (7101) to 14.15 (7545) (Callaghan Supp. 1990-1991).

14.15 (7521)

Anything of value that is used or intended to be used to facilitate any violation of this article including but not limited to money, negotiable instruments, or securities.

MINNESOTA

Forfeitures. Minn. Stat. Ann. 609.531-609.532 (West Supp. 1991).

609.5311

(property associated with controlled substances)

All property, real and personal, is subject to forfeiture if it has been used, or is intended for use, or has in any way facilitated, in whole or in part, the manufacturing, compounding, processing, delivering, importing, cultivating, exporting, transporting or exchanging of contraband or a controlled substance.

However, real property is forfeitable only if the retail value of the controlled substance or contraband is $1,000 or more.

MISSISSIPPI

Controlled Substances Law. Miss. Code Ann. 41-29-101 to 41-29-185 (Supp. 1990).

41-29-153

All moneys, negotiable instruments, businesses or business investments, securities, and other things of value used, or intended to be used, to facilitate any violation of Article 41 are subject to forfeiture.

MISSOURI

Criminal Activity Forfeiture Act. Mo. Ann. Stat. 513.600-513.645 (Vernon Supp. 1991).

513.607

All property of every kind used or intended for use in the course of, derived from, or realized through criminal activity is subject to civil forfeiture.

MONTANA

Seizures Related to Controlled Substances. Mont. Code Ann. 44-12-101 to 44-12-206 (1989)

44-12-102

Real property, including any right, title, and interest in any lot or tract of land and any appurtenances or improvements, is subject to forfeiture if it is directly used or intended to be used in any manner or part to commit or facilitate the commission of a violation of Title 45, Chapter 9, that is punishable by more than (5) years in prison.

NEBRASKA

Drugs and Narcotics. Neb. Rev. Stat. 28-401 to 28-445 (1985).

Real property used to commit or facilitate the commission of a drug offense is not subject to forfeiture.

NEVADA

An Act Relating to Controlled Substances, A.B. 339, 1989, amending Controlled Substances. Nev. Rev. Stat. 453.011–453.548 (Supp. 1988).

453.301

All real property and mobile homes are subject to forfeiture if they are used or intended to be used by any owner or tenant of the property or mobile home to facilitate a violation of N.R.S. 453.011 to 453.552, except 453.336 (Unlawful possession not for purpose of sale).

Forfeitures. Nev. Rev. Stat. 179.1156–179.119 (Supp. 1989).

179.1164

Any property or proceeds otherwise subject to forfeiture pursuant to 179.121, 200.760 or 453.301 is subject to forfeiture.

NEW HAMPSHIRE

Controlled Drug Act. N.H. Rev. Stat. Ann. 318–B:1 to 318–B:30 (Supp. 1990).

318–B:17–b

Any real property is subject to forfeiture if it is knowingly used or intended for use in the manufacturing, compounding, processing, concealing, trafficking, delivery or distribution of a controlled drug in felonious violation of the act.

NEW JERSEY

Forfeiture. N.J. Stat. Ann. 2C:64–1 to 2C:64–9 (West 1982, Supp. 1989).

2C:64–1

All property which has been, or is intended to be, utilized in furtherance of an unlawful activity, including but not limited to, conveyances intended to facilitate the perpetration of illegal acts, or buildings or premises maintained for the purpose of committing offenses against the state, is subject to forfeiture.

Additionally, property which has become or is intended to become an integral part of illegal activity, including but not limited to, money which is earmarked for use as financing for an illegal gambling enterprise, is subject to forfeiture.

NEW MEXICO

Controlled Substances. N.M. Code Ann. 30-31-1 to 30-31-41 (1989).

Real property used to commit or facilitate the commission of a drug offense is not subject to forfeiture.

NEW YORK

Proceeds of a Crime-Forfeiture, N.Y. Civ. Prac. Law 1310-1352 (McKinney Supp. 1991), and Criminal Forfeiture-Felony, N.Y. Penal Law 480.00-480.35 (McKinney Supp. 1991).

1311

A civil action may be commenced by the appropriate claiming authority against a criminal defendant to recover the property which constitutes the proceeds of a crime, the substituted proceeds of a crime or the real property instrumentality of a crime to recover a money judgment in an amount equivalent in value to the property which constitutes the proceeds of a crime, the substituted proceeds of a crime, an instrumentality of a crime, or the real property instrumentality of a crime.

A civil action may be commenced against a non-criminal defendant to recover the property which constitutes the proceeds of a crime, the substituted proceeds of a crime, an instrumentality of a crime, or the real property instrumentality of a crime provided that a judgment of forfeiture predicated on (A) of (iv) of (b) of subdivision 3 shall be limited to the amount of the proceeds of the crime.

1310

Real property instrumentality of a crime means an interest in real property the use of which contributes directly and materially to the commission of a specified felony offense.

1311

If the forfeiture action involves a residential leasehold or statutory tenancy, the court may modify the leasehold or tenancy to terminate only the interest of the defendant and to continue the occupancy or tenancy of any other person who lawfully resides in the premises, with such rights as the party would otherwise have had if the defendant's interest had not been forfeited.

480.05

When any person is convicted of a specified offense, the real property instrumentality of such specified offense is subject to forfeiture pursuant to Article 480, unless the forfeiture is disproportionate to the defendant's gain from or participation in the offense, in which event the trier of fact may direct forfeiture of a portion thereof.

480.00

Real property instrumentality of a crime means an interest in real property the use of which contributes directly and materially to the commission of a specified offense.

NORTH CAROLINA

Controlled Substances Act. N.C. Gen. Stat. 90-86 to 90-113.8 (1990).

90-112

All other property subject to forfeiture under the provisions of this Article shall be forfeited as in the case of conveyances used to conceal, convey, or transport intoxicating beverages.

Racketeer Influenced and Corrupt Organizations Act. N.C. Gen. Stat. 75D-1 to 75D-14 (1990).

75D-5

All property of very kind used or intended for use in the course of, derived from, or realized through a racketeering activity or pattern of racketeering activity is subject to forfeiture to the state.

NORTH DAKOTA

Controlled Substances Act. N.D. Code 19-03.1-01 to 19-03.1-43 (Supp. 1989).

Real property used to commit or facilitate the commission of a drug offense is not subject to forfeiture.

OHIO

Drug Offenses. 2925.01-2925.51 Supp. 1990).

2925.42 (Criminal forfeiture)

A person who is convicted of or pleads guilty to a felony drug abuse offense, and any juvenile who is found by a juvenile court to be a delinquent child for an act that, if committed by an adult, would be a felony drug abuse offense, loses any right to the possession of property and forfeits to the state any right, title, and interest he may have in that property if it was used and intended to be used in any manner to commit, or to facilitate the commission of, the felony drug abuse offense or act.

2925.41 (Criminal forfeiture)

Property includes real property, including, but not limited to, things growing on, affixed to, and found in the real property.

2925.43 (Civil forfeiture)

Any property is subject to forfeiture if it was used or intended to be used in any manner to commit, or to facilitate the commission of, an act that, upon the filing of an indictment, complaint, or information, could be prosecuted as a felony drug abuse offense or that, upon the filing of a complaint, could be the basis for finding a juvenile to be a delinquent child for committing an act that, if committed by an adult, would be a felony drug abuse offense.

OKLAHOMA

Controlled Dangerous Substances Act. Okla. Stat. Ann. tit. 63, 2-101 to 2-608 (West Supp. 1991).

2-503

All real property including any right, title, and interest in the whole of any lot or tract of land and any appurtenances or improvements thereto, is subject to forfeiture if it is used, or intended to be used, in any manner or part, to commit or to facilitate a commission of a violation of the Uniform Controlled Dangerous Substances Act which is punishable by imprisonment for more than (1) year.

OREGON

Seizure and Forfeiture of Certain Property Relating to Illegal Drug Activity. 1989 Or. Laws H.B. 2282.

All real property, including any right, title, and interest in the whole of any lot or tract of land and any appurtenances or improvements, is subject to forfeiture if it is used, or intended to be used, in any manner or part to commit or facilitate in any manner the commission of prohibited conduct.

Prohibited conduct does not include violation of 475.992(4) (f) (Possession of less than one ounce of dried leaves, flowers and stems of marijuana), and does not include solicitation, attempt, or conspiracy to deliver for no consideration less than five (5) grams of dried leaves, stems and flowers of the cannabis family.

PENNSYLVANIA

Controlled Substances Forfeitures. Pa. Stat. Ann. tit. 42 6801–6802 (Purdon Supp. 1991).

6801

Real property used or intended to be used to facilitate any violation of the Controlled Substance Drug, Device and Cosmetic Act, including structures or other improvements thereon, and including any right, title, and interest in the whole of any lot or tract of land and any appurtenances or improvements, is subject to forfeiture if it is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of a violation of the Controlled Substance, Drug, Device and Cosmetic Act and things growing on, affixed to and found in the land.

RHODE ISLAND

Controlled Substances Act. R.I. Gen. Laws 21–28–1.01 to 21–28–6.02 (1989).

21–28–5.04

All real property, including any right, title, and interest in the whole of any lot or tract of land and any appurtenances or improvements, is subject to forfeiture if it is used in the commission of a violation of 21–28–4.01 (A) (Manufacture, deliver, or possess with intent to manufacture or deliver a controlled substance); 21–28–4.01B (Counterfeit substance); 21–28–4.01.1 (Minimum sentence for certain quantities of controlled substances); or 21–28–4.01.2 (Minimum sentence for certain quantities of controlled substances).

SOUTH CAROLINA

Narcotics and Controlled Substances. S.C. Code Ann. 44–53–110 to 44–53–588 (Supp. 1990).

44–53–520

All property, both real and personal, is subject to forfeiture if it in any manner is knowingly used to facilitate production, manufacturing, distribution, sale, importation, exportation, or trafficking in various controlled substances.

SOUTH DAKOTA

Drugs and Substance Control. S.D. Codified Laws Ann. 34-20B-1 to 34-20B-114 (Supp. 1991).

34-20B-70.1

All real property, including any right, title and interest in the whole of any plotted lot or tract of land which shall be measured in 320 acre increments, or all of any smaller amount and any appurtenances or improvements, is subject to forfeiture if it is used, or intended to be used, in any manner or part, to commit or facilitate the commission of the manufacturing, compounding, processing, delivering, importing, cultivating, exporting, transporting, or exchanging of a controlled substance or ten (10) pounds or more of marijuana, that has not been lawfully manufactured, distributed, dispensed, and acquired.

TENNESSEE

Forfeiture of Property For Certain Conduct Relating to Controlled Substances, H.B. 628 1990, amending Drug Control Act, Tenn. Code Ann. 39-17-401 to 39-17-427 (Supp. 1990); 53-11-301 to 53-11-415, 53-11-452 (Supp. 1990).

53-11-452

All real property, including any right, title, and interest in the whole of or any part of any lot or tract of land and any appurtenances or improvements, is subject to forfeiture if it is used in any manner or part to commit, either a violation of 39-17-417 (i) (Manufacturing, delivery, selling, or possessing with intent to manufacture, deliver, or sell a controlled substance with respect to certain amounts) or 39-17-417 (j)(Manufacturing, delivery, selling or possessing with intent to manufacture, deliver, or sell a controlled substance with respect to certain amounts) or the commission of three (3) or more acts occurring on three (3) or more separate days within a sixty (60) day period and each act results in a felony conviction under Title 39, Chapter 17, Part 4.

However, except in specified circumstances, no interest in real property shall be forfeited, unless the holder is convicted of a crime or crimes described in the above paragraph.

TEXAS

Forfeiture of Contraband. Tex. Code Crim. Proc. Ann. art 59.01-59.10 (Supp. 1991).

59.01

Contraband means property of any nature, including real, personal, tangible or intangible, that is used, or intended to be used, in the commission of any felony under 481 (Controlled Substances Act) or 483 (Dangerous Drugs) of the Health and Safety Code.

UTAH

Controlled Substances. Utah Code Ann. 58-37-1 to 58-37-19 (Supp. 1990).

58-37-13

All warehousing, housing, and storage facilities, or interest in real property of any kind is subject to forfeiture if it is used, or intended for use, in producing, cultivating, warehousing, storing, protecting, or manufacturing any controlled substance in violation of the act.

Unless the premises are used in producing, cultivating, or manufacturing controlled substances, a housing, warehousing, or storage facility or interest in real property may not be forfeited unless cumulative sales of controlled substances on the property within a two (2) month period total or exceed $1,000 per the street value of any controlled substance found on the premises at any given time totals or exceeds $1,000.

VERMONT

Possession and Control of Regulated Drugs. Vt. Stat. Ann. tit, 18. 4201-4248 (Supp. 1990).

Real property used to commit or to facilitate the commission of a drug offense is not subject to forfeiture.

VIRGINIA

Drugs. Va. Code. 18.2-247 to 18.2-265.5 (Supp. 1990).

18.2-249

All real property of any kind or character, is subject to forfeiture if it is used in substantial connection with the illegal manufacture, sale or distribution of controlled substances in violation of 18.2-248 (Manufacturing, selling, giving, distributing or possessing with intent to manufacture, sell, give or distribute a controlled substance or imitation controlled substance) or of marijuana in violation of 18.2-248.1 (Penalties for sale, gift, distribution or possession with intent to sell, give, or distribute marijuana).

However, real property is not subject to forfeiture unless the minimum prescribed punishment for a violation is a term of not less than five years.

WASHINGTON

Controlled Substances Act. Wash. Rev. Code Ann. 69.50.101 to 69.50.607 (Supp. 1991).

69.50.505

All real property, including any right, title, and interest in the whole of any lot or tract of land, and any appurtenances or improvements, is subject to forfeiture if it is being used with the knowledge of the owners for the manufacturing, compounding, processing, delivery, importing, or exporting of any controlled substance, if such activity is not less than a Class C felony and a substantial nexus exists between the commercial production or sale of the controlled substance and the real property.

However, possession of marijuana shall not result in forfeiture of real property unless the marijuana is for commercial purposes, the amount possessed is five or more plants or one pound or more of marijuana and a substantial nexus exists between the possession of marijuana and real property.

Also, the unlawful sale of marijuana or a legend drug shall not result in the forfeiture of real property unless the sale was 40 grams or more in the case of marijuana or 100 dollars or more in the case of a legend drug, and a substantial nexus exists between the unlawful sale and the real property.

WEST VIRGINIA

Controlled Substances Act. W.Va. Code 60A-1-101 to 60A-7-707 (1989).

60A-7-703

All real property, including any right, title, and interest in any lot or tract of land, and any appurtenances or improvements, is subject to forfeiture if it is used or has been used, or is intended to be used, in any manner or part, to commit or to facilitate the commission of a violation punishable by more than one year imprisonment.

WISCONSIN

Controlled Substances Act. Wis. Stat. Ann. 161.001-161.62 (1989, Supp. 1990).

Real property used to commit or facilitate the commission of a drug offense is not subject to forfeiture.

WYOMING

Controlled Substances. Wyo. Stat. 35-7-1001 to 35-7-1057 (1988).

35-7-1049

All buildings knowingly used or intended for use to store, manufacture, or distribute property are subject to forfeiture.

USER ACCOUNTABILITY

MODEL DENIAL OF FEDERAL BENEFITS ACT (1991) SELECTED STATE DRIVER'S AND PROFESSIONALS LICENSE SUSPENSION LAWS

IN THIS SECTION PAGE

INTRODUCTION
TO
MODEL DENIAL OF FEDERAL BENEFITS ACT (1991)

An important objective of the National Drug Control Strategy is to hold users accountable for their illegal drug use. In 1988, Congress provided state and local officials with a powerful deterrent to casual drug use: denial of federal benefits.

Section 5301 of the Anti-Drug Abuse Amendments of 1988, codified at 21 U.S.C. 862, authorizes state and federal judges to deny certain federal benefits to individuals convicted of federal and state drug law violations. This additional sentencing tool allows judges to fashion meaningful sentences to deter individuals for whom incarceration is inappropriate or impractical due to prison overcrowding. For example, a college student may lose his financial aid for school; a farmer may lose his agricultural subsidy; an entrepreneur may lose his loan from the Small Business Administration. While a judge possesses sole discretion in most cases whether to deny any or all of an offender's benefits, Section 862 (5301) preserves an individual's right to receive federal payments for basic necessities and benefits relating to long-term drug treatment for addicts. Therefore, denial provisions are inapplicable to health, welfare, disability, and similar benefits.

Under the guidance of the Office of National Drug Control Policy, the U. S. Department of Justice, and the National Center for State Courts, a step-by-step implementation plan has been developed:

- Sentencing guidelines for the federal courts were amended on November 30, 1989 to include the denial of federal benefits as an option available in sentencing persons convicted in federal court.

- On January 26, 1990, the Assistant Attorney General, Office of Justice Programs, informed all state supreme courts and state court administrators of the denial program.

- The General Services Administration (GSA) modified the Lists of Parties Excluded from Federal Procurement and Nonprocurement Programs (commonly known as the Debarment List) to include persons denied federal benefits.

- DOJ, Office of Justice Programs, has set up a clearinghouse to receive notice from state and federal courts of sentences including denial of federal benefits and to transmit them to GSA for inclusion in the Debarment List and to federal agencies.

- The necessary guidelines and forms have been developed and are being distributed to affected organizations within the state and federal court systems.

- A Model Denial of Federal Benefits Act has been drafted and is being distributed to implement Section 862 at the state level by authorizing state judges to deny federal benefits for violations of state controlled substances laws.

This section introduces the Model Denial of Federal Benefits Act and explains the operation of the denial of benefits program. Adoption by states of the model act, when authorization is necessary, is a cornerstone to the success of the program. Research by the National Center for State Courts reveals that in many states a judge's sentencing authority is strictly defined by state statutes. State laws currently fail to provide judges with denial of federal benefits as a sentencing option. Enactment of the model act and appropriate regulations sets in motion an entire system designed to provide judges with one more weapon to effectively address the drug problem at the state and local level.

HIGHLIGHTS
OF
MODEL DENIAL OF FEDERAL BENEFITS ACT (1991)
AND
21 U.S.C. § 862

- Allows denial of certain federal benefits for specified time periods to individuals convicted of state or federal trafficking (distribution) and possession offenses.
- Places sole discretion whether to deny any or all of an individual's benefits with the judge, except for third time traffickers whose denial of benefits is mandatory.
- Authorizes imposition of a period of ineligibility in addition to or in lieu of other dispositions.
- Excludes from deniable benefits those benefits for which payment or services are required for eligibility, and which provide basic necessities, e.g. disability, welfare.
- Excludes from deniable benefits those benefits relating to long–term drug treatment for addicts.
- Requires restoration of eligibility if the individual completes a supervised drug rehabilitation program; has otherwise been rehabilitated; or has made a good faith effort to gain admission to a supervised drug rehabilitation program but is unable to do so.
- Requires notification of ineligibility or restoration of eligibility to federal agencies.
- Allows appeal of a denial order.

DENIAL OF FEDERAL BENEFITS: A NEW APPROACH TO USER ACCOUNTABILITY

What is the purpose of the denial program?

- To provide a meaningful deterrent to drug users for whom incarceration is unlikely or impractical.

Who has authority to deny federal benefits?

- State and federal judges may deny benefits in addition to other authorized or required dispositions.

Who can lose federal benefits?

- Individuals <u>convicted</u> of state or federal drug trafficking and possession offenses.

Which benefits can be denied?

- <u>Future benefits</u>
  e.g.
  - student loans and fellowships
  - research grants
  - contracts
  - mortgages and housing loans
  - agricultural subsidies
  - aviation, maritime or locomotive licenses

Which benefits are exempted from denial?

- <u>Basic needs payments</u>
  e.g.
  - retirement
  - welfare
  - social security
  - health
  - disability
  - veterans benefits
  - public nursing
  - long-term treatment for self-declared addicts who reasonably substantiate the declaration and submit to long-term treatment or are deemed rehabilitated

How many benefits can be denied?	• Any or all benefits denied at judge's discretion for 1st possession conviction; 1st and 2nd distribution convictions; • All benefits denied at judge's discretion for 2nd possession conviction. • Any or all benefits shall be denied for 3rd distribution conviction.
For how long can benefits be denied?	• Up to 1 year for 1st possession conviction • Up to 5 years for 2nd or subsequent possession conviction • Up to 5 years for 1st distribution conviction • Up to 10 years for 2nd distribution conviction • Permanently for 3rd distribution conviction
Can judges impose conditions in addition to the denial of benefits?	• Judges can require drug possessors: · to successfully complete an approved treatment program which includes drug testing · to perform community service if a service program exists
Can benefits be reinstated before the denial period is is over?	• Judges shall restore benefits if the individual: · completes a supervised drug rehabilitation program; · has otherwise been rehabilitated; · has made a good faith effort to enter a rehabilitation

	program but is unable to do so because of inability to pay or inaccessibility or unavailability of the program
Is a denial order reviewable?	• An individual may appeal a denial order pursuant to standard court rules.
What happens if there is a mistake in the denial order or accompanying documentation?	• The Chief Justice of the State Supreme Court or other designated official may promulgate rules and procedures for processing the denial information, including identifying and correcting errors and establishing time limits for submission to DOJ
How does the federal government know to deny benefits to an individual convicted of a state offense?	• The court clerk or other designated authority submits a copy of the order and necessary forms to the U.S. Department of Justice (DOJ).
	• DOJ acts as a clearing house and keeps records of state and federal denial of benefits information.
	• DOJ forwards data to the General Services Administration (GSA).
	• GSA includes data on List of Properties Excluded from Federal Procurement or Non-Procurement Programs; more commonly known as Debarment List.
	• Federal agencies check the Debarment List prior to the award of any federal benefit.

MODEL DENIAL OF FEDERAL BENEFITS ACT (1991) AND COMMENT

Section 1. [Short Title]. This act shall be known as and may be cited as the "Denial of Federal Benefits Act."

Comment

This section is a standard provision used in many statutes for easy reference to an act. Congress enacted Section 5301 of the Anti-Drug Abuse Amendments of 1988, codified at 21 U.S.C. 862, to deny federal benefits to certain federal and state drug traffickers and possessors. At the heart of Section 862 is the recognition that illegal drug use fuels the drug problem. The Section sends a clear message that drug users as well as drug traffickers will be held accountable for their actions. Denial of federal benefits provides an additional deterrent to casual drug use other than incarceration. For many of these users, incarceration is an unlikely or impractical outcome. Therefore, states need to fashion meaningful sanctions for illegal drug use, such as denial of benefits. Approximately 68% of illegal drug users are full-time or part-time employees. (National Drug Control Strategy 70 (February 1991)). Almost 20 percent of college students regularly use drugs. (National Commission on Drug-Free Schools, Final Report, Toward a Drug-Free Generation:A Nation's Responsibility 4 (September 1990)). For some of these individuals, a significant deterrent can be the loss of federal subsidies or educational loans.

Section 2. [Definitions]. As used in this [Act]:

(a) "Addict" means any individual who habitually uses any narcotic drug so as to endanger the public morals, health, safety, or welfare, or who is so far addicted to the use of narcotic drugs as to have lost the power of self-control with reference to the addiction.

(b) "Federal benefit" means the issuance of any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States. The definition excludes any retirement, welfare, Social Security, health disability, veterans benefit, public housing, or other similar benefit, or any other benefit for which payments or services are required for eligibility.

(c) "Veterans benefit" means all benefits provided to veterans, their families, or survivors by virtue of the service of a veteran in the Armed Forces of the United States.

Comment

The definition of "addict" is drawn from 21 U.S.C. 802(1), which defines addict for puposes of the Comprehensive Drug Abuse Prevention and Control Act of 1970. Addicts are a special class of users for whom long-term treatment benefits are exempted from denial in certain instances.

The definitions of federal benefit and veterans benefit are taken from 21 U.S.C. 862(d)(1)

and (2). "Federal benefit" specifies which grants, contracts, loans or licenses federal and state judges may deny. Typical benefits which a drug offender may lose include agricultural subsidies, student and business loans, research grants, and federally insured mortgages. However, only those future benefits for which an individual may be eligible can be denied. For example, a Guaranteed Student Loan which requires reapplication for each year of college. Existing benefits cannot be accelerated or revoked. The definition also identifies certain payments for basic needs which cannot be denied: welfare, Social Security, public housing, retirement, veterans and health benefits. Moreover, 21 U.S.C. 862(f) precludes any interpretation which affects federal obligations to Native Americans.

Section 3. [Finding and Conditions of Ineligibility]

(a) Upon an individual's conviction and in accordance with subsection (b), a [state court], in addition to any other authorized or required disposition:

(I) may deny any or all of an individual's federal benefits for up to:

(A) one year after a first conviction of [violation of state provisions involving illegal possession of a controlled substance];

(B) 5 years after a first conviction of [violation of state provisions involving illegal delivery, distribution, or possession with intent to distribute a controlled substance];

(C) 10 years after a second conviction of [violation of state provisions involving illegal delivery, distribution, or possession with intent to distribute a controlled substance].

(II) may deny all of an individual's federal benefits for up to 5 years after a second or subsequent conviction of [violation of state provisions involving illegal possession of a controlled substance];

(III) may require in addition to (I)(A) or (II) successful completion of an approved drug treatment program which includes periodic drug testing to insure that the individual remains drug free; [appropriate community service; or both;]

(IV) shall deny permanently any or all of an individual's federal benefits after a third conviction of [violation of state provisions involving illegal delivery, distribution, or possession with intent to distribute a controlled substance].

(b) In imposing penalties and conditions under subsection (a), a [state court] shall not deny long-term treatment benefits for a self-declared addict who reasonably substantiates the declaration and submits to a long-term treatment program for addiction, or is deemed to be rehabilitated.

Comment

Under 21 U.S.C. 862, judges may deny federal benefits to individuals convicted of state or federal trafficking or possession offenses. The Comprehensive Drug Abuse Prevention and Control Act of 1970 defines trafficking as an offense consisting of the distribution of controlled substances. Similarly, a possession offense is defined as involving the possession of a controlled substance. States should insert references to comparable state offenses involving distribution, delivery, and possession. Special consideration should be given to including other appropriately related drug violations, such as conspiracy or attempt to commit a controlled substance offense.

Except for third time traffickers whose denial of benefits is mandatory, the court retains sole discretion whether to deny a defendant's federal benefits. If information is available to determine which benefits a defendant receives, the court may selectively deny any benefit. Alternatively, the court may issue a blanket denial of all of a defendant's benefits. Another option for the court is to impose a period of ineligibility in addition to or in lieu of other authorized or required dispositions.

The length of the ineligibility period varies with the type of offense and conviction. The precise length of the period will be decided in consideration of the state's sentencing guidelines or other current sentencing scheme. However, Section 862 and the model act impose the following maximums: (1) five years for a first conviction of a trafficking offense or a second or subsequent conviction of a possession offense; (2) ten years for a second conviction of a trafficking offense; and (3) one year for first conviction of a possession offense.

Rehabilitation is an important concept underlying several sections of Section 862 and the model act. Long-term treatment benefits for self-declared addicts are exempted from denial under certain circumstances. One circumstance is the rehabilitation of the drug offender. For guidance in determining whether a specific offender has been rehabilitated, states should look to rules and regulations of their state health services agency and, if applicable, the U.S.Department of Health and Human Services.

As part of a denial sentence, courts may require drug possessors to successfully complete an approved drug treatment program which includes drug testing. A bracketed community service option is also provided. Courts in states with existing service programs may require community service as a condition of the sentence.

Section 4. [Restoration of Eligibility]

After [state application, notice, and hearing procedures], a [state court] shall restore an individual's eligibility to receive any or all of the federal benefits denied under Section 3 if the [state court] finds that the individual:

(a) has completed a supervised drug rehabilitation program;

(b) has otherwise been rehabilitated; or

(c) has made a good faith effort to gain admission to a supervised drug rehabilitation program, but is unable to do so because of inaccessibility or unavailability of such a program, or

the inability of the individual to pay for such a program.

Comment

Section 4 underscores the importance of treatment and rehabilitation in the denial of benefits program. A court is required to suspend a period of ineligibility if the individual successfully rehabilitates himself or herself. The court is under the same mandate if the individual attempts to enter rehabilitation but is unable to do so because of uncontrollable circumstances. As in Section 3, definitions regarding rehabilitation or rehabilitation programs should be guided by the state health services agency and, if applicable, the U.S. Department of Health and Human Services.

Section 5. [Notification of Ineligibility or Restoration of Eligibility to Relevant Federal Agencies]

(a) The [court clerk, court administrator, or other designated authority] shall submit a copy of the denial or restoration of benefits order and [all forms or other notification required by federal and state law, rules, or regulations] to the United States Department of Justice or other agency designated to receive such information.

(b) The order and accompanying documentation shall be submitted within [a reasonable time consistent with state court rules and procedures] after the issuance of an order denying or restoring an individual's eligibility to receive any or all federal benefits.

Comment

Issuance of an order under this Act initiates a state and federal administrative process designed to implement the denial of benefits program. The court clerk or other authorized official sends a copy of the order accompanied by proper documentation, particularly a Denial of Federal Benefits form, to the U.S. Department of Justice (DOJ) or other designated federal agency. Alternatively, the state may establish a central clearinghouse to receive all the denial of benefits information and forward it to the federal repository. The denial form and other necessary federal documentation will be supplied by DOJ or other designated agency. The information should be submitted within a reasonably expeditious time period. What is reasonable will vary among states, depending on time frames for processing orders and other court paperwork.

The DOJ, acting as a clearinghouse, will maintain records of all information received from federal and state court officials. It will forward the data to the General Services Administration (GSA) which will include the information on the Lists of Parties Excluded from Federal Procurement or Non-procurement Programs, more commonly known as the Debarment List.

As currently required by regulation and Executive Order, each federal agency will be responsible for checking the contents of the Debarment List for Section 862 violations prior to the award of any federal benefit. The Debarment List will contain codes that indicate whether all or only some benefits have been denied. If the denial is partial, agencies must contact DOJ for a complete listing of each individual's denied benefits.

Section 6. [Inapplicability of Act]

This [Act] shall not apply to any individual who cooperates or testifies with the government in the prosecution of a federal or state offense or who is in a government witness protection program.

Comment

This provision is a restatement of 21 U.S.C. 862(e). It excludes government witnesses from penalties and conditions imposed under the denial of benefits program.

Section 7. [Appeals]

An individual may file a notice of appeal in the [state court of appeals] and obtain review of a final denial of benefits order pursuant to [appropriate state appellate court rules regarding petition, notice, hearing, and standard of review].

Comment

Section 7 authorizes an appeal of a denial of federal benefits order pursuant to existing rules for review of trial court sentences.

Section 8. [Rules and Procedures]

The [chief judicial officer of the state or designated authority] may promulgate any rules and procedures deemed necessary and appropriate for the efficient implementation of this [Act].

Comment

The Chief Justice of the State Supreme Court or other designated official is authorized to establish procedures for processing orders and concomitant information. Issues which should be addressed include: (1) responsibilities of the court official who oversees the submission of denial of benefits information; (2) time limits for disseminating information to DOJ; (3) procedures for confirming DOJ's receipt of the documentation; and (4) procedures for identifying and correcting errors and notifying DOJ of the proper information.

Section 9. [Severability Provision]

If any provisions of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

Comment

This section is a standard saving provision used in many statutes.

Section 10. [Effective Date]
This [Act] takes effect on [date].

Comment

This section is a standard provision used in many statutes.

violates this subsection shall be subject to the provisions of subsections (b), (c), and (e) of this section.

(Pub.L. 91–513, Title II, § 420, formerly § 405B, as added Pub.L. 99–570, Title I, § 1102, Oct. 27, 1986, 100 Stat. 3207–10; and amended Pub.L. 100–690, Title VI, §§ 6452(b)(1), 6459, 6470(d), Nov. 18, 1988, 102 Stat. 4371, 4373, 4378; renumbered and amended Pub.L. 101–647, Title X, §§ 1002(c), 1003(c), Title XXXV, § 3599L, Nov. 29, 1990, 104 Stat. 4827, 4829, 4932.)

Historical and Statutory Notes

References in Text. "This subchapter", referred to in subsecs. (a) and (f), was in the original "this title" which is Title II of Pub.L. 91–513, Oct. 27, 1970, 84 Stat. 1242, and is popularly known as the "Controlled Substances Act". For complete classification of Title II to the Code, see Short Title note set out under section 801 of this title and Tables.

"Subchapter II of this chapter", referred to in subsec. (a), was in the original "title III", meaning Title III of Pub.L. 91–513, Oct. 27, 1970, 84 Stat. 1285. Part A of Title III comprises subchapter II of this chapter. For classification of Part B, consisting of sections 1101 to 1105 of Title III, see Tables volume.

Codification. Section was formerly classified to section 845b of this title.

1988 Amendment. Subsec. (a)(1)–(3). Pub.L. 100–690, § 6459(1)–(3), struck the word "or" after the semicolon in par. (1); substituted at the end of par. (2) "; or" for the period; and added par. (3).

Subsec. (c). Pub.L. 100–690, § 6452(b)(1)(A), (B), struck out "or convictions" after "a prior conviction" and added the sentence. "Penalties for third and subsequent convictions shall be governed by section 841(b)(1)(A) of this title."

Subsec. (e). Pub.L. 100–690, § 6470(d), struck "required by section 841(b) of this title" following "mandatory term of imprisonment".

Legislative History. For legislative history and purpose of Pub.L. 99–570, see 1986 U.S. Code Cong. and Adm. News, p. 5393. See, also, Pub.L. 100–690, 1988 U.S.Code Cong. and Adm.News, p. 5937; Pub.L. 101–647, 1990 U.S. Code Cong. and Adm. News, p. 6472.

Notes of Decisions

Avoiding detection or apprehension 2
Knowledge and intent 1
Nature of section ½

½. Nature of section

Defendant was properly convicted for using minor in cocaine distribution effort, despite claim that statute in question was not a separate offense statute but rather one that involved sentence enhancement. U.S. v. Valencia–Roldan, C.A.9 (Cal.) 1990, 893 F.2d 1080.

1. Knowledge and intent

Conviction under statute prohibiting use of a minor in cocaine distribution effort did not require that Government establish defendant knew that person so used was under age. U.S. v. Valencia–Roldan, C.A.9 (Cal.) 1990, 893 F.2d 1080.

Statute making it a crime to use a minor under the age of 14 in the distribution of a controlled substance does not require knowledge that the minor is under 14. U.S. v. Carter, C.A.8 (Minn.) 1988, 854 F.2d 1102.

2. Avoiding detection or apprehension

Finding that defendants had used minor in drug transaction in attempt "to avoid detection or apprehension" was sufficiently supported by evidence presented on use-of-minor charge, including evidence that, after defendants' vehicle broke down a short distance from site chosen for drug buy, they arranged for minor to transport them in order to have vehicle in which to leave site. U.S. v. Curry, C.A.11 (Ala.) 1990, 902 F.2d 912.

§ 862. Denial of Federal benefits to drug traffickers and possessors

(a) Drug traffickers

(1) Any individual who is convicted of any Federal or State offense consisting of the distribution of controlled substances shall—

(A) at the discretion of the court, upon the first conviction for such an offense be ineligible for any or all Federal benefits for up to 5 years after such conviction;

(B) at the discretion of the court, upon a second conviction for such an offense be ineligible for any or all Federal benefits for up to 10 years after such conviction; and

(C) upon a third or subsequent conviction for such an offense be permanently ineligible for all Federal benefits.

(2) The benefits which are denied under this subsection shall not include benefits relating to long-term drug treatment programs for addiction for any person who, if there is a reasonable body of evidence to substantiate such declaration, declares himself to be an addict and submits himself to a long-term treatment program for addiction, or is deemed to be rehabilitated pursuant to rules established by the Secretary of Health and Human Services.

(b) Drug possessors

(1) Any individual who is convicted of any Federal or State offense involving the possession of a controlled substance (as such term is defined for purposes of the Controlled Substances Act [21 U.S.C.A. § 801 et seq.]) shall—

(A) upon the first conviction for such an offense and at the discretion of the court—

(i) be ineligible for any or all Federal benefits for up to one year;

(ii) be required to successfully complete an approved drug treatment program which includes periodic testing to insure that the individual remains drug free;

(iii) be required to perform appropriate community service; or

(iv) any combination of clauses (i), (ii), or (iii); and

(B) upon a second or subsequent conviction for such an offense be ineligible for all Federal benefits for up to 5 years after such conviction as determined by the court. The court shall continue to have the discretion in subparagraph (A) above. In imposing penalties and conditions under subparagraph (A), the court may require that the completion of the conditions imposed by clause (ii) or (iii) be a requirement for the reinstatement of benefits under clause (i).

(2) The penalties and conditions which may be imposed under this subsection shall be waived in the case of a person who, if there is a reasonable body of evidence to substantiate such declaration, declares himself to be an addict and submits himself to a long-term treatment program for addiction, or is deemed to be rehabilitated pursuant to rules established by the Secretary of Health and Human Services.

(c) Suspension of period of ineligibility

The period of ineligibility referred to in subsections (a) and (b) of this section shall be suspended if the individual—

(A) completes a supervised drug rehabilitation program after becoming ineligible under this section;

(B) has otherwise been rehabilitated; or

(C) has made a good faith effort to gain admission to a supervised drug rehabilitation program, but is unable to do so because of inaccessibility or unavailability of such a program, or the inability of the individual to pay for such a program.

(d) Definitions

As used in this section—

(1) the term "Federal benefit"—

(A) means the issuance of any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States; and

(B) does not include any retirement, welfare, Social Security, health, disability, veterans benefit, public housing, or other similar benefit, or any other benefit for which payments or services are required for eligibility; and

(2) the term "veterans benefit" means all benefits provided to veterans, their families, or survivors by virtue of the service of a veteran in the Armed Forces of the United States.

(e) Inapplicability of this section to Government witnesses

The penalties provided by this section shall not apply to any individual who cooperates or testifies with the Government in the prosecution of a Federal or State offense or who is in a Government witness protection program.

(f) Indian provision

Nothing in this section shall be construed to affect the obligation of the United States to any Indian or Indian tribe arising out of any treaty, statute, Executive order, or the trust responsibility of the United States owing to such Indian or Indian tribe. Nothing in this subsection shall exempt any individual Indian from the sanctions provided for in this section, provided that no individual Indian shall be

denied any benefit under Federal Indian programs comparable to those described in subsection (d)(1)(B) or (d)(2) above.

(g) Presidential report

(1) On or before May 1, 1989, the President shall transmit to the Congress a report—

(A) delineating the role of State courts in implementing this section;

(B) describing the manner in which Federal agencies will implement and enforce the requirements of this section;

(C) detailing the means by which Federal and State agencies, courts, and law enforcement agencies will exchange and share the data and information necessary to implement and enforce the withholding of Federal benefits; and

(D) recommending any modifications to improve the administration of this section or otherwise achieve the goal of discouraging the trafficking and possession of controlled substances.

(2) No later than September 1, 1989, the Congress shall consider the report of the President and enact such changes as it deems appropriate to further the goals of this section.

(h) Effective date

The denial of Federal benefits set forth in this section shall take effect for convictions occurring after September 1, 1989.

(Pub.L. 91-513, Title II, § 421, formerly Pub.L. 100-690, Title V, § 5301, Nov. 18, 1988, 102 Stat. 4310, renumbered and amended Pub.L. 101-647, Title X, § 1002(d), Nov. 29, 1990, 104 Stat. 4827.)

Historical and Statutory Notes

References in Text. The Controlled Substances Act, referred to in text, is title II of Pub.L. 91-513, Oct. 27, 1970, 84 Stat. 1242, as amended, which is classified principally to subchapter I (§ 801 et seq.) of this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 801 of this title and Tables.

Codification. Section was enacted as part of the Anti-Drug Abuse Act of 1988 and not as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, which enacted this chapter, or the Controlled Substances Act, which comprises this subchapter.

Section was formerly classified to section 853a of this title.

Legislative History. For legislative history and purpose of Pub.L. 100-690, see 1988 U.S.Code Cong. and Adm.News, p. 5937. See, also, Pub.L. 101-647, 1990 U.S. Code Cong. and Adm. News, p. 6472.

Library References

Drugs and Narcotics ⇐49, 195 et seq.
WESTLAW Topic No. 138.
C.J.S. Drugs and Narcotics §§ 52, 145.

Notes of Decisions

1. Construction with other laws

Specific statute governing denial of federal benefits as penalty for drug offenses expressly prohibits denial of public housing benefits that related directly to health and survival and, thus, defendant's apartment lease and concomitant federal housing assistance benefits could not be forfeited under general forfeiture provision of Comprehensive Drug Abuse Prevention and Control Act. U.S. v. Robinson, D.R.I.1989, 721 F.Supp. 1541.

§ 863. Drug paraphernalia

(a) In general

It is unlawful for any person—

(1) to sell or offer for sale drug paraphernalia;

(2) to use the mails or any other facility of interstate commerce to transport drug paraphernalia; or

(3) to import or export drug paraphernalia.

(b) Penalties

Anyone convicted of an offense under subsection (a) of this section shall be imprisoned for not more than three years and fined under Title 18.

(c) Seizure and forfeiture

Any drug paraphernalia involved in any violation of subsection (a) of this section shall be subject to seizure and forfeiture upon the conviction of a person for such

OMB APPROVED 1121-0146 EXPIRES MARCH 1993

U.S. DEPARTMENT OF JUSTICE
OFFICE OF JUSTICE PROGRAMS
WASHINGTON, D.C. 20531

Denial of Federal Benefits for Drug Offenders

This requirement is pursuant to authority of 21 U.S.C. 853a. Courts may use this form or submit court documents. If the information requested below is included in court documents, complete only items 1-10, and submit this form as a transmittal sheet.

1 INDICATE NAME *(last, first, middle)*

2 SEX: ☐ MALE ☐ FEMALE

3 SENTENCING DATE:

4 OTHER NAMES USED *(AKA)*:

5 STREET ADDRESS

6 CITY.

7. STATE:

8. ZIP CODE:

9 DATE OF BIRTH:

10 SOCIAL SECURITY NUMBER:

11 CASE/DOCKET NUMBER:

12 OFFENSE
☐ DRUG TRAFFICKER ☐ DRUG POSSESSOR

13 SENTENCED BY COURT
A STATUTORY CRITERIA:

TRAFFICKER	POSSESSOR
☐ FIRST OFFENSE. ____ YEAR(S) *(up to 5 years)*	☐ FIRST OFFENSE. ____ YEAR(S) *(up to 1 year)*
☐ SECOND OFFENSE. ____ YEAR(S) *(up to 10 years)*	☐ SECOND OFFENSE. ____ YEAR(S) *(up to 5 years)*
☐ THIRD OFFENSE PERMANENTLY DENIED	☐ SUBSEQUENT OFFENSE ____ YEAR(S) *(up to 5 years)*

B OTHER CONDITIONS:

14 NAME OF SENTENCING JUDGE:

15 DURATION OF DENIAL.
A STARTING DATE _____
B ENDING DATE _____

16 BENEFITS DENIED
☐ ALL BENEFITS ARE DENIED
☐ SELECTED BENEFIT(S) ARE DENIED AS SPECIFIED BELOW:

17 ADDITIONAL INFORMATION.

18 RESCISSIONS THE PERIOD OF INELIGIBILITY FOR FEDERAL BENEFITS WHICH WAS IMPOSED BY THE COURT IN THE ABOVE REFERENCED CASE IS HEREBY SUSPENDED FOR THE REASON THAT:
☐ DEFENDANT HAS SUCCESSFULLY COMPLETED A DRUG REHABILITATION PROGRAM.
☐ OTHER *(specify)*.

19 SIGNATURE AND TITLE OF AUTHORIZED COURT OFFICIAL:

20 COURT NAME:

21. TELEPHONE *(Area Code)*:

22 STREET ADDRESS:

23 CITY.

24 STATE:

25 ZIP CODE:

OJP FORM 3500/2 (5-90)

OJP Denial of Federal Benefits for Drug Offenders

INSTRUCTIONS

NOTE: If all the information requested in this form is included in court documents *submitted with this form,* complete only items 1-10 and use this form as a transmittal sheet attached to the signed court documents. This form may also be used to restore benefits and as a rescission of the denial of benefits by using item 18. This form and appropriate court documents must be forwarded to:

U.S. Department of Justice
Office of Justice Programs
Denial of Federal Benefits Project
633 Indiana Avenue, N.W.
Washington, D.C. 20531

1. The name of the offender to be denied benefits, listing last, first, and middle names.
2. Indicate sex of the offender to aid in identification.
3. Enter date on which a judge rendered sentence calling for the denial of Federal benefits.
4. Other names used by the offender (aliases).

5-
8. Last known address of the offender. (This should not be a prison or jail address.)

9. Date of birth of the offender.
10. Social Security Number of the offender.
11. Case or document identification number of the court order or other document upon which the denial of Federal benefits is based.
12. Federal or State offense of which the offender is convicted.
13. Terms of the sentence of the offender under Statute and other conditions.
14. Name of the judge sentencing the offender to denial of Federal benefits.
15. If denied, the duration of the denial of Federal benefits, including the starting date and the ending date.
16. Indicate whether under 21 U.S.C. 83a all Federal benefits are to be denied or whether selected benefits are to be denied, and specify which benefits are selected.
17. Additional Information:
    a. If known, list other identification numbers assigned to the offender by the incarcerating State or local police department or FBI.
    b. Indicate whether the offender has been convicted of prior drug offense(s). The court may submit records of prior drug convictions.
    c. Indicate whether the offender will receive drug treatment. Give the starting date and the completion date of the drug treatment.
18. Indicate if benefits have been restored, or other rescissions. State the date that eligibility for Federal benefits is restored by action of the court. (This item is to be completed only after treatment has been completed and further action is taken by the court.)
19. Signature of an official of the court. This may be the signature of the sentencing judge if no other court order of denial of benefits is signed, or, it may be signed by another court official authorized to supply information.
20. Name of the court issuing the sentence.
21. Indicate the phone number of the court issuing the sentence.

22-
25. Address of the court issuing the sentence.

UNITED STATES
SENTENCING COMMISSION

SENTENCING MANUAL

§5F1.6. Denial of Federal Benefits to Drug Traffickers and Possessors

The court, pursuant to 21 U.S.C. § 853a, may deny the eligibility for certain Federal benefits of any individual convicted of distribution or possession of a controlled substance.

Commentary

Application Note:

1. *"Federal benefit" is defined in 21 U.S.C. § 853a(d) to mean "any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States" but "does not include any retirement, welfare, Social Security, health, disability, veterans benefit, public housing, or other similar benefit, or any other benefit for which payments or services are required for eligibility."*

Background: Subsections (a) and (b) of 21 U.S.C. § 853a provide that an individual convicted of a state or federal drug trafficking or possession offense may be denied certain federal benefits. Except for an individual convicted of a third or subsequent drug distribution offense, the period of benefit ineligibility, within the applicable maximum term set forth in 21 U.S.C. § 853a(a)(1) (for distribution offenses) and (a)(2)(for possession offenses), is at the discretion of the court. In the case of an individual convicted of a third or subsequent drug distribution offense, denial of benefits is mandatory and permanent under 21 U.S.C. § 853a(a)(1)(C)(unless suspended by the court under 21 U.S.C. § 853a(c)).

Subsection (b)(2) of 21 U.S.C. § 853a provides that the period of benefit ineligibility that may be imposed in the case of a drug possession offense "shall be waived in the case of a person who, if there is a reasonable body of evidence to substantiate such declaration, declares himself to be an addict and submits himself to a long-term treatment program for addiction, or is deemed to be rehabilitated pursuant to rules established by the Secretary of Health and Human Services."

Subsection (c) of 21 U.S.C. § 853a provides that the period of benefit ineligibility shall be suspended "if the individual (A) completes a supervised drug rehabilitation program after becoming ineligible under this section; (B) has otherwise been rehabilitated; or (C) has made a good faith effort to gain admission to a supervised drug rehabilitation program, but is unable to do so because of inaccessibility or unavailability of such a program, or the inability of the individual to pay for such a program."

Subsection (e) of 21 U.S.C. § 853a provides that a period of benefit ineligibility "shall not apply to any individual who cooperates or testifies with the Government in the prosecution of a Federal or State offense or who is in a Government witness protection program."

Historical Note: Effective November 1, 1989 (see Appendix C, amendment 305).

United States District Court

_____ District of _____

UNITED STATES OF AMERICA

V.

(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number:

_____
Defendant's Attorney

EFENDANT:

ıded guilty to count(s) _____

found guilty on count(s) _____ after a
ı of not guilty.

cordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

ection	Nature of Offense	Date Offense Concluded	Count Number(s)

defendant is sentenced as provided in pages 2 through _____ of this judgment. The sentence is
l pursuant to the Sentencing Reform Act of 1984..

defendant has been found not guilty on count(s) _____,
s discharged as to such count(s).

ıt(s) _____ (is)(are) dismissed on the motion of the United States.

ırdered that the defendant shall pay a special assessment of $ _____, for count(s)
_____, which shall be due ☐ immediately ☐ as follows:

S FURTHER ORDERED that the defendant shall notify the United States attorney for this district within
of any change of name, residence, or mailing address until all fines, restitution, costs, and special
ents imposed by this judgment are fully paid.

ıt's Soc. Sec. No.: _____

ıt's Date of Birth: _____

ıt's Mailing Address:

_____

_____

t's Residence Address:

_____

_____

_____
Date of Imposition of Sentence

_____
Signature of Judicial Officer

_____
Name & Title of Judicial Officer

_____
Date

dant: Judgment—Page _____ of _____
Number:

IMPRISONMENT

he defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for
of _____.

court makes the following recommendations to the Bureau of Prisons:

efendant is remanded to the custody of the United States marshal.
efendant shall surrender to the United States marshal for this district,
☐ at _____ a.m. / p.m. on _____.
☐ as notified by the United States marshal.
efendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,
☐ before 2 p.m. on _____.
☐ as notified by the United States marshal.
☐ as notified by the probation office.

RETURN

ve executed this judgment as follows:

_____

_____

_____

_____

ndant delivered on _____ to _____ at

_____, with a certified copy of this judgment.

_____
United States Marshal

it: Judgment—Page _____ of _____
nber:

SUPERVISED RELEASE

, release from imprisonment, the defendant shall be on supervised release for a term of _____

_____

; on supervised release, the defendant shall not commit another federal, state, or local crime and shall not ossess a controlled substance. The defendant shall comply with the standard conditions that have been y this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of d release that the defendant pay any such restitution that remains unpaid at the commencement of the pervised release. The defendant shall comply with the following additional conditions:

efendant shall report in person to the probation office in the district to which the defendant is released 72 hours of release from the custody of the Bureau of Prisons.

fendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

fendant shall not possess a firearm or destructive device.

STANDARD CONDITIONS OF SUPERVISION

defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

lant shall not leave the judicial district without the permission of the court or probation officer;

lant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within e days of each month;

lant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

lant shall support his or her dependents and meet other family responsibilities;

lant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

lant shall notify the probation officer within 72 hours of any change in residence or employment;

lant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled , or any paraphernalia related to such substances, except as prescribed by a physician;

lant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

lant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless mission to do so by the probation officer;

ant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed w by the probation officer;

ant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

ant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal teristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification

dant: Judgment—Page _____ of _____
Number:

PROBATION

ıe defendant is hereby placed on probation for a term of _____.

hile on probation, the defendant shall not commit another Federal, state, or local crime, shall not illegally
s a controlled substance, and shall not possess a firearm or destructive device. The defendant also shall
with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes
r a restitution obligation, it shall be a condition of probation that the defendant pay any such fine or restitution.
fendant shall comply with the following additional conditions:

STANDARD CONDITIONS OF SUPERVISION

ıe defendant is on probation pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

ndant shall not leave the judicial district without the permission of the court or probation officer;

ndant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within
five days of each month;

ndant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

ndant shall support his or her dependents and meet other family responsibilities;

ndant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

ndant shall notify the probation officer within 72 hours of any change in residence or employment;

ndant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled
ıe, or any paraphernalia related to such substances, except as prescribed by a physician;

ndant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

ndant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless
ıermission to do so by the probation officer;

dant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed
ıew by the probation officer;

dant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

dant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

d by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal
characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification
ıirement.

idant:
Number:

Judgment—Page _____ of _____

FINE

he defendant shall pay a fine of $ _____. The fine includes any costs of incarceration and/
ervision.

his amount is the total of the fines imposed on individual counts, as follows:

ne court has determined that the defendant does not have the ability to pay interest. It is ordered that:

The interest requirement is waived.
The interest requirement is modified as follows:

is fine plus any interest required shall be paid:
in full immediately.
in full not later than _____.
in equal monthly installments over a period of _____ months. The first payment is due on the
ite of this judgment. Subsequent payments are due monthly thereafter.
n installments according to the following schedule of payments:

is not paid, the court may sentence the defendant to any sentence which might have been imposed. See 18 U.S.C. § 3614.

nt: Judgment—Page ____ of ____
mber:

RESTITUTION AND FORFEITURE

RESTITUTION

defendant shall make restitution to the following persons in the following amounts:

Name of Payee	Amount of Restitution

s of restitution are to be made to:

e United States Attorney for transfer to the payee(s).

e payee(s).

on shall be paid:

full immediately.

full not later than _____

equal monthly installments over a period of _____ months. The first payment is due on the date of s judgment. Subsequent payments are due monthly thereafter.

installments according to the following schedule of payments:

nent shall be divided proportionately among the payees named unless otherwise specified here.

FORFEITURE

defendant is ordered to forfeit the following property to the United States:

nt:
mber:

Judgment—Page _____ of _____

STATEMENT OF REASONS

ourt adopts the factual findings and guideline application in the presentence report.

OR

ɔurt adopts the factual findings and guideline application in the presentence report except
ttachment, if necessary):

e Range Determined by the Court:

)ffense Level: _____

al History Category: _____

ɔnment Range: _____ to _____ months

ised Release Range: _____ to _____ years

ange: $ _____ to $ _____

☐ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

n: $ _____

☐ Full restitution is not ordered for the following reason(s):

ntence is within the guideline range, that range does not exceed 24 months, and the court finds no to depart from the sentence called for by application of the guidelines.

OR

ntence is within the guideline range, that range exceeds 24 months, and the sentence is imposed following reason(s):

OR

ice departs from the guideline range

motion of the government, as a result of defendant's substantial assistance.

ie following reason(s):

ant
umber:

Judgment—Page _____ of _____

DENIAL OF FEDERAL BENEFITS
(For Offenses Committed On or After November 18, 1988)

RUG TRAFFICKERS PURSUANT TO 21 U.S.C. § 853a(a)

IS ORDERED that the defendant shall be:

☐ ineligible for all federal benefits for a period of _____ ending _____.

☐ ineligible for the following federal benefits for a period of _____ ending _____:

*(specify benefits)*_____

_____

_____.

OR

Having determined that this is the defendant's third or subsequent conviction for distribution of controlled substances, IT IS ORDERED that the defendant shall be permanently ineligible for all federal benefits.

IUG POSSESSORS PURSUANT TO 21 U.S.C. § 853a(b)

S ORDERED that the defendant shall:

☐ be ineligible for all federal benefits for a period of _____ ending _____.

☐ be ineligible for the following federal benefits for a period of _____ ending _____:

*(specify benefits)*_____

_____

_____.

☐ successfully complete a drug testing and treatment program.

☐ perform community service, as specified in the probation or supervised release portion of this judgment.

Having determined that this is the defendant's second or subsequent conviction for possession of a controlled substance, IT IS FURTHER ORDERED that the defendant shall complete any drug treatment program and community service specified in this judgment as a requirement for the reinstatement of eligibility for federal benefits.

it to 21 U.S.C. § 853a(d), this denial of federal benefits does not include any retirement, welfare, ecurity, health, disability, veterans benefit, public housing, or other similar benefit, or any other for which payments or services are required for eligibility.

THE CLERK OF COURT IS RESPONSIBLE FOR SENDING A COPY OF THIS PAGE AND THE FIRST PAGE OF THIS JUDGMENT TO: U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, WASHINGTON, D.C. 20531.

United States District Court

_____ District of _____

REINSTATEMENT OF FEDERAL BENEFITS

Case Number:
Sentencing Date: _____

fendant's Name: _____

fendant's Address: _____

_____

_____

efendant's Soc. Sec. No.: _____

efendant's Date of Birth: _____

IS. .ISION OF PERIOD OF INELIGIBILITY PURSUANT TO 21 U.S.C. § 853a(c)

e defendant's ineligibility for federal benefits which was imposed by the district court in the above case is reby suspended because the defendant:

- has successfully completed a supervised drug rehabilitation program.
- has otherwise been rehabilitated.
- has made a good faith effort to gain admission to a supervised drug rehabilitation program, but has been unable to do so because of the inaccessibility or unavailability of such a program, or because of an inability to pay for such a program.

OR

EINSTATEMENT OF BENEFITS FOLLOWING COMPLETION OF CONDITIONS IMPOSED PURSUANT O 21 U.S.C. § 853a(b)(1)(B)

The defendant has successfully completed a drug treatment and testing program and/or community service in accordance with the judgment in the above case. Accordingly, the defendant's eligibility for federal benefits which was denied in the case is hereby reinstated.

_____ _____
Date Signature of Judicial Officer

_____
Name & Title of Judicial Officer

THE CLERK OF COURT IS RESPONSIBLE FOR SENDING A COPY OF THIS FORM TO:
U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, WASHINGTON, D.C. 20531.

UNITED STATES
DEPARTMENT OF JUSTICE

OFFICE OF JUSTICE PROGRAMS

OMB Approved:1121-0148

Guideline

OJP G 3500.2

September 11, 1990

Subject: DENIAL OF FEDERAL BENEFITS FOR CERTAIN DRUG OFFENDERS

1. PURPOSE. The purpose of this Guideline is to provide information to supplement the President's implementation plan of August 30, 1989, on the Denial of Federal Benefits Program.

2. SCOPE. This Guideline is of interest to all persons involved in any aspect of the Denial of Federal Benefits Program.

3. AUTHORITY. Section 5301 of the Anti-Drug Abuse Act of 1988 (Pub.L. 100-690), (21 U.S.C. 853a).

4. POLICY. Administration and Enforcement of the Act.

   a. The administration and enforcement of the Denial of Federal Benefits to Drug Traffickers and Possessors provisions of Pub.L. 100-690 Subtitle G, Section 5301, is subject to the general supervision and direction of the Attorney General, as assigned by the President. The Attorney General has assigned these duties to the Assistant Attorney General for the Office of Justice Programs (OJP).

   b. Copies of the statutory provision, guidelines, and forms prepared to implement the statute, and information concerning the foregoing, may be obtained upon request without charge from the Denial of Federal Benefits Project (DFBP), Office of Justice Programs (OJP), Department of Justice, 633 Indiana Avenue, N.W., Washington, D.C. 20531, phone (202) 307-0630.

   c. The Comptroller, Office of Justice Programs, is authorized to prescribe such forms and instructions in addition to, or in lieu of, those specified in this Guideline as may be necessary to carry out the purposes of this program.

5. DEFINITIONS.

   a. *Federal benefit* means (1) *the issuance* of any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States, and (2) does not include any retirement, welfare, Social Security, health, disability, veterans benefit, public housing, or other similar benefit, or any other benefit for which payments

or services are required for eligibility. *Appendix 1* contains a partial list of benefits covered.

b. *Veterans benefit* means all benefits provided to veterans, their families, or survivors by virtue of the service of a veteran in the Armed Forces of the United States.

c. *Controlled substance* means a drug or other substance as defined in the Controlled Substances Act, 21 U.S.C. 801, *et seq.*, particularly in 21 U.S.C. 802(6), listed in schedules I through V of the Controlled Substances Act in 21 U.S.C. 812, or a controlled substance analog as provided in 21 U.S.C. 813.

d. *Trafficking offense* means any offense that includes manufacturing, distributing, importing, dispensing, cultivating, or creating a controlled or counterfeit substance; or possession with intent to do any of the above; or conspiracy to commit any of the above offenses.

e. *Deemed to be Rehabilitated* and *Long-Term Treatment Program* for purposes of carrying out the provisions of Section 5301 of the Anti-Drug Abuse Act of 1988 are defined pursuant to rules established by the Secretary of the Department of Health and Human Services in Part 78 of Title 45 of the Code of Federal Regulations.

f. The definitions of "has otherwise been rehabilitated" and "supervised drug rehabilitation" that follow are nonbinding and are shown here merely for informational purposes so that the courts may take judicial notice thereof.

1. *Has otherwise been rehabilitated* for purposes of carrying out the provisions of Section 5301 (c)(B) of the Anti-Drug Abuse Act of 1988, 21 U.S.C. 853a (c)(B), means that an individual has abstained from the illegal use of a controlled substance for a period of at least 180 days, provided that such abstinence is documented by the results of periodic urine drug testing conducted during that period; and provided further that such drug testing is conducted using an immunoassay test approved by the Food and Drug Administration for commercial distribution or, in the case of a State offense, either using an immunoassay test approved by the Food and Drug Administration for commercial distribution or pursuant to standards approved by the State.

2. *Supervised Drug Rehabilitation* is a program supervised and/or maintained by a State, local, or private organization licensed to conduct or supervise rehabilitation services that incorporates a system for regular monitoring through drug testing and reporting on the progress of individual treatment subjects, and that provides written reports to the appropriate governmental authority at regular intervals during the course of

treatment and at the completion or termination of treatment.

g. *State* means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Trust Territory of the Pacific Islands, and the Canal Zone (21 U.S.C. 802 (26)).

6. DENIAL OF FEDERAL BENEFITS TO DRUG TRAFFICKERS. Any individual who is convicted of any State or Federal offense consisting of the distribution of a controlled substance (as such term is defined for purposes of the Controlled Substances Act. 21 U.S.C. 801 *et seq.*) shall:

a. At the discretion of the court, upon the first conviction for such an offense, be ineligible for any or all Federal benefits for up to 5 years after such conviction;

b. At the discretion of the court, upon a second conviction for such an offense, be ineligible for any or all Federal benefits for up to 10 years after such conviction; and

c. Upon a third or subsequent conviction for such an offense, be permanently ineligible for all Federal benefits. (This provision is mandatory.)

7. EXCLUSIONS FOR DENIAL OF BENEFITS TO DRUG TRAFFICKERS. The benefits that are denied under Section 5301 shall not include benefits relating to long-term drug treatment programs for addiction for any person who, if there is a reasonable body of evidence to substantiate such declaration, declares himself to be an addict and submits himself to a long-term treatment program for addiction, or is deemed to be rehabilitated pursuant to rules established by the Secretary of Health and Human Services.

8. DENIAL OF FEDERAL BENEFITS TO DRUG POSSESSORS. Any individual who is convicted of any State or Federal offense involving the possession of a controlled substance (as such term is defined for purposes of the Controlled Substances Act (21 U.S.C. 801 *et seq.*)) shall:
(a) upon the first conviction for such an offense, and at the discretion of the court:
(1) Be ineligible for any or all Federal benefits for up to one year;
(2) Be required to complete successfully an approved drug treatment program that includes periodic testing to insure that the individual remains drug-free;
(3) Be required to perform appropriate community service; or
(4) Any combination of clauses 8(a)(1), (2) or (3).

(b) upon a second or subsequent conviction for such an offense, be ineligible for all Federal benefits for up to five years after such conviction as determined by the court. The court shall continue to have the discretion in subparagraph (a) in imposing penalties and conditions. The court may require that the completion of the conditions imposed by clause (a)(2) or (a)(3) be a requirement for the reinstatement of benefits under clause 8(a)(1).

9. WAIVER AND SUSPENSION OF DENIAL OF FEDERAL BENEFITS TO DRUG POSSESSORS: PENALTIES AND CONDITIONS. The penalties and conditions that may be imposed under paragraph 8 shall be waived in the case of a person who, if there is a reasonable body of evidence to substantiate such declaration, declares himself to be an addict and submits himself to a long-term treatment program for addiction, or is deemed to be rehabilitated pursuant to rules established by the Secretary of Health and Human Services.

10. SUSPENSION OF PERIOD OF INELIGIBILITY. The period of ineligibility referred to in paragraphs 6 and 8 shall be suspended by the court upon a showing that the individual (1) has completed a supervised drug rehabilitation program after becoming ineligible under Section 5301; (2) has otherwise been rehabilitated; or (3) has made a good faith effort to gain admission into supervised drug rehabilitation programs, but is unable to do so because of inaccessibility or unavailability of such a program, or the inability of the individual to pay forsuch a program.

11. INAPPLICABILITY.

a. *Government Witnesses.* The penalties provided by Section 5301 shall not apply to any individual who cooperates or testifies on behalf of the government in the prosecution of a State or Federal offense or who is in a government witness protection program. **The government shall identify by motion any individual who has cooperated or testified on behalf of the government in the prosecution of a State or Federal offense or who is in a government witness protection program. The government may submit the motion under seal for the safety of a person or to avoid disclosure of an ongoing investigation.**

b. *Indian Provision.* **Nothing in this Guideline shall be construed to affect the obligation of the United States to any Indian or Indian tribe arising out of any treaty, statute, Executive Order, or the trust responsibility of the United States owing to such Indian or Indian tribe. Nothing in this subparagraph shall exempt any individual Indian from the sanctions provided for in Section 5301 provided that no individual Indian shall be denied any benefit under Federal Indian programs comparable to those described in subparagraphs 5(a)(2) and (b).**

12. EFFECTIVE DATE. The Denial of Federal Benefits provision

may only be applied to convictions occurring after September 1, 1989, that arise from offenses occurring on or after November 18, 1988.

13. JUDICIAL ACTION.

a. In pronouncing sentence, the court shall determine the range and scope of benefits to be denied. Recommendations regarding sentencing can be made to the court with respect to this law in accordance with all other sentencing recommendation requirements.

b. The court, at its discretion, may deny some or all benefits or suspend eligibility on a benefit-specific basis. There are no restrictions on the number or range of benefits for which the court may deny eligibility, other than those benefits specifically excepted from judicial denial by Section 5301. *Appendix 1* contains a partial listing of benefits that may be denied.

c. The court, at its discretion, may sentence an individual to be ineligible for all Federal benefits. Accordingly, a court could order a blanket denial of all benefits for a specified period of time not to exceed the periods described in paragraphs 6 and 8 along with any exclusions to that blanket denial as stated above. This mechanism maximizes the flexibility of the judicial branch in determining sentences in particular cases.

14. CLEARINGHOUSE. The Denial of Federal Benefits Project (DFBP), Office of Justice Programs (OJP), Department of Justice (DOJ), will be the "information clearinghouse" for information provided by all State courts and Federal courts regarding sentences of drug traffickers or possessors that include denial of benefits and individuals who have been convicted of a third or subsequent drug trafficking offense. The DFBP will collect this information regarding those individuals to whom benefits are to be denied and forward this information to the General Services Administration (GSA) for inclusion in the publication, "Lists of Parties Excluded from Federal Procurement or Nonprocurement Programs," more commonly known as the "Debarment List." Each agency should consult the Debarment List to ensure compliance with the provisions of the statute.

15. STATE COURT AND FEDERAL COURT SUBMISSION OF STATEMENTS. "Statements" include, but are not limited to, copies of Judicial Orders issued by State courts and Federal courts, "Denial of Federal Benefits" forms, or "Judicial Notice of Restoration" forms. State courts and Federal courts are requested to send statements to DFBP after sentencing of an offender to denial of Federal benefits, or when the offender's criminal history indicates the individual has been convicted of a third or subsequent drug trafficking offense, or completion of action qualifying the offender for reinstatement of benefits.

APPENDIX 1. BENEFITS

1. PROCUREMENT PROGRAMS WHICH MAY BE DENIED UNDER SECTION 5301. All Contracts or Purchase Orders issued by Federal agencies or by others using monies appropriated by the Federal government. This will include all Federally awarded acquisition and personal property sales contracts.

2. NON-PROCUREMENT PROGRAMS WHICH MAY BE DENIED UNDER SECTION 5301. This is a partial list of non-procurement benefits as of September 11, 1990. The number preceeding each benefit is either the number assigned that benefit in the Federal Domestic Assistance Catalogue or (when a letter appears) by the Denial of Federal Benefits Project. This list will be modified as Agencies add or delete benefits covered under this project.

** DEPARTMENT OF AGRICULTURE

* Non-License Benefits:

10.001 Agricultural Research - Basic and Applied
10.028 Animal Damage Control (only grants awarded to individuals)
10.051 Commodity Loans and Purchases
10.052 Cotton Production Stabilization
10.053 Dairy Indemnity Program
10.054 Emergency Conservation Program
10.055 Feed Grain Production Stabilization
10.058 Wheat Production Stabilization
10.059 National Wool Act Payments
10.062 Water Bank Program
10.063 Agricultural Conservation Program
10.064 Forestry Incentives Program
10.065 Rice Production Stabilization
10.066 Emergency Livestock Assistance
10.067 Grain Reserve Program
10.068 Rural Clean Water Program
10.069 Conservation Reserve Program
10.070 Colorado River Salinity Control
10.163 Market Protection and Promotion
10.206 Grants for Agricultural Research - Competitive Research Grants
10.212 Small Business Innovation Research
10.213 Competitive Research Grants for Forest and Rangeland Renewable Resources
10.404 Emergency Loans
10.405 Farm Labor Housing Loans and Grants
10.406 Farm Operating Loans
10.407 Farm Ownership Loans
10.410 Very Low and Low Income Housing Loans
10.411 Rural Housing Site Loans
10.415 Rural Rental Housing Loans
10.416 Soil and Water Loans
10.417 Very Low-Income Housing Repair Loans and Grants
10.420 Rural Self-Help Housing Technical Assistance
10.429 Guaranteed Rural Housing Loans - Demonstration Program
10.433 Rural Housing Preservation Grants

APPENDIX 1. (CONT'D)

** DEPARTMENT OF AGRICULTURE

* Non-License Benefits:

10.437 Interest Rate Reduction Program
10.438 Farm Credit System Farm Land Acquisition Program
10.450 Federal Crop Insurance
10.551 Food Stamps (research grants to individuals and cooperative agreements for research when the agreement is with an individual rather than an institution)
10.557 Special Supplemental Food Program for Women, Infants, and Children (cooperative agreements for research when the agreement is with an individual rather than an institution)
10.652 Forestry Research (research grants)
10.664 Cooperative Forestry Assistance
10.900 Great Plains Conservation
10.901 Resource Conservation and Development
10.902 Soil and Water Conservation
10.903 Soil Survey
10.904 Watershed Protection and Flood Prevention
10.905 Plant Materials for Conservation
10.910 Rural Abandoned Mine Program
10.960 Technical Agricultural Assistance
10.961 International Agricultural Research - Collaborative Program
10.962 International Training - Foreign Participant
10.963 Scientific and Technical Cooperation
10.A02 Child Nutrition Program (cooperative agreements for research when the agreement is with an individual rather than an institution)

* Licenses:

10.025 Plant and Animal Diseases, Pest Control, and Animal Care (only licenses issued to individuals under the Animal Welfare and Virus-Serum-Toxin Acts)
10.162 Inspection Grading and Standardization
10.A01 Licenses under the U.S. Grain Standards Act and the Agricultural Marketing Act of 1946
10.A63 Market Protection and Promotion (individuals for grading, inspection, and cottonseed and oilseed testing)

** DEPARTMENT OF COMMERCE

* Non-License Benefits:

11.301 Economic Development - Business Development Assistance
11.312 Research and Evaluation Program
11.408 Fishermen's Contingency Fund
11.409 Fishing Vessel and Gear Damage Compensation Fund
11.417 Sea Grant Support
11.427 Fisheries Development and Utilization Research and Development Grants and Cooperative Agreements Program
11.430 Undersea Research

APPENDIX 1. (CONT'D)

** DEPARTMENT OF COMMERCE

* Non-License Benefits:

11.431 Climate and Atmospheric Research
11.432 Environmental Research Laboratories Joint Institutes
11.612 Advanced Technology Program
11.613 State Technology Program
11.800 Minority Business Development Centers

* Licenses:

11.C01 Professional and Commercial Licenses, Permits and Leases

** DEPARTMENT OF DEFENSE

* Non-License Benefits:

12.D01 Graduate Fellowship Programs -- Science and Engineering
12.D02 Health Professions Scholarship
12.D03 Defense Mapping Agency Sales Agent Program

** DEPARTMENT OF EDUCATION

* Non-License Benefits:

84.002 Adult Education - State Administered Basic Grant Program (Stipends)
84.003 Bilingual Education - Fellowship Program
84.007 Supplemental Educational Opportunity Grants
84.015 National Resource Centers and Fellowships Program for Language and Area or Language and International Studies
84.017 International Research and Studies
84.018 Fulbright-Hays Seminars Abroad - Bilateral Projects
84.019 Fulbright-Hays Training Grants - Faculty Research Abroad
84.021 Fulbright-Hays Training Grants - Group Projects Abroad
84.022 Fulbright-Hays Training Grants - Doctoral Dissertation Research Abroad
84.032 Guaranteed Student Loans
84.033 College Work-Study Program (Student Assistance)
84.036 Library Career Training
84.037 National Defense/National Direct/Perkins Loan Cancellations
84.038 Perkins (formerly National Direct) Student Loans
84.047 Upward Bound
84.048 Vocational Education - Basic Grants to States
84.051 National Vocational Education Research
84.063 Pell Grant Program
84.069 Grants to States for State Student Incentives
84.077 Bilingual Vocational Training
84.083 Women's Educational Equity
84.094 Patricia Roberts Harris Fellowships
84.099 Bilingual Vocational Instructor Training
84.100 Bilingual Vocational Materials, Methods, and Techniques

APPENDIX 1. (CONT'D)

** DEPARTMENT OF EDUCATION

* Non-License Benefits:

84.117 Educational Research and Development
84.136 Legal Training for the Disadvantaged
84.141 Migrant Education - High School Equivalency Program
84.149 Migrant Education - College Assistance Migrant Program
84.164 Mathematics and Science Education (Teacher Grants)
84.170 Jacob K. Javits Fellowships
84.176 Paul Douglas Teacher Scholarships
84.185 Robert C. Byrd Honors Scholarships
84.190 Christa McAuliffe Fellowships
84.191 National Adult Education Research
84.200 Graduate Assistance in Areas of National Need (Fellowships)
84.206 Jacob K. Javits Gifted and Talented Students
84.219 Student Literacy Corps
84.226 Income Contingent Loan Program (ICL)
84.E01 Grant and Aid Programs Directly to Individuals
84.E02 National Adult Literacy Volunteer Training Program
84.E03 Grant/Aid Programs in which State and Local Education Agencies Provide Directly to Individuals
84.E04 Allen J. Ellender Fellowships
84.E05 Bilingual Education - Personnel Training Program

** DEPARTMENT OF ENERGY

* Non-License Benefits:

81.036 Energy-Related Inventions
81.041 State Energy Conservation
81.047 Pre-Freshman Engineering
81.048 Priorities and Allocations for Energy Programs and Projects
81.065 Nuclear Waste Disposal Siting
81.084 Minority Honors Training and Industrial Assistance Program
81.089 Fossil Energy Research and Development
81.095 Nuclear Energy, Reactor Systems, Development, and Technology
81.096 Innovative Clean Coal Technology
81.097 Science and Engineering Research Semester
81.E18 Strategic Petroleum Reserve
81.E19 Naval Petroleum and Oil Shale Reserves
81.E20 Minority Undergraduate Training in Energy-Related Careers Program
81.E22 Liquefied Gaseous Fuels Spill Test Facility
81.E24 Health Physics Fellowship Program
81.E27 Environment, Safety and Health Oversight
81.E29 Fuels Programs
81.E30 Bonneville Power Administration
81.E32 Conservation and Renewable Energy
81.E33 Defense Programs

APPENDIX 1. (CONT'D)

** DEPARTMENT OF ENERGY

Non-License Benefits:

81.E34 Energy Information Administration
81.E35 Energy Research
81.E36 Environmental Restoration and Waste Management
81.E37 Environment, Safety and Health
81.E39 Fossil Energy
81.E40 Minority Economic Impact
81.E41 New Production Reactors
81.E43 Nuclear Energy
81.E44 Nuclear Safety
81.E45 Southeastern Power Administration
81.E46 Southwestern Power Administration
81.E48 Western Area Power Administration

Licenses:

81.003 Granting of Patent Licenses

** DEPARTMENT OF HEALTH AND HUMAN SERVICES

Non-License Benefits:

13.108 Health Education Assistance Loans
13.142 NIEHS Hazardous Waste Worker Health and Safety Training
13.161 Health Program for Toxic Substances and Disease Registry
13.180 Medical Treatment Effectiveness Research
13.184 Disabilities Prevention
13.186 National Research Services Awards
13.217 Family Planning - Services
13.244 Mental Health Clinical or Service Related Training Grants
13.263 Occupational Safety and Health - Training Grants
13.272 Alcohol National Research Service Awards for Research Training
13.273 Alcohol Research Programs
13.277 Drug Abuse Scientist Development Award for Clinicians - Scientist Development Awards and Research Scientist Awards
13.278 Drug Abuse National Research Service Awards for Research Training
13.281 Mental Research Scientist Development Award and Research Scientist Development Awards for Clinicians
13.361 Nursing Research
13.393 Cancer Cause and Prevention Research
13.394 Cancer Detection and Diagnosis Research
13.395 Cancer Treatment Research
13.396 Cancer Biology Research
13.399 Cancer Control
13.790 Work Incentive Program/WIN Demonstration Program
13.792 Community Services Block Grant
13.793 Community Services Block Grant - Discretionary Awards

APPENDIX 1. (CONT'D)

** DEPARTMENT OF HEALTH AND HUMAN SERVICES

* Non-License Benefits:

13.821 Biophysics and Physiological Sciences
13.822 Health Careers Opportunity Program
13.837 Heart and Vascular Diseases Research
13.838 Lung Diseases Research
13.839 Blood Diseases and Resources Research
13.846 Arthritis, Musculoskeletal and Skin Diseases Research
13.847 Diabetes, Endocrinology and Metabolism Research
13.848 Digestive Diseases and Nutrition Research
13.849 Kidney Diseases, Urology and Hematology Research
13.855 Allergy, Immunology and Transplantation Research
13.856 Microbiology and Infectious Diseases Research
13.859 Pharmacological Sciences
13.862 Genetics Research
13.863 Cellular and Molecular Basis of Disease Research
13.864 Population Research
13.865 Research for Mothers and Children
13.866 Aging Research
13.867 Retinal and Choroidal Diseases Research
13.868 Anterior Segment Diseases Research
13.871 Strabismus, Amblyopia and Visual Processing
13.880 Minority Access to Research Careers
13.973 Special Loans for National Health Service Corps Members to Enter Private Practice
13.982 Mental Health Disaster Assistance and Emergency Mental Health
13.989 Senior International Fellowships
13.995 Adolescent Family Life - Demonstration Projects

** DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

* Non-License Benefits:

14.141 Section 106(b) Nonprofit Sponsor Assistance Program
14.179 Nehemiah Housing Opportunity Grant Program
14.218 Community Development Block Grants
14.219 Community Development Block Grants (except for public services)
14.220 Section 312 Rehabilitation Loans
14.221 Urban Development Action Grants
14.222 Urban Homesteading
14.230 Rental Housing Rehabilitation
14.H01 Neighborhood Development Demonstration Grants

** DEPARTMENT OF THE INTERIOR

* Non-License Benefits:

15.222 Cooperative Inspection Agreements with States and Tribes
15.904 Historic Preservation Fund Grants-In-Aid/Acquisition or Development Assistance

APPENDIX 1. (CONT'D)

** DEPARTMENT OF THE INTERIOR

* Non-License Benefits:

15.910 National Natural Landmarks Program

* Licenses:

15.101 Licenses for Commercial Outfitters
15.102 Professional and Commercial Licenses, Permits and Leases

** DEPARTMENT OF JUSTICE

* Non-License Benefits:

16.541 Juvenile Justice and Delinquency Prevention - Special Emphasis
16.542 National Institute of Juvenile Justice
16.560 Justice Research and Development Project Grants
16.582 Crime Victim Assistance/Discretionary Grants
16.J01 NIJ - Fellowship and Research Grants
16.J02 BJA - Anti Drug Grants

* Licenses:

16.J03 Narcotics Practitioners Registration

** DEPARTMENT OF LABOR

* Non-License Benefits:

17.248 Employment and Training Research and Development Project Contracts and Grants (ETA)
17.250 Job Training Partnership Act
17.A01 Miner Training Instructor Approval (MSHA)
17.A02 Miner Certification and Qualification (MSHA)

* Licenses:

17.202 Certification of Foreign Workers for Temporary Agricultural and Logging Employment
17.203 Labor Certification for Alien Workers
17.308 Farm Labor Contractor Registration

** DEPARTMENT OF TRANSPORTATION

* Non-License Benefits:

20.001 Boating Safety
20.106 Airport Improvement Program
20.215 Highway Training and Education
20.600 State and Community Highway Safety
20.800 Construction - Differential Subsidies
20.802 Title XI - Federal Ship Financing Guarantees
20.804 Operating - Differential Subsidies
20.805 Ship Sales
20.806 State Marine Schools

APPENDIX 1. (CONT'D)

** DEPARTMENT OF TRANSPORTATION

* Non-License Benefits:

20.807 U.S. Merchant Marine Academy
20.808 Capital Construction Fund
20.810 Supplementary Training
20.812 Construction Reserve Fund
20.T13 Essential Air Service Program
20.T14 Merchant Mariner's Document

* Licenses:

20.T01 Professional or Commercial Airmen Certificates
20.T02 Designation as Representatives of the FAA
20.T03 Aviation Operating Certificates
20.T04 Merchant Marine Licenses
20.T05 Merchant Marine Certificates of Registration
20.T06 License, Vessel activity: Fishing, Recreation
20.T07 Commercial Motor Vehicle Drivers Disqualification
20.T08 Grants for Research Fellowships granted by FHWA
20.T09 Locomotive Operator Disqualification
20.T10 Exemptions to individual carriers and shippers of hazardous materials
20.T11 Certificates for Schools and Other Air Agencies
20.T12 Air Carrier Fitness Certificates

** DEPARTMENT OF THE TREASURY

* Licenses:

21.T01 Import Brokerage Licenses
21.T02 Alcohol, Tobacco and Firearms Licenses and Permits
21.T03 Banking Licenses

** DEPARTMENT OF VETERANS AFFAIRS

* Non-License Benefits:

64.001 Medical Research Support
64.005 Grants to States for Construction of State Homes
64.018 Sharing Specialized Medical Resources
64.203 State Cemetery Grants

** ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

* Non-License Benefits:

25.A01 Other Services (Research Grant Program)

** AGENCY FOR INTERNATIONAL DEVELOPMENT

* Non-License Benefits:

26.A01 Participant Training Grants

APPENDIX 1. (CONT'D)

** AGENCY FOR INTERNATIONAL DEVELOPMENT

* Non-License Benefits:

26.A02 Science Advisor's Small Research Program Grants
26.A03 Intermediate Foreign Credit Institution Loan Portfolios

** APPALACHIAN REGIONAL COMMISSION

* Non-License Benefits:

23.005 Appalachian Housing Project Planning Loan, Technical Assistance Grant and Site Development and Off-site Improvement Grant: State Appalachian Housing Programs

** COMMISSION OF FINE ARTS

* Non-License Benefits:

91.A01 National Capital Arts and Cultural Affairs Program

** COMMISSION ON THE BICENTENNIAL OF THE U.S. CONSTITUTION

* Non-License Benefits:

90.001 Bicentennial Educational Grant Program

* Licenses:

90.B01 Commercial Logo Licensing Program

** CONSUMER PRODUCT SAFETY COMMISSION

* Non-License Benefits:

92.S01 Grants

** ENVIRONMENTAL PROTECTION AGENCY

* Non-License Benefits:

66.456 National Estuary Program
66.500 Environmental Protection - Consolidated Research
66.501 Air Pollution Control Research
66.502 Pesticides Control Research
66.504 Solid Waste Disposal Research
66.505 Water Pollution Control - Research, Development, and Demonstration
66.506 Safe Drinking Water Research and Demonstration
66.507 Toxic Substances Research
66.E01 Special Studies, Investigations, and Surveys
66.E02 Chesapeake Bay Program
66.E07 Nonpoint Source Implementation

** FEDERAL COMMUNICATIONS COMMISSION

* Licenses:

32.F01 Television Broadcast Licenses

APPENDIX 1. (CONT'D)

** FEDERAL COMMUNICATIONS COMMISSION

* Licenses:

32.F02 Radio Broadcast Licenses
32.F03 FM and TV Booster Licenses
32.F04 FM and TV Translator Licenses (Including Low Power TV)
32.F05 Instructional Television Fixed Service Licenses
32.F06 Cable Television Relay Service Licenses
32.F07 Broadcast Auxiliary Service Licenses
32.F08 Direct Broadcast Satellite Licenses
32.F09 High Frequency (International) Broadcast Licenses
32.F10 Public Land Mobile Radio Licenses
32.F11 Cellular System Licenses
32.F12 Rural Radio Licenses
32.F13 Offshore Radio Licenses
32.F14 Point-to-Point Microwave and Local Television Radio Service Licenses
32.F15 Multipoint Distribution Service Licenses
32.F16 Digital Electronic Message Service Licenses
32.F17 International Fixed Public Radio Licenses
32.F18 Transmit and/or Receive Satellite Earth Station Licenses
32.F19 Section 214 Certificates for Construction of Facilities
32.F20 Telephone Equipment Registrations
32.F21 Aviation Service Licenses
32.F22 Maritime Service Licenses
32.F23 Land Mobile Radio Licenses
32.F24 Private Operational Fixed Microwave Licenses
32.F25 Equipment Certifications
32.F26 Equipment Type Acceptance
32.F27 Equipment Type Approvals
32.F28 Equipment Notifications
32.F29 Radio Telephone Operator's Certificates (1st, 2nd, and 3rd Class) (including endorsements)
32.F30 General Radio Telephone Operator's Licenses (including endorsements)
32.F31 Marine Radio Operator's Permits
32.F32 Restricted Radiotelephone Operator's License
32.F33 Permits to Deliver Programs to Foreign Broadcast Stations
32.F34 Cable Landing Licenses
32.F35 Space Station Licenses
32.F36 General Mobile Radio Service Licenses
32.F37 Experimental and Developmental Radio Licenses (all services)

** FEDERAL EMERGENCY MANAGEMENT AGENCY

* Non-License Benefits:

83.516 Disaster Assistance

** FEDERAL ENERGY REGULATORY COMMISSION

* Non-License Benefits:

28.F03 Exemption for Small Hydroelectric Projects

APPENDIX 1. (CONT'D)

** FEDERAL ENERGY REGULATORY COMMISSION

* Non-License Benefits:

28.F05 Qualifying Facilities Status for Cogeneration and Small Power Production

* Licenses:

28.F01 Preliminary Permit for Hydroelectric Projects
28.F02 License for Hydroelectric Projects
28.F04 Certificate of Public Convenience and Necessity Under Section 7 of the Natural Gas Act

** FEDERAL MARITIME COMMISSION

* Non-License Benefits:

33.F02 Non-attorney admissions to practice

* Licenses:

33.001 Ocean Freight Forwarder Licenses

** FEDERAL MEDIATION AND CONCILIATION SERVICE

* Non-License Benefits:

34.F03 Grants

** HARRY S TRUMAN SCHOLARSHIP FOUNDATION

* Non-License Benefits:

85.001 Harry S Truman Scholarship Program

** INTERSTATE COMMERCE COMMISSION

* Licenses:

41.103 Certificate to operate as motor, water or rail carriers
41.104 Licenses to operate as motor, water or rail carriers
41.106 Permits to operate as motor, water or rail carriers
41.107 Certificates for household goods freight forwarders
41.108 Licenses for household goods freight forwarders
41.109 Permits for household goods freight forwarders
41.110 Certificates to property brokers
41.111 Licenses for property brokers
41.112 Permits for property brokers
41.113 Practitioner's license

** NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

* Non-License Benefits:

89.003 National Historical Publications and Records Grants

APPENDIX 1. (CONT'D)

** NATIONAL CREDIT UNION ADMINISTRATION

* Licenses:

44.001 Credit Union Charter (License)

** NATIONAL ENDOWMENT FOR THE ARTS

* Non-License Benefits:

45.001 Design Arts Program - Design Advancement, USA Fellowships
45.002 Dance Program - Choreographers' Fellowships, Dance/Film/Video, General Services to the Field, Special Projects
45.004 Literature Program - Assistance to Literary Magazines, Fellowships for Creative Writers, Fellowships for Translators, Senior Fellowships for Literature, Small Press Assistance
45.005 Music Program - Collaborative Fellowships, Composers Fellowships, Fellowships for American Jazz Masters, Jazz Composition, Jazz Performance, Jazz Special Projects, Jazz Study, Music Recording, Solo Recitalists
45.006 Media Arts Program - Film/Video Production, Radio Production
45.008 Theater Program - Distinguished Theater Artist Fellowships, Fellowships for Playwrights, Fellowships for Solo Performance Theater Artists and Mimes
45.009 Visual Arts Program - Visual Artists Fellowships
45.012 Museum Program - Fellowships for Museum Professionals
45.014 Opera - Musical Theater Program - New American Works/Individuals as Producers, Special Projects
45.015 Folk Arts Program - National Heritage Fellowships
45.021 Promotion of the Arts - Arts Administration Fellows Program
45.023 Promotion of the Arts - Locals Program

** NATIONAL ENDOWMENT FOR THE HUMANITIES

* Non-License Benefits:

45.104 Promotion of the Humanities - Humanities Projects in Media
45.113 Promotion of the Humanities - Public Humanities Projects
45.115 Promotion of the Humanities - Younger Scholars
45.116 Promotion of the Humanities - Summer Seminars for College Teachers
45.121 Promotion of the Humanities - Summer Stipends
45.122 Promotion of the Humanities - Regrants/Centers for Advanced Study
45.124 Promotion of the Humanities - Reference Materials/Access
45.125 Promotion of the Humanities - Humanities Projects in Museums and Historical Organizations
45.127 Promotion of the Humanities - Elementary and Secondary Education in the Humanities
45.132 Promotion of the Humanities - Texts/Publication Subvention
45.133 Promotion of the Humanities - Interpretive Research/Humanities, Science and Technology
45.134 Promotion of the Humanities - Regrants/Conferences
45.137 Promotion of the Humanities - Humanities Projects in Libraries and Archives
45.140 Promotion of the Humanities - Interpretive Research/Projects

APPENDIX 1. (CONT'D)

** NATIONAL ENDOWMENT FOR THE HUMANITIES

* Non-License Benefits:

45.142 Promotion of the Humanities - Fellowships for University Teachers
45.143 Promotion of the Humanities - Fellowships for College Teachers and Independent Scholars
45.145 Promotion of the Humanities - Reference Materials/Tools
45.146 Promotion of the Humanities - Texts/Editions
45.147 Promotion of the Humanities - Texts/Translations
45.148 Promotion of the Humanities - Regrants Program/International Research
45.149 Promotion of the Humanities - Office of Preservation
45.150 Promotion of the Humanities - Higher Education in the Humanities
45.151 Promotion of the Humanities - Summer Seminars for School Teachers
45.152 Promotion of the Humanities_Travel to Collections
45.153 Promotion of the Humanities - Regrants Program/Selected Areas
45.154 NEH/Reader's Digest Teacher - Scholar Program

** NATIONAL SCIENCE FOUNDATION

* Non-License Benefits:

47.009 Graduate Research Fellowships
47.041 Engineering Grants
47.049 Mathematical and Physical Sciences
47.050 Geosciences
47.051 Biological, Behavioral, and Social Sciences
47.053 Scientific, Technological, and International Affairs
47.066 Teacher Preparation and Enhancement
47.067 Materials Development, Research, and Informal Science Education
47.068 Studies and Program Assessment
47.069 Research Initiation and Improvement
47.070 Computer and Information Science and Engineering
47.071 Undergraduate Science, Engineering, and Mathematics Education
47.072 Young Scholars

** NUCLEAR REGULATORY COMMISSION

* Licenses:

77.N01 Nuclear Reactor Operators License
77.N02 Materials Licenses (to individuals and corporate entities)

** SMALL BUSINESS ADMINISTRATION

* Non-License Benefits:

59.002 Economic Injury Disaster Loans (EIDL)
59.003 Loans for Small Businesses
59.007 Management and Technical Assistance for Socially and Economically Disadvantaged Businesses

APPENDIX 1. (CONT'D)

** SMALL BUSINESS ADMINISTRATION

* Non-License Benefits:

59.008 Physical Disaster Loans
59.011 Small Business Investment Companies (SBICs)
59.012 Small Business Loans
59.013 State and Local Development Company Loans
59.016 Bond Guarantees for Surety Companies
59.021 Handicapped Assistance Loans
59.038 Veterans Loan Program
59.041 Certified Development Company Loans
59.042 Business Loans for 8(a) Program Recipients
59.043 Women's Business Ownership Assistance
59.044 Veterans Entrepreneurial Training Assistance

** SMITHSONIAN INSTITUTION

* Non-License Benefits:

98.S01 Fellowships

** TENNESSEE VALLEY AUTHORITY

* Non-License Benefits:

62.004 Tennessee Valley Region - Economic Development
62.005 Tennessee Valley Region - Natural Resources Development
62.006 Tennessee Valley Region - Valley Agricultural Institute
62.T01 Power Research
62.T03 Development Programs

** UNITED STATES INFORMATION AGENCY

* Non-License Benefits:

82.001 Educational Exchange - Graduate Students
82.002 Educational Exchange - University Lecturers (Professors) and Research Scholars
82.C03 Educational Exchange - Secondary School Teachers
82.I01 Educational Exchange - Elementary School Teachers

APPENDIX 2. DENIAL OF FEDERAL BENEFITS FOR DRUG OFFENDERS

OMB APPROVED: 1121-0148 EXPIRES MARCH 1993

U.S. DEPARTMENT OF JUSTICE
OFFICE OF JUSTICE PROGRAMS
WASHINGTON, D.C. 20531

Denial of Federal Benefits for Drug Offenders

This requirement is pursuant to authority of 21 U.S.C. 853a. Courts may use this form or submit court documents. If the information requested below is included in court documents, complete only items 1-10, and submit this form as a transmittal sheet.

1 INDICATE NAME *(last, first, middle)*

2. SEX: ☐ MALE ☐ FEMALE

3 SENTENCING DATE:

4 OTHER NAMES USED *(AKA)*:

5 STREET ADDRESS:

6 CITY.

7. STATE:

8. ZIP CODE:

9 DATE OF BIRTH:

10 SOCIAL SECURITY NUMBER:

11 CASE/DOCKET NUMBER:

12 OFFENSE
☐ DRUG TRAFFICKER ☐ DRUG POSSESSOR

13 SENTENCE BY COURT
A STATUTORY CRITERIA:

TRAFFICKER	POSSESSOR
☐ FIRST OFFENSE, ____ YEAR(S) *(up to 5 years)*	☐ FIRST OFFENSE, ____ YEAR(S) *(up to 1 year)*
☐ SECOND OFFENSE, ____ YEAR(S) *(up to 10 years)*	☐ SECOND OFFENSE, ____ YEAR(S) *(up to 5 years)*
☐ THIRD OFFENSE PERMANENTLY DENIED	☐ SUBSEQUENT OFFENSE ____ YEAR(S) *(up to 5 years)*

B OTHER CONDITIONS:

14 NAME OF SENTENCING JUDGE:

15 DURATION OF DENIAL.
A STARTING DATE _____
B ENDING DATE _____

16 BENEFITS DENIED
☐ ALL BENEFITS ARE DENIED
☐ SELECTED BENEFIT(S) ARE DENIED AS SPECIFIED BELOW:

17 ADDITIONAL INFORMATION.

18 RESCISSIONS THE PERIOD OF INELIGIBILITY FOR FEDERAL BENEFITS WHICH WAS IMPOSED BY THE COURT IN THE ABOVE REFERENCED CASE IS HEREBY SUSPENDED FOR THE REASON THAT:
☐ DEFENDANT HAS SUCCESSFULLY COMPLETED A DRUG REHABILITATION PROGRAM.
☐ OTHER *(specify)*.

19 SIGNATURE AND TITLE OF AUTHORIZED COURT OFFICIAL:

20 COURT NAME:

21. TELEPHONE *(Area Code)*:

22. STREET ADDRESS:

23 CITY.

24. STATE:

25 ZIP CODE:

OJP FORM 3500/2 (5-90)

OJP Denial of Federal Benefits for Drug Offenders

INSTRUCTIONS

NOTE: If all the information requested in this form is included in court documents *submitted with this form,* complete only items 1-10 and use this form as a transmittal sheet attached to the signed court documents. This form may also be used to restore benefits and as a rescission of the denial of benefits by using item 18. This form and appropriate court documents must be forwarded to:

U.S. Department of Justice
Office of Justice Programs
Denial of Federal Benefits Project
633 Indiana Avenue, N.W.
Washington, D.C. 20531

1. The name of the offender to be denied benefits, listing last, first, and middle names.
2. Indicate sex of the offender to aid in identification.
3. Enter date on which a judge rendered sentence calling for the denial of Federal benefits.
4. Other names used by the offender (aliases).
5.
8. Last known address of the offender. (This should not be a prison or jail address.)
9. Date of birth of the offender.
10. Social Security Number of the offender.
11. Case or document identification number of the court order or other document upon which the denial of Federal benefits is based.
12. Federal or State offense of which the offender is convicted.
13. Terms of the sentence of the offender under Statute and other conditions.
14. Name of the judge sentencing the offender to denial of Federal benefits.
15. If denied, the duration of the denial of Federal benefits, including the starting date and the ending date.
16. Indicate whether under 21 U.S.C. 83a all Federal benefits are to be denied or whether selected benefits are to be denied, and specify which benefits are selected.
17. Additional Information:
    a. If known, list other identification numbers assigned to the offender by the incarcerating State or local police department or FBI.
    b. Indicate whether the offender has been convicted of prior drug offense(s). The court may submit records of prior drug convictions.
    c. Indicate whether the offender will receive drug treatment. Give the starting date and the completion date of the drug treatment.
18. Indicate if benefits have been restored, or other rescissions. State the date that eligibility for Federal benefits is restored by action of the court. (This item is to be completed only after treatment has been completed and further action is taken by the court.)
19. Signature of an official of the court. This may be the signature of the sentencing judge if no other court order of denial of benefits is signed, or, it may be signed by another court official authorized to supply information.
20. Name of the court issuing the sentence.
21. Indicate the phone number of the court issuing the sentence.
22.
25. Address of the court issuing the sentence.

PARTIES EXCLUDED FROM PROCUREMENT PROGRAMS

AA

CAUSE

Denial of ALL Federal contracts by a sentencing judge pursuant to Section 5301 of the Anti-Drug Abuse Act of 1988 on the basis of a conviction(s) for a Federal or State offense relating to the distribution or possession of controlled substances.

TREATMENT

Listed persons shall not be issued any contract provided by an agency of the United States or by appropriated funds of the United States. Subcontracts awarded with appropriated Federal funds shall also be denied. The denial shall terminate on the date shown. Persons convicted for a third offense relating to distribution of controlled substances after the effective date of the Act shall be denied benefits permanently. Therefore, the termination date for such denials shall be listed as "permanent" (Perm.).

BB

CAUSE

PARTIAL denial of Federal contracts by a sentencing judge pursuant to Section 5301 of the Anti-Drug Abuse Act of 1988 on the basis of a conviction(s) for a Federal or State offense relating to the distribution or possession of controlled substances.

TREATMENT

Listed persons shall not be issued contracts or subcontracts as specified by the sentencing judge which are provided by an agency of the United States or by appropriated funds of the United States. Contact the U.S. Department of Justice's Denial of Federal Benefits Project liaison shown under the heading "For Further Information" in the front of this issue to determine the extent to which benefits have been denied. The denial shall terminate on the date included in the listing. Persons convicted for a third offense relating to distribution of controlled substances after the effective date of the Act shall be denied benefits permanently. Therefore, the termination date for such denials shall be listed as "permanent" (Perm.).

NOTE

A denial of benefits under Section 5301 of the Anti-Drug Abuse Act of 1988 does not include benefits relating to long-term drug treatment programs for addiction for any person who declares himself an addict, provides a reasonable body of evidence to substantiate this declaration, and submits to a long-term treatment program for addiction, or is deemed to be rehabilitated pursuant to rules established by the Secretary of Health and Human Services. The denial of benefits may also be suspended on the basis of the person's participation or good faith effort to participate in a supervised rehabilitation program. Contact the U.S. Department of Justice's Denial of Federal Benefits Project liaison shown under the heading "For Further Information" in the front of this issue to verify any assertions that the denial of benefits does not apply, or has been waived or suspended on this basis.

PARTIES EXCLUDED FROM PROCUREMENT PROGRAMS

AA

CAUSE

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INTRODUCTION
TO
SELECTED STATE OF DRIVER'S AND PROFESSIONAL LICENSE SUSPENSION LAWS

With the threat of incarceration for many drug offenders proving impractical and undesirable, meaningful sanctions are essential to society's efforts to reduce the demand for illegal drugs. For years states have revoked or suspended the driver's licenses of individuals convicted of driving while intoxicated or under the influence of alcohol. The intent of these laws is to increase traffic safety through a reduction in alcohol related accidents. Several studies indicate the laws have had the desired impact. A 1977 California study found that drivers with a mandated loss of license had fewer reckless driving convictions, minor traffic violations and car accidents. Researchers in Alabama concluded that mandatory revocation was the controlling factor in reducing alcohol related accidents. (See Appendix).

Thirty jurisdictions now employ a similar concept in the war on drugs. They revoke or suspend the driver's license of an individual upon conviction of a controlled substance offense. These statutes can help deter casual drug use by holding users accountable for their drug involvement. Someone whose professional or private life depends on the use of a motor vehicle may be unwilling or unable to risk the loss of driving privileges for an occasional high. The risk for minors is even greater in states such as Maine, Massachusetts, and New Jersey, which also defer the initial granting of a license for juvenile drug offenders.

The National Drug Control Strategy strongly recommends revocation or suspension of driver's licenses as an effective user sanction. Federal law provides an additional incentive for states to heed this recommendation. Failure to mandate a six month suspension of driving privileges for convicted drug offenders by October 1, 1993 results in a five percent reduction of a state's allotment of federal highway funds. The reduction increases to ten percent on October 1, 1995.

States such as Georgia and Indiana also include suspension of revocation of professional licenses in their array of user sanctions. The right to practice law or medicine, teach, or practice a trade is terminated or suspended, upon conviction of a drug offense. Reinstatement is conditioned on successful rehabilitation or completion of a drug treatment program.

This section looks at how some states tailor their controlled substance and driver's license laws to hold drug users accountable: CALIFORNIA, GEORGIA, INDIANA, ILLINOIS, and NEW JERSEY. Also reviewed are the GEORGIA and INDIANA provisions affecting professional licenses or certificates.

The war on drugs cannot be won alone by soldiers in the jungles of South America or police officers in the alleys of our cities, or lab technicians in the health departments of our businesses. Skirmishes can be fought there, but the war must be won in the consciences, the attitude, the character of Americans as a people. So long as we tolerate drugs, think they are sophisticated or mildly risque, we will never rid ourselves of this national albatross.

Lois Haight Herrington
Chairperson
The White House Conference
for a Drug Free America
Final Report, 1988

SUMMARY OF STATE LICENSE SUSPENSION LAWS

"An effective way to hold people accountable for involvement in illegal drug transactions is to suspend their driver's licenses for a specified period of time . . . ."

State Drug Control Status Report
November, 1990

SUSPENSION OF DRIVER'S LICENSES

ALASKA	*MAINE*	*OREGON*
ARKANSAS	*MASSACHUSETTS*	*SOUTH CAROLINA*
CALIFORNIA	*MISSISSIPPI*	*SOUTH DAKOTA*
ILLINOIS	*MISSOURI*	*WISCONSIN*
KENTUCKY	*MONTANA*	*WYOMING*
LOUISIANA	*OHIO*	

"Another method to hold users accountable is to give sentencing judges the authority to temporarily suspend the state professional licenses of those convicted of a drug offense ..."

State Drug Control Status Report
November, 1990

SUSPENSION OF PROFESSIONAL LICENSES

IOWA	*MINNESOTA*	*NEW YORK*
MARYLAND	*NEBRASKA*	*RHODE ISLAND*
MICHIGAN		

"...[T]he threatened loss of a license is enough to induce heavy drug users to seek and complete a drug treatment program ..."

State Drug Control Status Report
November, 1990

SUSPENSION OF DRIVER'S AND PROFESSIONAL LICENSES

COLORADO	*INDIANA*	*TENNESSEE*
DELAWARE	*NEVADA*	*UTAH*
FLORIDA	*OKLAHOMA*	*VIRGINIA*
GEORGIA	*PENNSYLVANIA*	*WASHINGTON*

CALIFORNIA

Detailed Summary
of

Cal. Veh. Code. § 13202, 13202.5 (Deering Supp. 1990, 1991).

§ 13202. Controlled substance offenses.

(a) A court may suspend or order the revocation of the privilege of a person to operate a motor vehicle upon the conviction of a controlled substance offense as defined in the Health and Safety code when the vehicle was involved in, or incidental to, the commission of the offense.

(b) A court shall order the revocation of the privilege of any person to operate a motor vehicle upon conviction of § 11350, 11351, 11352, 11353, 11357, 11359, 11360, or 11361 of the Health and Safety Code when a vehicle was involved in, or incidental to, the commission of the offense.

(c) The court determines the period of suspension or revocation. However, the period shall not exceed three years from the date of conviction.

§ 13202.5. Conviction of person under 18 for offenses involving alcohol or marijuana.

(a) The court shall suspend a person's driving privilege, or delay issuing the privilege, one year for each conviction of an offense committed while the person was 13 years or older, but less than 21 years.

(b) The court may modify the order imposing the delay if no further conviction occurs in a 12 month period after the conviction.

For each successive offense, the court shall extend the period of suspension or delay an additional year.

Conviction includes findings in juvenile proceedings.

(b) When the court suspends driving privileges, the court in which the conviction occurred shall require the person to surrender all driver's licenses. Within ten days following the conviction, the court shall transmit the certified abstract of the conviction and the licenses to the department.

(c) (1) Upon petition by the affected person, a court may modify the order of suspension or delay and impose restrictions on the person's driving privileges based on a critical need to drive.

(2) "Critical need to drive" means circumstances which are required to be shown for a junior permit.

(3) The restriction is effective for the balance of the period of suspension or restriction. The court shall notify the department within ten days of the modification order.

(d) This section applies to violations involving controlled substances or alcohol in Article 7 of Chapter 9 of Division 2 of, and Sections 25658, 25661, and 25662 of, the Business and Professions Code, Division 10 of the Health and Safety Code, Section 191.5, paragraph (3) of subdivision (c) of Section 192, subdivision (c) or (d) of Section 192.5, and subdivision (f) of Section 647 of the Penal Code, Section 23103 when subject to Section 23103.5, Section 23140, and Article 2 (commencing with Section 23152) of Chapter 12 of Division 11 of this code.

(e) Suspension, restriction, or delay of driving privileges shall be in addition to other penalties.

mandatory a revocation by the department, suspend the privilege of the person to operate a motor vehicle for a period of not to exceed 30 days.

Amended Stats 1984 ch 276 § 2.

Amendments:

1984 Amendment: Substituted "may" for "shall" after "Section 22348, the court".

§ 13201. Enumerated misdemeanors

A court may suspend the privilege of any person to operate a motor vehicle, for a period not exceeding six months, upon conviction of any of the following offenses:

(a) Failure of the driver of a vehicle involved in an accident to stop or otherwise comply with the provisions of Section 20002.

(b) Reckless driving proximately causing bodily injury to any person under Section 23104.

(c) Failure of the driver of a vehicle to stop at a railway grade crossing as required by Section 22452.

(d) Evading a peace officer in violation of Section 2800.1, 2800.2, or 2800.3.

Amended Stats 1988 ch 504 sec 4, effective August 22, 1988.

Amendments:

1988 Amendment: Added subd (d).

§ 13202. Controlled substance offenses

(a) A court may suspend or order that the department revoke in which case the department shall revoke the privilege of any person to operate a motor vehicle upon conviction of any offense related to controlled substances as defined in Division 10 (commencing with Section 11000) of the Health and Safety Code when the use of a motor vehicle was involved in, or incidental to, the commission of the offense.

(b) A court shall order that the department revoke and the department shall revoke the privilege of any person to operate a motor vehicle upon conviction of a violation of Section 11350, 11351, 11352, 11353, 11357, 11359, 11360, or 11361 of the Health and Safety Code when a motor vehicle was involved in, or incidental to, the commission of such offense.

(c) The period of time for suspension or the period after revocation during which the person may not apply for a license shall be determined by the court, but in no event shall such period exceed three years from the date of conviction.

Amended Stats 1984 ch 1635 § 93.

Amendments:

1984 Amendment: Substituted "offense related to controlled substances" for "narcotic controlled substance offense" in subd (a).

§ 13202.5. Drug and alcohol related offenses by person under age of 21, but aged 13 or over; suspension, delay, or restriction of driving privileges.

(a) For each conviction of a person for any offense specified in subdivision (d), committed while the person was under the age of 21 years, but 13 years of age or older, the court shall suspend the person's driving privilege for one year. If the person convicted does not yet have the privilege to drive, the court shall order the department to delay issuing the privilege to drive for one year subsequent to the time the person becomes legally eligible to drive. However, if there is no further conviction for any offense specified in subdivision (d) in a 12-month period after the conviction, the court, upon petition of the person affected, may modify the order imposing the delay of the privilege. For each successive offense, the court shall suspend the person's driving privilege for those possessing a license or delay the eligibility for those not in possession of a license at the time of their conviction for one additional year.

As used in this section, the term "conviction" includes the findings in juvenile proceedings specified in Section 13105.

(b) Whenever the court suspends driving privileges pursuant to subdivision (a), the court in which the conviction is had shall require all driver's licenses held by the person to be surrendered to the court. The court shall within 10 days following the conviction transmit a certified abstract of the conviction, together with any driver's licenses surrendered, to the department.

* * *

(c) (1) After a court has issued an order suspending or delaying driving privileges pursuant to subdivision (a), the court, upon petition of the person affected, may review the order and may impose restrictions on the person's privilege to drive based upon a showing of a critical need to drive.

(2) As used in this section, "critical need to drive" means the circumstances which are required to be shown for the issuance of a junior permit pursuant to Section 12518.

(3) The restriction shall remain in effect for the balance of the period of suspension or restriction in this section. The court shall notify the department of any modification within 10 days of the order of modification.

(d) This section applies to violations involving controlled substances or alcohol contained in the following provisions:

(1) Article 7 (commencing with Section 4211) of Chapter 9 of Division 2 of, and Sections 25658, 25658.5, 25661, and 25662 of, the Business and Professions Code * * *.

(2) Division 10 (commencing with Section 11000) of the Health and Safety Code * * *.

(3) Section 191.5, paragraph (3) of subdivision (c) of Section 192, subdivision (c) or (d) of Section 192.5, and subdivision (f) of Section 647 of the Penal Code * * *.

(4) Section 23103 when subject to Section 23103.5, Section 23140, and Article 2 (commencing with Section 23152) of Chapter 12 of Division 11 of this code.

(e) Suspension, restriction, or delay of driving privileges pursuant to this section shall be in addition to any penalty imposed upon conviction of any violation specified in subdivision (d).

(Amended by Stats.1988, c. 1254, § 8; Stats.1990, c. 1696 (S.B.1756), § 8; Stats.1990, c. 1697 (S.B.2635), § 4.)

Additions or changes indicated by underline; deletions by asterisks * * *

GEORGIA

Detailed Summary
of

H.B. 123 (1991), amending Ga. Code Ann. § 40-5-75 (Supp. 1990). Suspension of licenses by operation of law for conviction of possession of controlled substances or marijuana.

(a) The driver's license of any person convicted of possession of a controlled substance or marijuana shall by operation of law be suspended:

(1) not less than 180 days upon the first conviction if there has been no arrest, conviction of or plea of *nolo contendere* to such offense within the previous five years.

After 180 days, the license shall be reinstated only if the person submits proof of completion of the assessment component and either the education intervention component or the intensive intervention component of a DUI alcohol or drug use risk reduction program by the Department of Human Resources and pays a restoration fee of $35.00 or $25.00 to the Department of Public Safety. A plea of *nolo contendere* to a charge of possession of marijuana or a controlled substance, except as provided in (c) shall constitute a conviction.

(2) for three years upon the second conviction within five years. After one year from the date of conviction, the person may apply for reinstatement of the driver's license by submitting proof of completion of the intensive intervention component of a DUI alcohol or drug use risk reduction program by the Department of Human Resources and paying a restoration fee of $35.00 or $25.00 to the Department of Public Safety. A plea of *nolo contendere* and all previous pleas of *nolo contendere* within the five year period of time shall constitute a conviction; and

(3) for five years upon the third conviction within five years. At the end of two years, the person may apply for a three-year driving permit upon compliance with the following conditions:

(A) The person has not been convicted of or pleaded *nolo contendere* to any drug related offense for a period of two years immediately preceding the permit application;

(B) The person submits proof of completion of a licensed drug treatment program. The proof shall be submited within two years of the license suspension prior to issuance of the permit. The offender shall pay for the drug-treatment program and a permit fee of $25.00 to the Department of Public Safety;

(C) The person submits proof of financial

(C) The person submits proof of financial responsibility; and

(D) Refusal to issue the permit would cause extreme hardship. Extreme hardship means that the applicant cannot reasonably obtain other transportation and would be prohibited from:

(i) going to his place of employment or performing normal occupational duties;

(ii) receiving scheduled medical care or obtaining prescription drugs;

(iii) attending a college or school at which he is regularly enrolled as a student; or

(iv) attending regularly scheduled sessions or meetings of drug abuse support organizations.

(b) Whenever a person is convicted of possession of a controlled substance or marijuana, the court shall require the person to surrender all driver's licenses. The court shall forward the licenses and a copy of its order to the Department of Public Safety within ten days after the conviction. The periods of suspension shall begin on the date of conviction for the offense resulting in such suspension.

However, effective January 1, 1992, if the person has no license or a suspended license at the time of the conviction, the suspension periods under this code shall not commence until the person applies for the issuance or reinstatement of a driver's license.

(c) (1) The decision to accept a plea of *nolo contendere* to a misdemeanor charge of unlawful possession of less than one ounce of marijuana shall be a the sole discretion of the judge. If a plea of *nolo contendere* is accepted, the judge shall order the defendant to attend and complete the assessment and education/intervention component of a first offender alcohol or DUI risk reduction program. The order shall require the defendant to complete the program with 120 days and to submit evidence of the completion to the Department of Public Safety. The judge shall notify the defendant that if he fails to complete the program by the specified date, the driver's license shall be suspended by operation of law. The record of the disposition of the case shall be forwarded to the Department of Public Safety.

(2) If a plea of *nolo contendere* is accepted; the defendant's driver's license has not been suspended; and the defendant has not been convicted of or has not had a plea of *nolo contendere* accepted to a violation of this section within the previous five years, the court shall, subject a paragraph (1), return the driver's license to the person. Otherwise, the license shall be forwarded to the Department of Public Safety.

(d) A license reinstatement application shall be accompanied by proof of completion of the required components of a DUI alcohol or drug use risk reduction program and a restoration fee of $35.00 or $25.00. Application for a three year driving permit under paragraph (3) of (a) shall be accompanied by proof of completion of an approved residential drug treatment program and a permit fee of $25.00.

(e) Not withstanding any other provision, any person whose license is suspended pursuant to this section shall not be eligible for early reinstatement of his license and a limited driving permit. The person's license shall only be reinstated as provided in this section.

(f) Except as provided in (a), it is unlawful for any person to operate any motor vehicle after the person's license has been suspended pursuant to this section if the person has not thereafter obtained a valid license. Any person who is convicted of operating a motor vehicle before reinstatement of the person's license or issuance of a three year driving permit shall be fined not less than $750.00 nor more than $5,000.00 or imprisoned in the penitentiary for not more than 12 months, or both.

(g) An adjudication of a minor child as a delinquent child or an unruly child for possession of marijuana or a controlled substance shall be deemed a conviction.

(h) Licensed 16 year old drivers who are adjudicated in juvenile court may complete an assessment component and an education/intervention component or intensive intervention component of a DUI alcohol or drug use risk reduction program by the Department of Human Resources.

A BILL TO BE ENTITLED

AN ACT

To amend Chapter 5 of Title 40 of the Official Code of Georgia Annotated, relating to drivers' licenses, so as to provide for the suspension or revocation of the drivers' licenses of persons convicted of misdemeanor possession of marijuana; to provide for reporting of suspensions to the Department of Public Safety; to provide for the time of commencement of such suspensions or revocations; to provide for the periods of suspension or revocation; to provide conditions for reinstatement or return of licenses; to provide for probationary licenses; to provide for all ~~related matters; to provide~~ for an effective date; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

Section 1. Chapter 5 of Title 40 of the Official Code of Georgia Annotated, relating to drivers' licenses, is amended by striking Code Section 40-5-75, relating to suspension of drivers' licenses for possession of controlled substances or marijuana, in its entirety and inserting in lieu thereof a new Code Section 40-5-75 to read as follows:

"40-5-75. (a) The driver's license of any person convicted of possession of a controlled substance or marijuana in violation of subsection (b) of Code Section 16-13-2 or subsection (a) or (j) of Code Section 16-13-30 shall by operation of law be suspended and such suspension shall be subject to the following terms and conditions:

(1) Upon the first conviction of any such offense, with no arrest and conviction of and no plea of nolo contendere accepted to such offense within the previous five years, as measured from the dates of previous arrests for which convictions were obtained to the date of the current arrest for which a conviction is obtained, the period of suspension shall be for not less than ~~120~~ 180 days. At the end of ~~120~~ 180 days, the person may apply to the Department of Public Safety for reinstatement of his driver's license. Such license shall be reinstated only if the person submits proof of completion of a ~~certified~~ the assessment component and either the education/intervention component or the intensive intervention component of a DUI alcohol or drug use risk reduction program as prescribed by the Department of Human Resources and pays to the Department of Public Safety a restoration fee of $35.00 or $25.00 ~~to the Department of Public Safety~~ when such reinstatement is processed by mail. For purposes of this paragraph, a plea of nolo contendere by a person to a charge of possession of marijuana or a controlled substance in violation of subsection (b) of Code Section 16-13-2 or subsection (a) or (j) of Code Section 16-13-30 shall, except as provided in subsection (c) of this Code section, constitute a conviction;

(2) Upon the second conviction of any such offense within five years, as measured from the dates of previous arrests for which convictions were obtained to the date of the current arrest for which a conviction is obtained, the period of suspension shall be for three years, provided that

after one year from the date of the conviction the person may apply to the Department of Public Safety for reinstatement of his driver's license by submitting proof of completion of ~~a certified~~ the intensive intervention component of a DUI alcohol or drug use risk reduction program as prescribed by the Department of Human Resources and paying to the Department of Public Safety a restoration fee of $35.00 or $25.00 ~~to the Department of Public Safety~~ when such reinstatement is processed by mail. For purposes of this paragraph, a plea of nolo contendere and all previous pleas of nolo contendere within such five-year period of time shall constitute a conviction; and

(3) Upon the third conviction of any such offense within five years, as measured from the dates of previous arrests for which convictions were obtained to the date of the current arrest for which a conviction is obtained, such person's license shall be suspended for a period of five years. At the end of two years, the person may apply to the Department of Public Safety for a three-year driving permit upon compliance with the following conditions:

(A) Such person has not been convicted or pleaded nolo contendere to any drug related offense, including driving under the influence, for a period of two years immediately preceding the application for such permit;

(B) Such person submits proof of completion of a licensed drug-treatment program. Such proof shall be submitted within two years of the license suspension and prior

to the issuance of the permit. Such licensed drug-treatment program shall be paid for by the offender. The offender must pay a permit fee of $25.00 to the Department of Public Safety;

(C) Such person submits proof of financial responsibility as provided in Chapter 9 of this title; and

(D) Refusal to issue such permit would cause extreme hardship to the applicant. For the purposes of this subparagraph, the term 'extreme hardship' means that the applicant cannot reasonably obtain other transportation, and, therefore, the applicant would be prohibited from:

(i) Going to his place of employment or performing the normal duties of his occupation;

(ii) Receiving scheduled medical care or obtaining prescription drugs;

(iii) Attending a college or school at which he is regularly enrolled as a student; or

(iv) Attending regularly scheduled sessions or meetings of support organizations for persons who have addiction or abuse problems related to alcohol or other drugs, which organizations are recognized by the commissioner.

(b) Whenever a person is convicted of possession of a controlled substance or marijuana in violation of subsection (b) of Code Section 16-13-2 or subsection (a) or (j) of Code Section 16-13-30, the court in which such

conviction is had shall require the surrender to it of any driver's license then held by the person so convicted and the court shall thereupon forward such license and a copy of its order to the Department of Public Safety within ten days after the conviction. The periods of suspension provided for in this Code section shall begin on the date of such person's conviction for the offense resulting in such suspension~~.~~ ; provided, however, that, effective January 1, 1992, if, at the time of conviction of unlawful possession of a controlled substance or marijuana, the person does not have a driver's license or the person's driver's license has been previously suspended, the periods of suspension specified by this Code section shall not commence until the person applies for the issuance or reinstatement of ~~a~~ driver's license.

(c) (1) The decision to accept a plea of nolo contendere to a misdemeanor charge of unlawful possession of less than one ounce of marijuana shall be at the sole discretion of the judge~~,--but,--if--such--plea-is-accepted,-the-penalties-set-forth-in-paragraph-(1)-of-subsection--(a)--of--this--Code section--shall--be--imposed~~. If a plea of nolo contendere is accepted as provided in this subsection, the judge shall, as a part of the disposition of the case, order the defendant to attend and complete the assessment and ~~educational/intervention----------component~~ education/intervention components of the a First Offender DUI Alcohol or Drug Use Risk Reduction Program. The order shall stipulate that the defendant shall complete such program within 120 days and that the defendant shall submit evidence of such completion to the Department of Public

Safety. The judge shall also notify the defendant that, if he fails to complete such program by the date specified in the court's order, his driver's license shall be suspended, by operation of law, as provided in this Code section. The record of the disposition of the case shall be forwarded to the Department of Public Safety.

(2) If a plea of nolo contendere is accepted and the defendant's driver's license has not been suspended under any other provision of this Code and if the defendant has not been convicted of or has not had a plea of nolo contendere accepted to a charge of violating this Code section within the previous five years, the court shall, subject to paragraph (1) of this subsection, return the driver's license to the person; otherwise, such driver's license shall be forwarded to the Department of Public Safety.

(d) Application for reinstatement of a driver's license under paragraph (1) or (2) of subsection (a) of this Code section shall be made on such forms as the commissioner may prescribe and shall be accompanied by proof of completion of the required ~~component~~ components of a DUI alcohol or drug use risk reduction program and a restoration fee of $35.00 or $25.00 ~~to the Department of Public Safety~~ when such reinstatement is processed by mail. Application for a three-year driving permit under paragraph (3) of subsection (a) of this Code section shall be made on such form as the commissioner may prescribe and shall be accompanied by proof of completion of an approved residential drug treatment program and a fee of $25.00 for such permit.

(e) Notwithstanding any other provision of this

person whose license is suspended pursuant to this Code section shall not be eligible for early reinstatement of his license and shall not be eligible for a limited driving permit, but such person's license shall ~~only~~ be reinstated only as provided in this Code section.

(f) Except as provided in subsection (a) of this Code section, it shall be unlawful for any person to operate any motor vehicle in this state after such person's license has been suspended pursuant to this Code section if such person has not thereafter obtained a valid license. Any person who is convicted of operating a motor vehicle before the department has reinstated such person's license or issued such person a three-year driving permit shall be punished by a fine of not less than $750.00 nor more than $5,000.00 or by imprisonment in the penitentiary for not more than 12 months, or both.

(g) Notwithstanding the provisions of Code Section 15-11-38, and except as provided in subsection (c) of this Code section, an adjudication of a minor child as a delinquent child or an unruly child for possession of marijuana or a controlled substance in violation of subsection (b) of Code Section 16-13-2 or subsection (a) or (j) of Code Section 16-13-30 shall be deemed a conviction for purposes of this Code section.

(h) Notwithstanding the provisions of subsection (a) of this Code section, licensed drivers who are 16 years of age who are adjudicated in a juvenile court pursuant to this Code section may, at their option, complete an assessment component and an education/intervention component or intensive intervention component of a DUI alcohol or drug use risk reduction program operated by or under contract with the

juvenile court in lieu of a program as prescribed by the Department of Human Resources."

Section 2. This Act shall become effective upon its approval by the Governor or upon its becoming law without such approval.

Section 3. All laws and parts of laws in conflict with this Act are repealed.

GEORGIA

Detailed Summary of

Ga. Code Ann. § 16-13-110 to 16-13-114 (Supp. 1990). Sanctions Against Licensed Persons for Offenses Involving Controlled Substances or Marijuana.

16-13-110. Definitions.

(a) (1) Controlled substance – controlled substance as defined in § 16-13-21.

(2) Convicted or conviction – a final conviction, a plea of guilty or *nolo contendere*, or affording of first offender treatment.

(3) Licensed individual – an individual to whom the state government has issued a license, permit, registration, certification, or other authorization to conduct a licensed occupation.

(4) Licensed occupation – an occupation, profession, business, trade, or commercial activity which requires a state government license or other authorization.

(5) Licensing authority – an entity of state government which issues a license or other authorization.

(6) Marijuana – marijuana as defined in § 16-13-21.

(b) Law shall constitute a licensed occupation.

§ 16-13-111. Notification of conviction of licensed individual to licensing authority; reinstatement of licensing imposition of more stringent sanctions.

(a) A licensee shall notify the appropriate authority within ten days of following a conviction for the manufacture, distribution, trafficking, sale, or possession of a controlled substance or marijuana.

(b) Upon being notified of a conviction, the appropriate authority shall suspend or revoke the license or other authorization of such individual:

(1) The period of suspension for a first conviction shall be for not less than three months. However, in the case of a misdemeanor the licensing authority may impose a lesser sanction or no sanction.

(2) Revocation of a license or other authorization is mandatory for a second or subsequent conviction.

(c) Failure to notify the appropriate authority of a conviction as required in (a) is grounds for revocation of a license or other authorization.

(d) A licensee sanctioned under (b) or (c) may be entitled to reinstatement of his or her license or other authorization upon successful completion of a drug abuse treatment and education program.

(e) Suspension or revocation are minimum sanctions and this section shall not prohibit implementation of additional or more stringent sanctions.

§ 16-13-112. Applicability of administrative procedures.

Administrative procedures shall be governed by the appropriate provisions applicable to each licensing authority.

§ 16-13-113. Article as supplement to power of licensing authority.

Provisions of this article are supplemental to and shall not prohibit other sanctions for a particular licensing authority.

16-13-114. Period of applicability of article.

This article applies only with respect to criminal offenses committed on or after July 1, 1990. However nothing shall prevent any licensing authority from implementing sanctions additional to or in lieu of those in this article with respect to offense committed prior to July 1, 1990.

(c) Any person who distributes or possesses with the intent to distribute to any person under 18 years of age any anabolic steroid for any use in humans other than the treatment of disease pursuant to the order of a practitioner shall be punished by imprisonment for not less than one year nor more than six years or by a fine not to exceed $10,000.00, or both. (Code 1933, § 79A-9907, enacted by Ga. L. 1967, p. 296, § 1; Ga. L. 1989, p. 238, § 2.)

The 1989 amendment, effective March 30, 1989, designated the existing provisions as subsection (a), substituted "Except as provided in subsections (b) and (c) of this Code section, any" for "Any" in subsection (a), and added subsections (b) and (c).

Law reviews. — For note on 1989 amendment to this Code section, see 6 Ga. St. U.L. Rev. 204 (1989).

ARTICLE 5

SANCTIONS AGAINST LICENSED PERSONS FOR OFFENSES INVOLVING CONTROLLED SUBSTANCES OR MARIJUANA

Effective date. — This article became effective July 1, 1990.

16-13-110. Definitions.

(a) As used in this article, the term:

(1) "Controlled substance" means any drug, substance, or immediate precursor included in the definition of the term "controlled substance" in paragraph (4) of Code Section 16-13-21.

(2) "Convicted" or "conviction" refers to a final conviction in a court of competent jurisdiction, or the acceptance of a plea of guilty or nolo contendere or affording of first offender treatment by a court of competent jurisdiction.

(3) "Licensed individual" means any individual to whom any department, agency, board, bureau, or other entity of state government has issued any license, permit, registration, certification, or other authorization to conduct a licensed occupation.

(4) "Licensed occupation" means any occupation, profession, business, trade, or other commercial activity which requires for its lawful conduct the issuance to an individual of any license, permit, registration, certification, or other authorization by any department, agency, board, bureau, or other entity of state government.

(5) "Licensing authority" means any department, agency, board, bureau, or other entity of state government which issues to individuals any license, permit, registration, certification, or other authorization to conduct a licensed occupation.

(6) "Marijuana" means any substance included in the definition of the term "marijuana" in paragraph (16) of Code Section 16-13-21.

(b) Without limiting the generality of the provisions of subsection (a) of this Code section, the practice of law shall constitute a licensed occupation for purposes of this article and the Supreme Court of Georgia shall be the licensing authority for the practice of law. (Code 1981, § 16-13-110, enacted by Ga. L. 1990, p. 2009, § 1.)

16-13-111. Notification of conviction of licensed individual to licensing authority; reinstatement of license; imposition of more stringent sanctions.

(a) Any licensed individual who is convicted under the laws of this state, the United States, or any other state of any criminal offense involving the manufacture, distribution, trafficking, sale, or possession of a controlled substance or marijuana shall notify the appropriate licensing authority of the conviction within ten days following the conviction.

(b) Upon being notified of a conviction of a licensed individual, the appropriate licensing authority shall suspend or revoke the license, permit, registration, certification, or other authorization to conduct a licensed occupation of such individual as follows:

(1) Upon the first conviction, the licensed individual shall have his or her license, permit, registration, certification, or other authorization to conduct a licensed occupation suspended for a period of not less than three months; provided, however, that in the case of a first conviction for a misdemeanor the licensing authority shall be authorized to impose a lesser sanction or no sanction upon the licensed individual; and

(2) Upon the second or subsequent conviction, the licensed individual shall have his or her license, permit, registration, certification, or other authorization to conduct a licensed occupation revoked.

(c) The failure of a licensed individual to notify the appropriate licensing authority of a conviction as required in subsection (a) of this Code section shall be considered grounds for revocation of his or her license, permit, registration, certification, or other authorization to conduct a licensed occupation.

(d) A licensed individual sanctioned under subsection (b) or (c) of this Code section may be entitled to reinstatement of his or her license, permit, registration, certification, or other authorization to conduct a licensed occupation upon successful completion of a drug abuse treatment and education program approved by the licensing authority.

(e) The suspension and revocation sanctions prescribed in this Code section are intended as minimum sanctions, and nothing in this Code

section shall be construed to prohibit any licensing authority from establishing and implementing additional or more stringent sanctions for criminal offenses and other conduct involving the unlawful manufacture, distribution, trafficking, sale, or possession of a controlled substance or marijuana. (Code 1981, § 16-13-111, enacted by Ga. L. 1990, p. 2009, § 1.)

16-13-112. Applicability of administrative procedures.

Administrative procedures for the implementation of this article for each licensed occupation shall be governed by the appropriate provisions applicable to each licensing authority. (Code 1981, § 16-13-112, enacted by Ga. L. 1990, p. 2009, § 1.)

16-13-113. Article as supplement to power of licensing authority.

The provisions of this article shall be supplemental to and shall not operate to prohibit any licensing authority from acting pursuant to those provisions of law which may now or hereafter authorize other sanctions and actions for that particular licensing authority. (Code 1981, § 16-13-113, enacted by Ga. L. 1990, p. 2009, § 1.)

16-13-114. Period of applicability of article.

This article shall apply only with respect to criminal offenses committed on or after July 1, 1990; provided, however, that nothing in this Code section shall prevent any licensing authority from implementing sanctions additional to or other than those provided for in this article with respect to offenses committed prior to July 1, 1990. (Code 1981, § 16-13-114, enacted by Ga. L. 1990, p. 2009, § 1.)

CHAPTER 14

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

Sec.
16-14-3. Definitions.
16-14-15. Acquisition of record of real property by alien corporation.

INDIANA

Detailed Summary
of

H.B. 1855 (1991), amending Ind. Code Ann. § 35-48-4-15 (Supp. 1990).
Use of motor vehicle in commission of crime, prior convictions; offense committed on school property; suspension of license.

Sec. 15. (a) If a person is convicted of a specified controlled substance offense or conspiracy to commit a specified controlled substance offense, the court shall suspend the person's:

(1) operator's license;
(2) existing motor vehicle registrations; and
(3) ability to register motor vehicles;

for at least 180 days but no more than two years.

(b) If the person is convicted of an offense described in (a) and has one or more prior unrelated convictions for such an offense; or if the offense was committed on or within 1,000 feet of school property or on a school bus, the court may suspend the person's:

(1) operator's license;
(2) existing motor vehicle registrations; and
(3) ability to register motor vehicles;

for at least 180 days but no more than two years.

(c) If a person is convicted of an offense under alcohol does not have a license or learner's permit, the person may not receive a license or permit for at least 180 days.

issuance of a driver's license or permit as described in subsection (c), (d), or (e):

(1) the bureau of motor vehicles shall comply with the order for invalidation or denial of issuance; and

(2) the child shall surrender to the court all driver's licenses or permits of the child and the court shall immediately forward the licenses or permits to the bureau of motor vehicles.

(g) The juvenile court may enter an order for the maximum period of invalidation or denial of issuance under subsections (d) and (e) and, following a determination that the child has committed no further delinquent acts, enter an order to allow the child to receive a license or permit before the period of invalidation or denial is completed.

SECTION 3. IC 35-48-4-15, AS ADDED BY P.L.67-1990, SECTION 13, IS AMENDED TO READ AS FOLLOWS: Sec. 15. (a) If a person is convicted of an offense under section 1, 2, 3, 4, 5, 6, 7, 10, or 11 of this chapter, or conspiracy to commit an offense under section 1, 2, 3, 4, 5, 6, 7, 10, or 11 of this chapter, ~~and the offense is committed in a motor vehicle or a motor vehicle is used to facilitate the commission of the offense,~~ the court ~~may,~~ **shall,** in addition to any other order the court enters, order that the person's:

(1) operator's license be suspended;

(2) existing motor vehicle registrations be suspended; and

(3) ability to register motor vehicles be suspended;

by the bureau of motor vehicles for a period specified by the court of at least ~~ninety (90)~~ **one hundred eighty (180)** days but not more than two (2) years.

(b) If a person is convicted of an offense described in subsection (a) and the person has one (1) or more prior unrelated convictions for an offense described in subsection (a) or if the offense was committed on school property, within one thousand (1,000) feet of school property, or on a school bus, the court may, in addition to any other order the court enters, order that the person's:

(1) operator's license be suspended;

(2) existing motor vehicle registrations be suspended; and

(3) ability to register motor vehicles be suspended;

by the bureau of motor vehicles for a period specified by the court of at least one hundred eighty (180) days but not more than two (2) years.

(c) If a person is convicted of an offense described in subsection (a) and the person does not hold an operator's

license or a learner's permit, the court shall order that the person may not receive an operator's license or a learner's permit from the bureau of motor vehicles for a period of not less than one hundred eighty (180) days.

INDIANA

Detailed Summary
of

Ind. Code Ann. § 25-1-1.1-2 to 25-1-1.1-3 (Supp.1991).

§ 25-1-1.1-2. Suspension or revocation of license or certificate; conviction for drug related offense.

Sec. 2. A board, commission, or committee may suspend or revoke a license or certificate if the licensee or certificate holder is convicted of:

(1) Possession of cocaine or a narcotic drug;
(2) Possession of a controlled substance;
(3) Fraudulently obtaining a controlled substance;
(4) Manufacture of paraphernalia as a Class D felony;
(5) Dealing in paraphernalia as a Class D felony;
(6) Possession of paraphernalia as a Class D felony;
(7) Possession of marijuana, hash oil, or hashish as a Class D felony;
(8) Maintaining a common nuisance;
(9) An offense relating to registration, labeling, and prescription forms;
(10) Conspiracy to commit offenses in (1)-(9);
(11) Attempt to commit offense in (1)-(9); and
(12) An offense in another jurisdiction with substantially similar elements to offenses in (1)-(9).

§ 25-1-1.1-3. Suspension or revocation of license or certificate; conviction for additional drug related offenses.

Sec. 3. A board, commission or committee shall suspend or revoke a license or certificate if the licensee or certificate holder is convicted of:

(1) Dealing in cocaine or a narcotic drug;
(2) Dealing in a schedule I, II, or III controlled substance;
(3) Dealing in a schedule IV substance;
(4) Dealing in a Schedule V substance;
(5) Dealing in a substance represented to be a controlled substance;
(6) Knowingly or intentionally manufacturing, advertising, distributing, or possessing with intent to manufacture, advertise, or distribute a substance represented to be a controlled substance;
(7) Dealing in a counterfeit substance;
(8) Dealing in marijuana, hash oil, or hashish;
(9) Conspiracy to commit an offense in (1)-(8);
(10) Attempt to commit an offense in (1)-(8); and
(11) An offense in another jurisdiction with substantially similar elements to offenses in (1)-(8).

25-1-1.1-2. **Conviction of drug related offenses other than dealing.** — A board, a commission, or a committee may suspend or revoke a license or certificate issued under this title by the board, the commission, or the committee if the individual who holds the license or certificate is convicted of any of the following:

(1) Possession of cocaine or a narcotic drug under IC 35-48-4-6.

(2) Possession of a controlled substance under IC 35-48-4-7(a).

(3) Fraudulently obtaining a controlled substance under IC 35-48-4-7(b).

(4) Manufacture of paraphernalia as a Class D felony under IC 35-48-4-8.1(b).

(5) Dealing in paraphernalia as a Class D felony under IC 35-48-4-8.2(b).

(6) Possession of paraphernalia as a Class D felony under IC 35-48-4-8.3(b).

(7) Possession of marijuana, hash oil, or hashish as a Class D felony under IC 35-48-4-11.

(8) Maintaining a common nuisance under IC 35-48-4-13.

(9) An offense relating to registration, labeling, and prescription forms under IC 35-48-4-14.

(10) Conspiracy under IC 35-41-5-2 to commit an offense listed in subdivisions (1) through (9).

(11) Attempt under IC 35-41-5-1 to commit an offense listed in subdivisions (1) through (9).

(12) An offense in any other jurisdiction in which the elements of the offense for which the conviction was entered are substantially similar to the elements of an offense described under subdivisions (1) through (11). [P.L.67-1990, § 7.]

Compiler's Notes. Section 14 of P.L.67-1990, effective July 1, 1990, provides: "(a) IC 25-1-1.1-2, as added by this act, and IC 25-1-1.1-3, as added by this act, only apply to convictions that result from criminal offenses that are committed after June 30, 1990.

"(b) This SECTION expires July 1, 1995."

Cross References. Penalties for felonies, IC 35-50-1, 35-50-2, 35-50-5-2.

25-1-1.1-3. Conviction of offenses related to dealing in controlled substances. — A board, a commission, or a committee shall revoke or suspend a license or certificate issued under this title by the board, the commission, or the committee if the individual who holds the license or certificate is convicted of any of the following:

(1) Dealing in cocaine or a narcotic drug under IC 35-48-4-1.

(2) Dealing in a schedule I, II, or III controlled substance under IC 35-48-4-2.

(3) Dealing in a schedule IV controlled substance under IC 35-48-4-3.

(4) Dealing in a schedule V controlled substance under IC 35-48-4-4.

(5) Dealing in a substance represented to be a controlled substance under IC 35-48-4-4.5.

(6) Knowingly or intentionally manufacturing, advertising, distributing, or possessing with intent to manufacture, advertise, or distribute a substance represented to be a controlled substance under IC 35-48-4-4.6.

(7) Dealing in a counterfeit substance under IC 35-48-4-5.

(8) Dealing in marijuana, hash oil, or hashish under IC 35-48-4-10(b).

(9) Conspiracy under IC 35-41-5-2 to commit an offense listed in subdivisions (1) through (8).

(10) Attempt under IC 35-41-5-1 to commit an offense listed in subdivisions (1) through (8).

(11) An offense in any other jurisdiction in which the elements of the offense for which the conviction was entered are substantially similar to the elements of an offense described under subdivisions (1) through (10).

As added by P.L.67-1990, SEC.8.

Historical and Statutory Notes

1990 Legislation

For related provisions of P.L.67-1990, see Historical Note under section 25-1-1.1-2.

ILLINOIS

Detailed Summary
of

Ill. Ann. Stat. ch 95½ § 6-206 (Smith-Hurd Supp. 1991).
Discretionary authority to suspend or revoke license or permit - Right to a hearing.

(a) The Secretary of State may suspend or revoke a person's driving privileges without a preliminary hearing upon a showing of a person's records or other sufficient evidence that the person:

...

28. Has been convicted of illegal possession, while operating or in actual physical control, as a driver, of a motor vehicle, of any controlled substance or cannabis. The person's driving privileges shall be suspended for one year for a first offense and five years for a second or subsequent offense within five years of a previous conviction. The presiding judge shall note in the court record that the offense occurred while the defendant was operating a motor vehicle and order the clerk to report the violation to the Secretary of State;

29. Has been convicted of the following offenses which were committed while the person was operating or in actual physical control, as a driver, of a motor vehicle: ... sale or delivery of controlled substances or instruments used for illegal drug use or abuse in which case the driver's driving privileges shall be suspended for one year;

30. Has been convicted a second or subsequent time for any combination of the offenses in 29, in which case the person's driving privileges shall be suspended for five years.

...

(b) If a conviction is appealed, the Secretary of State may rescind or withhold a suspension or revocation order if a certified copy of the stay order is filed. If the conviction is affirmed, the date of the conviction shall relate back to the time the original judgment of conviction was entered and the 6 month limitation shall not apply.

(c) 1. The Secretary of State shall immediately notify a person in writing of a revocation or suspension order. The notice shall be mailed, postage prepaid, to the last known address of the person.

2. A person's license to operate a commercial vehicle as an occupation shall not be revoked or suspended unless 5 offenses were committed, at least 2 of which occurred while operating a commercial vehicle in connection with the driver's regular occupation. Within 25 days after the mailing of notice of a license suspension or revocation, the driver may submit an

affidavit establishing the driver's employment as a commercial driver. The affidavit shall also state the number of offenses committed while driving a commercial vehicle in connection with the driver's regular employment or occupation. The affidavit shall be accompanied by the driver's license which shall be suspended and the Secretary of State shall send the driver a permit to drive a commercial vehicle in the driver's regular occupation only. Unless the affidavit is properly completed and received by the Secretary of State within the 25 day period, the license to drive any motor vehicle shall be revoked or suspended as set forth in the notice. The Secretary may revoke or suspend the person's driving privileges to drive any vehicle other a commercial vehicle in connection with the person's regular occupation upon notice of conviction of not less than 3 offenses against traffic regulations governing the movement of vehicles with the exception of specified offenses under Section 6–204.

In lieu of the affidavit, the driver may request a hearing.

Any person who falsifies the affidavit shall be guilty of perjury and upon conviction shall have all driving privileges revoked without further rights.

3. At the conclusion of a hearing, the Secretary of State shall rescind or continue an order of revocation; substitute an order of suspension; or for good cause rescind, continue, change or extend the order of suspension. If the order is not rescinded, the Secretary of State may issue a restricted driving permit to relieve undue hard–ship if the person establishes no other means of transportation is reasonably available and the person will not endanger public safety or welfare. The permit allows driving between the person's residence and place of employment or within the scope of employment related duties, or to receive necessary medical care including alcohol remedial or rehabilitative activity, or to attend classes. The Secretary may issue restricted driving permits for appropriate time periods, but no longer than one year. A restricted driving permit shall be subject to cancellation, revocation and suspension in like manner and for like cause as a driver's license. However, a conviction of one or more traffic offenses shall be deemed sufficient cause to cancel, revoke or suspend a permit. The Secretary of State may require the person to participate in a designated driver remedial or rehabilitative program as a condition of the permit.

(d) This section is subject to the Driver's License Compact.

5. Convictions in other states, driving under the influence

Secretary of State properly denied plaintiff's petition to rescind suspension of his driver's license, notwithstanding plaintiff's contention that acceptance of his plea of nolo contendere by Georgia court to charge of driving while under influence of alcohol was not grounds for suspension of his Illinois driver's license, as Secretary's decision was not contrary to manifest weight of evidence nor was it based on information outside administrative record. Rigney v. Edgar, App. 1 Dist.1985, 90 Ill.Dec. 548, 135 Ill.App.3d 893, 482 N.E.2d 367, appeal denied.

Illinois Secretary of State was not required to give effect to nolo contendere provision of Georgia law, pursuant to full faith and credit clause of United States Constitution, U.S.C.A. Const. Art. 4, § 1, in action to suspend plaintiff's Illinois driver's license, as to require Secretary of State to apply more lenient Georgia statutes to plaintiff's offense would be contrary to public policy of Illinois, and it would be contrary to some policies of driver license compact. Rigney v. Edgar, App. 1 Dist.1985, 90 Ill.Dec. 548, 135 Ill.App.3d 893, 482 N.E.2d 367, appeal denied.

6. Nonresidents

Former Illinois resident whose Illinois license had expired but who had valid Texas driver's license could not be convicted for driving while license was revoked where Illinois had failed to take action against defendant's nonresident driving privileges or notify Texas of defendant's conviction for driving under influence of alcohol while visiting Illinois. People v. Eberhardt, App. 3 Dist.1985, 92 Ill.Dec. 830, 138 Ill.App.3d 148, 485 N.E.2d 876.

7. Privilege to drive

Operation of motor vehicle is a privilege and not a right, and driver's license is issued in recognition of that privilege; privilege to drive, and license which is given so that privilege may be exercised, are by no means separate and divisible. People v. Sass, App. 4 Dist.1986, 98 Ill.Dec. 623, 144 Ill.App.3d 163, 494 N.E.2d 745.

8. Discretion of Secretary of State

After entering judgments of conviction and sentence for aggravated criminal sexual abuse, which crime required revocation of defendant's driver's license, trial court violated separation of powers doctrine in directing Secretary of State to issue defendant restricted driving permit; ch. 95 ½, ¶ 6–205 vested Secretary with sole discretion to issue permit upon submission of application by defendant. People v. Sales, App. 2 Dist.1990, 141 Ill.Dec. 831, 195 Ill.App.3d 160, 551 N.E.2d 1359.

Order directing Secretary of State to issue restricted driving permit, entered by trial court after convicting and sentencing defendant for aggravated criminal sexual abuse, which crime called for revocation of his driver's license, was void inasmuch as Secretary was vested with sole discretion to issue such permit. People v. Sales, App. 2 Dist.1990, 141 Ill.Dec. 831, 195 Ill.App.3d 160, 551 N.E.2d 1359.

9. Sex offenses

Trial court order instructing clerk of court to send copy of defendant's aggravated criminal sexual abuse conviction to Secretary of State's office pursuant to vehicle code provision in effect constituted order to revoke defendant's driver's license which would be reversed; provision requiring Secretary of State to revoke license of any person convicted of aggravated criminal sexual abuse and other sex offenses had been held unconstitutional. People v. Priola, App. 2 Dist.1990, 146 Ill.Dec. 776, 203 Ill.App.3d 401, 561 N.E.2d 82.

6–206. Discretionary authority to suspend or revoke license or permit—Right to a hearing

§ 6–206. Discretionary authority to suspend or revoke license or permit; Right to a hearing.

(a) The Secretary of State is authorized to suspend or revoke the driving privileges of any person without preliminary hearing upon a showing of such person's records or other sufficient evidence that such person:

1. Has committed an offense for which mandatory revocation of a driver's license or permit is required upon conviction;

2. Has been convicted of not less than 3 offenses against traffic regulations governing the movement of vehicles committed within any 12 month period. No such revocation or suspension shall be entered more than 6 months subsequent to the date of last conviction;

3. Has been repeatedly involved as a driver in motor vehicle collisions or has been repeatedly convicted of offenses against laws and ordinances regulating the movement of traffic, to a degree which indicates lack of ability to exercise ordinary and reasonable care in the safe operation of a motor vehicle or disrespect for the traffic laws and the safety of other persons upon the highway;

4. Has by the unlawful operation of a motor vehicle caused or contributed to an accident resulting in death or injury requiring immediate professional treatment in a medical facility or doctor's office to any person, except that any suspension or revocation imposed by the Secretary of State under the provisions of this subsection shall start no later than 6 months after being convicted of violating a law or

ordinance regulating the movement of traffic, which violation is related to such accident, or shall start not more than one year subsequent to the date of said accident, whichever date occurs later;

5. Has permitted an unlawful or fraudulent use of a driver's license, identification card or permit;

6. Has been lawfully convicted of an offense or offenses in another State, including the authorization contained in Section 6-203.1, which if committed within this State would be grounds for suspension or revocation;

7. Has refused or failed to submit to an examination provided for by Section 6-207 or has failed to pass such examination;

8. Is ineligible for a driver's license or permit under the provisions of Section 6-103;

9. Has made a false statement or knowingly concealed a material fact or has used false information or identification in any application for a license, identification card or permit;

10. Has displayed or attempted to fraudulently use any license, identification card or permit not issued to such person;

11. Has operated a motor vehicle upon a highway of this State when such person's driving privilege or privilege to obtain a driver's license or permit was revoked or suspended unless such operation was authorized by a judicial driving permit, probationary license to drive or a restricted driving permit issued pursuant to this Code;

12. Has submitted to any portion of the application process for another person or has obtained the services of another person to submit to any portion of the application process for the purpose of obtaining a license, identification card or permit for some other person;

13. Has operated a motor vehicle upon a highway of this State when such person's driver's license was invalid under the provisions of Section 6-110. Provided that for the first such offense the Secretary of State may suspend such driver's license for not more than 60 days, for the second such offense not more than 90 days, and for the third such offense not more than 1 year;

14. Has committed a violation of Section 6-301 or 6-301.1;

15. Has been convicted of violating Section 21-2 of the Criminal Code of 1961 [1] relating to criminal trespass to vehicles in which case, the suspension shall be for one year;

16. Has been convicted of violating Section 11-204 of this Code relating to fleeing from a police officer;

17. Has refused to submit to a test, or tests, as required under Section 11-501.1 of this Code and such person has not sought a hearing as provided for in Section 11-501.1;

18. Has, since issuance of a driver's license or permit, been adjudged to be afflicted with or suffering from any mental disability or disease;

19. Has committed a violation of paragraph (a) or (b) of Section 6-101 relating to driving without a driver's license;

20. Has been convicted of violating Section 6-104 relating to classification of driver's license;

21. Has been convicted of violating Section 11-402 of this Code relating to leaving the scene of an accident resulting in damage to a vehicle in excess of $1,000. in which case the suspension shall be for one year;

22. Has used a motor vehicle in violating paragraph (3), (4), (7), or (9) of subsection (a) of Section 24-1 of the Criminal Code of 1961 [2] relating to unlawful use of weapons, in which case the suspension shall be for one year;

23. Has, as a driver, been convicted of committing a violation of paragraph (a) of Section 11-502 of this Code for a second or subsequent time within one year of a similar violation;

24. Has been convicted by a court-martial or punished by non-judicial punishment by military authorities of the United States at a military installation in Illinois of or for a traffic related offense which is the same as or similar to an offense specified under Section 6-205 or 6-206 of this Code;

25. Has permitted any form of identification to be used by another in the application process in order to obtain or attempt to obtain a license, identification card or permit;

26. Has altered or attempted to alter a license or has possessed an altered license, identification card or permit;

27. Has violated Section 6-16 of The Liquor Control Act of 1934;[3]

28. Has been convicted of the illegal possession, while operating or in actual physical control, as a driver, of a motor vehicle, of any controlled substance prohibited under the Illinois Controlled Substances Act[4] or any cannabis prohibited under the provisions of the Cannabis Control Act,[5] in which case such person's driving privileges shall be suspended for one year, and any such driver who is convicted of a second or subsequent offense, within 5 years of a previous conviction, for the illegal possession, while operating or in actual physical control, as a driver, of a motor vehicle, of any controlled substance prohibited under the provisions of the Illinois Controlled Substances Act or any cannabis prohibited under the Cannabis Control Act shall be suspended for 5 years. Any defendant found guilty of this offense while operating a motor vehicle, shall have an entry made in the court record by the presiding judge that this offense did occur while the defendant was operating a motor vehicle and order the clerk of the court to report the violation to the Secretary of State as such;

29. Has been convicted of the following offenses which were committed while such person was operating or in actual physical control, as a driver, of a motor vehicle: criminal sexual assault, aggravated criminal sexual assault, criminal sexual abuse, aggravated criminal sexual abuse, juvenile pimping, soliciting for a juvenile prostitute and the manufacture, sale or delivery of controlled substances or instruments used for illegal drug use or abuse in which case the driver's driving privileges shall be suspended for one year;

30. Has been convicted a second or subsequent time for any combination of the offenses named in paragraph 29 of this subsection, in which case such person's driving privileges shall be suspended for 5 years; or

31. Beginning on January 1, 1991, has refused to submit to a test as required by Section 11-501.6 or has submitted to such a test resulting in an alcohol concentration of 0.10 or more in which case the penalty shall be as prescribed in Section 6-208.1.

For purposes of paragraphs 5, 9, 10, 12, 14, 19, 25, 26 and 27 of this subsection, license means any driver's license, any traffic ticket issued when the person's driver's license is deposited in lieu of bail, a suspension notice issued by the Secretary of State, a duplicate or corrected driver's license, a probationary driver's license or a temporary driver's license.

(b) If any conviction forming the basis of a suspension or revocation authorized hereunder is appealed, the Secretary of State may rescind or withhold the entry of the order of suspension or revocation, as the case may be, provided that a certified copy of a stay order of a court is filed with the Secretary of State. If such conviction is affirmed on appeal, the date of the conviction shall relate back to the time the original judgment of conviction was entered and the 6 month limitation hereinabove prescribed shall not apply.

(c)1. Upon suspending or revoking the driver's license or permit of any person as authorized in this Section, the Secretary of State shall immediately notify such person in writing of the revocation or suspension. Such notice to be deposited in the United States mail, postage prepaid, to the last known address of such person.

2. If the Secretary of State suspends or revokes the driver's license of a person under subsection 2 of paragraph (a) of this Section, a person's driver's license to operate a commercial vehicle as an occupation shall not be revoked or suspended unless 5 offenses were committed, at least 2 of which occurred while operating a commercial vehicle in connection with the driver's regular occupation. Within 25 days after the mailing of a notice of suspension or revocation by the Secretary of

State, any such driver may submit an affidavit on forms to be provided by the Secretary of State setting forth the facts of such person's employment as a driver of a commercial vehicle. The affidavit shall also state the number of offenses committed while driving a commercial vehicle in connection with the driver's regular employment or occupation. The affidavit shall be accompanied by the driver's license which shall be suspended by the Secretary of State who shall thereupon send to the driver a permit to drive a commercial vehicle in the driver's regular occupation only. Unless such affidavit is properly completed by the driver and received by the Secretary of State within such 25 day period, such driver's license to drive any motor vehicle shall be revoked or suspended as set forth in the notice that was mailed pursuant to this Section. The Secretary may revoke or suspend the driving privileges of such person to drive any vehicle other than a commercial vehicle in connection with such person's regular occupation upon notice of conviction of not less than 3 offenses against traffic regulations governing the movement of vehicles with the exception of those offenses excluded under subsection 2 of paragraph (a) of Section 6-204, committed within any 12 month period so as to indicate the disrespect for traffic laws and a disregard for the safety of other persons on the highways.

In lieu of the affidavit provided for above, the driver may request a hearing pursuant to Section 2-118 of this Code.

Any person who falsely states any fact in the affidavit required herein shall be guilty of perjury under Section 6-302 and upon conviction thereof shall have all driving privileges revoked without further rights.

3. At the conclusion of a hearing pursuant to Section 2-118 of this Code, the Secretary of State shall either rescind or continue an order of revocation or shall substitute an order of suspension therefor; or, good cause appearing therefor, rescind, continue, change or extend the order of suspension. If the Secretary of State does not rescind the order, the Secretary may upon application therefor, to relieve undue hardship, issue a restricted driving permit granting the privilege of driving a motor vehicle between the petitioner's residence and petitioner's place of employment or within the scope of his employment related duties, or to allow transportation for the petitioner, or a household member of the petitioner's family, to receive necessary medical care and if the professional evaluation indicates, provide transportation for alcohol remedial or rehabilitative activity, or for the petitioner to attend classes, as a student, in an accredited educational institution; if the petitioner is able to demonstrate that no alternative means of transportation is reasonably available and the petitioner will not endanger the public safety or welfare. In each case the Secretary may issue such restricted driving permit for such period as deemed appropriate, except that all such permits shall expire within one year from the date of issuance. A restricted driving permit issued hereunder shall be subject to cancellation, revocation and suspension by the Secretary of State in like manner and for like cause as a driver's license issued hereunder may be cancelled, revoked or suspended; except that a conviction upon one or more offenses against laws or ordinances regulating the movement of traffic shall be deemed sufficient cause for the revocation, suspension or cancellation of a restricted driving permit. The Secretary of State may, as a condition to the issuance of a restricted driving permit, require the applicant to participate in a designated driver remedial or rehabilitative program.

(d) This Section is subject to the provisions of the Drivers License Compact.[6]
Amended by P.A. 77-2739, § 1, eff. Oct. 1, 1972; P.A. 78-663, § 1, eff. Jan. 1, 1974; P.A. 79-1141, § 1, eff. Jan. 1, 1976; P.A. 81-1400, § 1, eff. Aug. 25, 1980; P.A. 82-141, § 1, eff. Jan. 1, 1982; P.A. 82-311, § 1, eff. Jan. 1, 1982; P.A. 82-783, Art. III, § 37, eff. July 13, 1982; P.A. 83-466, § 1, eff. Sept. 17, 1983; P.A. 83-905, § 1, eff. Jan. 1, 1984; P.A. 83-1362, Art. II, § 99, eff. Sept. 11, 1984; P.A. 84-112, § 1, eff. July 25, 1985; P.A. 84-272, § 7, eff. Jan. 1, 1986; P.A. 84-300, § 1, eff. Sept. 13, 1985; P.A. 84-551, § 50, eff. Sept. 18, 1985; P.A. 84-772, § 1, eff. Jan. 1, 1986; P.A. 84-1308, Art. II, § 96, eff. Aug. 25, 1986; P.A. 84-1394, § 5, eff. Sept. 18, 1986; P.A. 85-813, § 1, eff. Jan. 1, 1988; P.A. 85-1259, § 3, eff. Jan. 1, 1989; P.A. 86-879, § 1, eff. Jan. 1, 1990; P.A. 86-929, § 2, eff. Sept. 21, 1989; P.A. 86-947, § 2, eff. Jan. 1, 1991; P.A. 86-1019, § 7, eff. July 1, 1990; P.A. 86-1475, Art. 2, § 2-25, eff. Jan. 10, 1991.

[1] Chapter 38, ¶ 21-2.

NEW JERSEY

Detailed Summary
of

N.J. Stat. Ann. § 2C:35-16 (West Supp. 1990).
Mandatory forfeiture or postponement of driving privileges.

In addition to other authorized dispositions, a person who is convicted of or adjudicated delinquent for a controlled substance offense forfeits his right to operate a motor vehicle for not less than six months nor more than two years.

If the person is less than 17 years of age at the time of sentencing, the suspension shall run from the day the person reaches the age of 17 years. A revocation, suspension, or postponement period imposed under this section shall commence from the date of termination of an existing revocation, suspension, or postponement.

The court shall collect all driver's licenses and forward them to the Director of the Division of Motor Vehicles along with a report indicating the first and last day of the suspension or postponement period. If the court is unable to collect the licenses, it shall cause a report of the conviction or adjudication to be filed with the director. The report shall include the name, address, birthdate, and sex of the person and the first and last day of the suspension or postponement period. The court shall inform the person orally and in writing of the penalties for operating a motor vehicle during the suspension or postponement period. The person shall be required to acknowledge in writing receipt of the notice. Failure to receive notice or acknowledge the receipt of notice is no defense to subsequent charges under R.S. 39:3-40. If the person holds a license from another jurisdiction, the court shall revoke the person's non-resident driving privileges and notify the Director. The Director shall notify appropriate authorities in the licensing jurisdiction.

A court may suspend, revoke or postpone driving privileges of a person admitted to supervisory treatment without a guilty plea or finding of guilt.

able to pay mandatory penalties imposed under former law. State v. Rock, 228 N.J.Super. 577, 550 A.2d 531 (L.1988).

3. Juveniles

Juveniles, like adults, cannot be incarcerated for involuntary failure to pay mandatory penalties provided for by this section as part of Comprehensive Drug Reform Act. State in Interest of L.M., 229 N.J.Super. 88, 550 A.2d 1252 (A.D.1988) certification denied 114 N.J. 485, 555 A.2d 609.

Juvenile drug offender's claimed entitlement to same treatment as nondrug offenders did not constitute fundamental right, in determining whether this section mandating imposition of fine as part of Comprehensive Drug Reform Act violates state or federal equal protection rights. State in Interest of L.M., 229 N.J.Super. 88, 550 A.2d 1252 certification denied 114 N.J. 485, 555 A.2d 609, (A.D.1988).

4. Findings

Finding of guilt beyond reasonable doubt was not prerequisite to imposition of drug enforcement and demand reduction penalty upon individual placed into pretrial intervention program; DEDR penalties are not punitive in nature, but rather, serve general rehabilitative or preventative function in that they fund enforcement efforts and educational, public awareness, rehabilitation or other public programs designed to prevent drug abuse. State v. Bulu, 234 N.J. Super. 331, 560 A.2d 1250 (A.D.1989).

2C:35–16. Mandatory forfeiture or postponement of driving privileges

In addition to any disposition authorized by this title, the provisions of section 24 of P.L.1982, c. 77 (C. 2A:4A–43), or any other statute indicating the dispositions that can be ordered for an adjudication of delinquency, and notwithstanding the provisions of subsection c. of N.J.S. 2C:43–2 every person convicted of or adjudicated delinquent for a violation of any offense defined in this chapter or chapter 36 of this title shall forthwith forfeit his right to operate a motor vehicle over the highways of this State for a period to be fixed by the court at not less than six months or more than two years, ~~or, after the expiration of six months, until the privilege shall be restored to him in the discretion of the Director of the Division of Motor Vehicles upon application to and after certification by a physician to the director that the person is not a drug dependent person within the meaning of this chapter~~ which shall commence on the day the sentence is imposed. In the case of any person who at the time of the imposition of sentence is less than 17 years of age, the period of the suspension of driving privileges authorized herein ~~shall not commence to run until the defendant reaches the age of 17~~, including a suspension of the privilege of operating a motorized bicycle, shall commence on the day the sentence is imposed and shall run for a period as fixed by the court of not less than six months or more than two years after the day the person reaches the age of 17 years. If the driving privilege of any person is under revocation, suspension, or postponement for a violation of any provision of this title or Title 39 of the Revised Statutes at the time of any conviction or adjudication of delinquency for a violation of any offense defined in this chapter or chapter 36 of this title, the revocation, suspension, or postponement period imposed herein shall commence as of the date of termination of the existing revocation, suspension, or postponement.

The court before whom any person is convicted of or adjudicated delinquent for a violation of any offense defined in this chapter or chapter 36 of this title shall ~~cause a report of the conviction or adjudication to be filed with the Director of the Division of Motor Vehicles~~ collect forthwith the New Jersey driver's license or licenses of the person and forward such license or licenses to the Director of the Division of Motor Vehicles along with a report indicating the first and last day of the suspension or postponement period imposed by the court pursuant to this section. If the court is for any reason unable to collect the license or licenses of the person, the court shall cause a report of the conviction or adjudication of delinquency to be filed with the Director. That report shall include the complete name, address, date of birth, eye color, and sex of the person and shall indicate the first and last day of the suspension or postponement period imposed by the court pursuant to this section. The court shall inform the person orally and in writing that if the person is convicted of personally operating a motor vehicle during the period of license suspension or postponement imposed pursuant to this section, the person shall, upon conviction, be subject to the penalties set forth in R.S. 39:3–40. A person shall be required to acknowledge receipt of the written notice in writing. Failure to receive a written notice or failure to acknowledge in writing the receipt of a written notice shall not be a defense to a subsequent charge of a violation of R.S. 39:3–40. If the person is the holder of a driver's license from another jurisdiction, the court shall not collect the

license but shall notify forthwith the Director who shall notify the appropriate officials in the licensing jurisdiction. The court shall, however, in accordance with the provisions of this section, revoke the person's non-resident driving privilege in this State.

In addition to any other condition imposed, a court may in its discretion suspend, revoke or postpone in accordance with the provisions of this section the driving privileges of a person admitted to supervisory treatment under N.J.S. 2C:36A–1 or N.J.S. 2C:43–12 without a plea of guilty or finding of guilt.

L.1987, c. 106, § 1, operative July 9, 1987. Amended by L.1988, c. 44, § 7, eff. June 28, 1988.

Historical and Statutory Notes

1987 Legislation

Effective and operative date of L.1987, c. 106, see Historical Note under § 2C:35–1.

Notes of Decisions

Conspiracy 2
Multiple convictions 4
Period of suspension 3
Validity 1

1. Validity

Mandatory penalty provisions that were part of Comprehensive Drug Reform Act, including mandatory fine and mandatory deprivation of juvenile's privilege to secure driver's license for six months, did not violate state constitutional prohibition against amendment and incorporation by reference, on theory that N.J.S.A. 2C:4A-43 exclusively enumerates all potential dispositions to which juvenile adjudicated delinquent may be subjected; the provisions were complete legislation in themselves. State in Interest of L.M., 229 N.J.Super. 88, 550 A.2d 1252 (A.D.1988) certification denied 114 N.J. 485, 555 A.2d 609.

2. Conspiracy

Imposition of mandatory penalties under Comprehensive Drug Reform Act of 1986 cannot be based on conviction or delinquency adjudication for a conspiracy to commit drug offense. State in Interest of W.M., 237 N.J. Super. 111, 567 A.2d 217 (A.D.1989).

3. Period of suspension

Under this penalty provision requiring each person convicted of controlled dangerous substance offense to forfeit his right to drive, which did not state that it applied "for each offense," driver's license of defendant convicted of two drug offenses could not be suspended for more than maximum 24–month period of forfeiture specified in penalty provision. State v. Blow, 237 N.J. Super. 184, 567 A.2d 253 (A.D.1989).

4. Multiple convictions

Separate Drug Enforcement and Demand Reduction penalties and lab fees had to be imposed for each drug violation, though sentences were concurrent. State v. Anaya, 238 N.J. Super. 31, 568 A.2d 1208 (A.D.1990).

Separate Drug Enforcement and Demand Reduction penalties and lab fees had to be imposed for each drug violation, though sentences were concurrent. State v. Anaya, 238 N.J. Super. 31, 568 A.2d 1208 (A.D.1990).

2C:35–16.1. Conviction of drug related offense taking place upon leased residential premises; notice to owner of premises or agent

The court in which any conviction is had or any plea of guilty entered to a charge of an offense under the "Comprehensive Drug Reform Act of 1987," N.J.S.2C:35–1 et al., involving the use, possession, manufacture, dispensing or distribution of a controlled dangerous substance, controlled dangerous substance analog or drug paraphernalia, or in which any adjudication of juvenile delinquency is made on the basis of an act which if committed by an adult would constitute such an offense, shall ascertain whether the offense or act took place upon leased residential premises in which the defendant was a resident at the time of the offense or act, and upon ascertaining that it did so occur shall cause notice of the conviction, plea or adjudication to be forthwith transmitted to the owner of those premises or his appropriate agent.

L.1989, c. 294, § 3, eff. Jan. 12, 1990.

Historical and Statutory Notes

Statement: Committee statement to Senate, No. 2411—L.1989, c. 291, see § 2A:18–61.1.

Title of Act:

An Act to provide for the removal of tenants and other persons from rented residential premises under certain circumstances involving certain violations of the "New Jersey Code of Criminal Justice," N.J.S.2C:1–1 et seq. and amending P.L. 1974, c. 49. L.1989, c. 294.

Last additions in text indicated by underline; deletions by strikeouts

GENERAL SUMMARY*

Studies That Demonstrate The Effect On Future Driving of Driver License Suspension/Revocation For Driving Under The Influence Offenses

1. California, 1977 – Effectiveness of License Suspension or Revocation for Drivers Convicted of Multiple Driving– Under–The–Influence Offenses, Research and Statistics, California Department of Motor Vehicles, 2415 First Ave., Sacramento, CA 95818.

   - The study compared records of offenders required to attend a 12 month rehabilitation program but without a licensing action against those of drivers who received only a license suspension or revocation.

   - Drivers with mandated loss of license had fewer: reckless driving convictions, minor traffic violations, total crashed, personal injury crashes, and fatal crashes.

   - The effect of license revocation was evident for 42 months for subsequent DUI occurrence and 48 months for subsequent crash involvements.

2. Washington, 1981 – License Revocation and Alcoholism Treatment Programs for Habitual Traffic Offenders, Washington Department of Licensing, Highways–Licenses Building, Olympia, Washington 98504.

   - License revocation was associated with significant reductions in moving violation convictions and accidents as compared to control group drivers who participated in an approved alcoholism treatment program but whose license were not revoked.

   - A stay of revocation had no impact on subsequent driving performance (that is, the crashes were not reduced when the revocation was canceled).

   - The data support the contention that revoked drivers continue to drive during the license revocation period but may drive more cautiously in an attempt to avoid detection.

*** This summary has been provided by the National Highway Traffic Safety Administration (NHTSA). For complete copies of the studies or more information, contact the NHTSA, Traffic Safety Program, 400 Seventh Street, S.W., Washington, D.C. 20590. (202) 366–2723.**

3. North Carolina, 1983 – An Initial Evaluation of the North Carolina Alcohol and Drug Education Traffic Schools, Highway Safety Research Center, University of North Carolina, CTP-197A, Chapel Hill, NC 27514.

   - True random assignment was not possible, since the remedial program had to be made available to all who wished to attend it. However, a comparison group of non-attenders was selected and controls established for other variables.

   - For all outcome measures studied and all time frames examined, the group that attended the treatment program fared worse than the comparison group. Persons in the comparison group were more likely to have received a true license suspension. The results were highly significant.

   - Legislation enacting the Statewide treatment program (ADETS) reduced the application of licensing sanctions. Persons who received treatment were less likely to receive a suspension. Once the suspension was found more effective, subsequent legislation provided that the ADETS program be administered in addition to other actions.

4. California, 1984 – The Long-Term Traffic Safety Impact of a Pilot Alcohol Abuse Treatment as an Alternative to License Suspensions, Research and Statistics, California Department of Motor Vehicles, 2415 First Ave., Sacramento CA 95818.

   - In 1975 the California law provided treatment for repeat alcohol offenders, in lieu of license suspension or revocation. The treatment group, over four years, accumulated 70 percent more non-alcohol related accidents and convictions than the group that received licensing actions.

   - The drivers who received three year revocations had fewer non-alcohol accidents/convictions than those with 12 month suspensions.

   - Those with 12 month suspensions had fewer non-alcohol accidents and convictions than the treatment group.

   - The treatment group had nine percent fewer alcohol related convictions than the license actions group.

   - No difference between groups was noted on alcohol related accidents.

   - The treatment group had 30 percent more total accidents (both alcohol related and non-alcohol related), leading to the conclusion that the license action is the most effective countermeasure.

5. Alabama, 1983 and 1985 – The Impact of the Revision of DUI Legislation in Alabama, Alabama Department of Public Safety, P.O. Box 1511, Montgomery, AL 36102-1511.

- Auburn University Measured the effect of 1980 and 1093 alcohol related law changes in Alabama. In 1980, a law was adopted to prohibit plea bargaining and require convicted alcohol offenders to attend remedial programs, but also made discretionary the loss of license for DWI first offenders. Until 1980, the loss of license had been mandatory. The study revealed that first offender convictions increased from 35 percent to 80 percent of the cases filed but the proportion of alcohol related crashes compared to total crashes also increased significantly.

- In 1983 the law was amended to again require mandatory license suspension for convicted first offenders, as well as strengthening other aspects of the law, such as the amount of the fine. This resulted in a statistically significant reduction in alcohol related crashes without negatively impacting the conviction rate or the beneficial aspects of the alcohol education and remedial program. The researchers concluded that the mandatory revocation was the controlling element that resulted in reduced crashes.

6. California, 1986 – An Evaluation of the Process Efficiency and Traffic Safety Impact of the California Implied Consent Program, Department of Motor Vehicles, 2415 First Ave., Sacramento, CA 95818.

   - This study revealed that persons whose licenses were suspended under the implied consent law for refusing the chemical test had significantly fewer subsequent crashes of all types than persons whose licenses were not suspended.

   - During the initial six month suspension period the had: 63.7 percent fewer alcohol related crashes; 76.5 percent fewer non–alcohol related crashes; and 72.2 percent fewer total crashes, than drivers who refused the chemical test but whose suspensions were set aside by a hearing examiner.

   - During an 18 month follow–up period the study reported 57.8 percent fewer fatal and injury accidents for the persons with suspended licenses.

7. Wisconsin, 1987 – Deterrent Effect of Mandatory License Suspension for DWI Convictions, Blomberg, Preusser and Ulmer, National Technical Information Service, Springfield, Virginia 22161.

   - Prior to May 1982, approximately 45 percent of the DWI first offenders lost their licenses. In 1982 mandatory loss of license was initiated and from that date 100 percent of convicted DWI offenders lost their licenses for at least 90 days.

   - A reduction was noted in convictions and crashes for drivers convicted after May, 1982. Also, a time series analysis of Statewide accident data for the years 1977 through 1985 (both before and after the new law was implemented) showed a significant reduction (a drop of 25 percent) in alcohol related crashes through 1985. This reflects the value of license suspension as a general deterrent to drinking and driving.

- It was concluded that mandatory short term (90 day) license suspensions for all DWI first offenders reduced alcohol related crashes Statewide, reduced repeat offenses by previous DWI offenders, and that the public perception, attitudes and behavior may be enhanced by a well organized public information campaign.

8. Insurance Institute for Highway Safety, 1988 – Fatal Crash Involvement and Laws Against Alcohol Impaired Driving, Insurance Institute for Highway Safety, 1005 N. Glebe Road, Arlington, VA 22201.

   - The Insurance Institute for Highway Safety (IIHS) studied the effects of three types of laws that relate to drinking and driving. No effort was made to evaluate the level of enforcement of these laws or the efficiency and effectiveness of the State programs dealing with them -- the sole criterion was whether the States had in place the laws that were studied. The laws evaluated were: illegal per se; administrative per se; and, laws that mandate jail or community service for first convictions of DWI. Laws of all 48 contiguous States were analyzed for purposes of this study.

   - During the hours when fatally injured drivers are most likely to be intoxicated, administrative suspension laws were found to reduce fatal crashes by nine percent, and first offense mandatory jail or community service to reduce fatal crashes by six percent. Illegal per se laws were found to reduce fatal crashes by six percent during the hours when fatal crashes are less likely to involve alcohol.

   - In 1985 alone, the three types of laws were estimated to have prevented almost 1,600 drivers from being in fatal crashes. If all 48 contiguous States had these three laws in place in 1985 it would have reduced driver fatal crash involvements by an additional 2,600. It is estimated these laws could prevent 4,100 to 4,200 drivers from being involved in fatal crashes annually, if adopted by all States.

9. Wisconsin, 1988 – Follow–Up Evaluation of Wisconsin's 1982 Drinking and Driving Law, Preusser, Blomberg and Ulmer National Technical Information Service, Springfield, Virginia 22161.

   - This study extended to 24 months the 12 month 1987 study reported above. The result showed that the effects reported in the earlier study were not diminished during the longer time period.

   - This study also extended the Statewide alcohol related crash data to the year 1986 and found a continuation of the earlier reported crash reduction.

   - The study re–examined driver knowledge and attitudes in Milwaukee and found some continuing effects of the 1985 media campaign.

10. Effects of License Revocation On Drunk Driving Offenders, 1988, Ross and Gonzales, University of New Mexico, Albuquerque, NM 87131.

- While the study is reported as scientifically invalid due to an inability to exercise random selection, it is nonetheless a useful presentation of anecdotal information about drivers whose licenses have been suspended for alcohol related offenses.

- Who are the offenders? In this study they were overwhelmingly young males. Ethnic groups, problem drinkers, and persons with working class backgrounds also appear to be over–represented when compared to thepopulation at large. It was speculated that drinking and driving may be more socially acceptable amount these populations.

- What is the extent and nature of illegal driving? Two thirds of the interviewed persons admitted driving while suspended but they claimed to driver fewer miles and more carefully than before.

- Impact of revocation on employment. Only seven of the 65 drivers who were employed at the time of their arrest claimed to lose their jobs because of the suspension. (Editor's note: No follow–up with previous employers or comparison to changes in employment by a control group was made under this study. A far smaller rate of job loss due to license suspension may have been determined if either procedure had been followed (see studies by Johnson, 1986, and Wells–Parker and Crosby, 1987)).

- Insurance consequences. These, too, were mixed. Some subjects were not insured at the time of the offense, some planned to conceal the conviction from their insurance company, some accepted a minor increase in insurance premium, and some reported an excessive increase in the premium.

- Attitudes toward conviction and license revocation. As a whole the offenders admitted their guilt, accepted their punishment, and expressed support for the anti–drunk driving movement. Those who denied their guilt were more likely to express irritation than remorse. A large percentage did not understand either the administrative or criminal law process.

- In conclusion, it was pointed out that most suspended persons driver fewer miles and more carefully than before although they view the likelihood of being caught driving while under suspension as very low (one in 100 to one in 1,000). Recommendations included: continued use of licensing sanctions against alcohol offenders; backing the use of licensing sanctions with severe penalties if violated; use of strengthened enforcement tactics against persons who drive while suspended; improved and expanded public information and education to clarify and justify the States' legal processes, because a much larger percentage of the offenders who understood the processes complied with the licensing sanction than did those who did not understand it.

11. Changes in Alcohol–Involved Fatal Crashes Associated With Tougher State Alcohol Legislation, 1989, Sigmastat, Inc., 18416 Shady View Lane, Brookville, MD 20833.

- The purpose of the study was to investigate changes associated with four legislative policies, namely: administrative per se; illegal per se; mandatory jail or community service for first offense drunk drivers; and, mandatory license suspension for convicted drunk drivers.

- The measure selected for analysis was single-vehicle nighttime (8 pm to 4 am) fatal driver crash involvements per 100 fatal crash driver involvement.

- The study revealed that of the four types of laws studied, administrative per se was clearly the most effective, followed by mandatory license suspension. The other two laws were judged minimally effective. In general, this study supports the Insurance Institute for Highway Safety study reported above.

12. An Evaluation of Administrative Per Se Laws, 1989, Stewart, Gruenewald and Roth, Pacific Institute for Research and Evaluation, 7101 Wisconsin Ave., Bethesda, MD 20814.

- The study compared drunk driving recidivism in three States with administrative per se laws (Louisiana, Mississippi and North Dakota) against one State without it (California).

  *(Editor's note: since the study was completed, California has adopted admin. per so).

- Louisiana and North Dakota showed significant reductions in drunk driving recidivism following implementation of their administrative penalties. In Mississippi the recidivism was not changed but significant reductions occurred in other traffic offenses. No changes were noted in California.

- The study also explored police attitudes toward administrative per se. While there were some complaints about increased paperwork and hearing appearances, police officers generally were enthusiastic about the results of drunk driving enforcement under this program.

13. Impact of Driver's License Suspension on Employment Stability of Drunken Drivers, 1987, Wells-Parker and Cosby, Social Science Research Center, Mississippi State University, MS 39762.

- This study compares unemployed characteristics (e.g. incidence of unemployment, and number of jobs in the previous year) of a group of offenders who experienced license suspension to a control group of recently arrested DUI offenders who were not suspended during the comparable time period. Also, the offenders themselves were queried about the reasons for job loss.

- Among offenders, in the previous year the group who had been suspended were unemployed only three percent more than offenders who had not been suspended. These differences failed to reach statistical significance.

- High rates of unemployment within both the suspended and non-suspended groups suggest that other factors such as problem drinking and low socioeconomic status are operative within the DUI population and contribute to lack of employment.

- Several respondents reported that suspension had a negative effect on social and family relationships. In addition to paying larger fines, the offenders experienced increases of hundreds of dollars in insurance costs, although approximately 40 percent of suspended offenders had no insurance at the time the arrest. Many offenders also reported hundreds of dollars of other costs such as towing expense, bail bondsmen's fees, and lawyers' fees.

- While the majority of the offenders admitted to driving while under suspension, most maintained that they drove fewer miles than before. They did not purposely reduce their proportion of nighttime driving, and this lends some credence to suggestions that license suspension reduces accidents across the board rather than specifically during the hours of highest risk.

- In summary, it appears that: license suspension had little impact on employment stability among DUI offenders as a group; offenders appear to anticipate greater impact on employment than actually occurs; many DUI offenders are problem drinkers which itself has a strong effect on employment; the identification of DUI offenders with drinking problems and referring them to treatment centers could have a more positive impact on employment status than reducing or not imposing a license suspension.

14. The Effect of Administrative License Revocation on Employment: A Preliminary Report, 1986, Delma Johnson, Office of Alcohol and State Programs, National Highway Traffic Safety Administration, 400 7th St., SW, Washington, D.C. 20590.

- A total number of 1,442 Delaware DUI offenders were studied. Of that number 58 claimed job loss due to license revocation, but follow up with their employers revealed that only 22 (1.5%) actually lost their jobs for that reason. All 22 reported that:

  - driving had been part of their job responsibilities
  - all were re-employed at the time of the study
  - no public support (unemployment compensation, public assistance, food stamps, etc.) was requested or received during the period of license suspension.

- Although the study was of DUI first offenders who receive a minimum revocation period of 90 days in the study State, it was determined the average revocation period of those studied was 7.88 months, and four of the offenders had their licenses revoked for more than 12 months. These lengthy revocations apparently were due to delays by the individuals themselves in applying for reinstatement.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION FACT SHEET

Administrative License Revocation Costs and Benefits

Administrative license revocation laws allow police and driver licensing authorities to revoke the driver's license of drivers who fail or refuse an alcohol test. These laws are based on objective and standard tests of the blood alcohol content. They allow police to take the driver's license at the time of arrest, and the licensing authority to complete the revocation process without the long delays typically experienced waiting for a criminal trial. An appeal process protects the driver's right to due process. Administrative license revocation laws are in place in twenty–nine states and the District of Columbia, where they have been successful in reducing alcohol–impaired driving.

A state incurs a number of costs when it enacts and implements an administrative license revocation law. States also receive substantial direct and indirect benefits. The National Highway Traffic Safety Administration recently completed a study of the costs, benefits, and other financial consequences of administrative license revocation laws in three states: Illinois, Mississippi, and Nevada. The study found that these three states' laws produced substantial savings through reduced nighttime cashes. Each state was able to cover start–up and operating costs through license reinstatement fees assessed to offenders. In addition, the laws helped each state qualify for federal grant funds. Costs and benefit calculations for each

States show:

	ILLINOIS	MISSISSIPPI	NEVADA
Direct costs (start–up and annual operating)	$ 852,015	$ 56,144	$ 200,787
Annual reinstatement fees	1,645,590	118,288	284,000
Annual NHTSA Sec 408 grants (five–year limit)	2,324,123	646,055	273,488
Annual savings in cost of	89,000,000	104,328,000	37,118,000

Start–up costs included training for enforcement, court, and motor vehicle department personnel, legal advice for operating the program, developing new forms, new facilities, and computer programming. Annual operating costs included driver license processing, forms reproduction, hearing and court expenses, police time, and costs of publicizing the law.

Annual reinstatement fees were collected from offenders who applied to regain their licenses at the end of the revocation period. Each state collected more in reinstatement fees than it expended in start-up and annual operating costs. States qualify for NHTSA Section 408 grants by satisfying four criteria, including prompt license suspension. Most states that have received Sec. 408 grants have used an administrative license revocation law to satisfy the prompt license suspension criterion. All three states studied became eligible for grants after their administrative license revocation law was in place.

Annual savings in night-time crash costs were estimated by calculating the reduction in night-time fatal, injury, and property-damage crashes due to each state's law. Societal cost estimates for each crash type, ranging from $2,261,497 for a fatality to $3,560 for a property damage crash, were used to calculate overall annual savings. These cost estimates include direct injury and other crash costs as well as indirect costs such as police and insurance costs, paperwork, lost productivity, and reduced quality of life due to disability.

The data show that each state's administrative license revocation law produced substantial benefits through reduced crashes. Each state was able to cover start-up and operating costs through license reinstatement fees assessed to offenders. In addition, the laws helped each state qualify for federal grant funds.

This Fact Sheet summarizes the findings of NHTSA contract DTNH22-88-07310. The contract final report, "Cost-Benefit Analysis of Administrative License Suspensions," by John H. Lacey, Ralph K. Jones, and J. Richard Stewart, is available from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

SELECTED STATE DRUG PRECURSOR LAWS

IN THIS SECTION PAGE

INTRODUCTION
TO
STATE DRUG PRECURSOR LAWS

The United States is one of the world's largest manufacturers and distributors of chemicals. Each year it exports over 60,000 metric tons of chemicals to Latin America. Many of these chemicals find their way into the clandestine laboratories of cocaine and heroin producing countries. It is common for seizures of clandestine laboratories in Columbia and other South American countries to uncover chemical containers with U.S. firm logos.

Diversion of chemicals within the United States for the production of illegal substances is equally common and just as destructive. Domestic clandestine laboratories alone produce enough stimulants, depressants, hallucinogens and narcotics to satisfy America's illegal drug demand. A survey by the Drug Enforcement Administration (DEA) reveals a steady increase in domestic clandestine laboratories: from approximately 450 in 1985 to over 900 in 1989. (See Appendix). The DEA attributes the increase in part to the availability of precursor chemicals.

At the urgence of federal authorities, Congress responded by enacting the Chemical Diversion and Trafficking Act of 1988. States soon began to impose their own strict record keeping and reporting requirements on chemical manufacturers, and distributors. This section looks at the legislative &2initiatives of six states who are aggressively working to curb the flood of precursor and essential chemicals into the American drug market: ARKANSAS, COLORADO, NEW MEXICO, OKLAHOMA, TEXAS and WASHINGTON.

[T]his nation can ill–afford to allow the war on drugs to diminish into a war of words. A truly effective campaign against illegal drugs must be waged at both the federal and state levels.

Dick Thornburgh
Attorney General
Letter to National Conference of Commissioners on Uniform State Laws Regarding the Uniform Controlled Substances Act (UCSA)
July 11, 1990

HIGHLIGHTS OF DRUG PRECURSOR LAWS IN ARKANSAS, COLORADO, NEW MEXICO, OKLAHOMA, TEXAS AND WASHINGTON

SCHEDULING AUTHORITY

- Authorizes scheduling of substances as precursors after consideration of (1) the substance's potential abuse; (2) the substance's use to illegally manufacture a controlled substance; (3) the substance's risk to public health; and similar factors.
- Excludes from scheduling authority tobacco, alcoholic beverages, and substances prepared for distribution pursuant to a prescription or over–the–counter.

LICENSING REQUIREMENTS

- Requires annual license or permit to manufacture, possess, sell, transfer or otherwise furnish precursors.
- Exempts from licensing requirements specific categories of individuals who possess precursors in the ordinary course of their business or research. E.g. doctors, pharmacists, law enforcement officers.
- Permits denial, revocation or suspension of license or permit and forfeiture of precursors for falsification of documents or violation of state or federal controlled substance or precursor laws.

REPORTING REQUIREMENTS

- Requires maintenance of accurate records and inventories for specified periods of time.
- Requires a person to furnish proper identification to receive or possess precursors, including a driver's license number, address, and signature.
- Requires a person to provide the appropriate state agency with advance notice of a precursor delivery.
- Requires prompt notification to the appropriate state agency of the theft or loss of precursors; the difference between the quantity received and shipped; and the receipt of precursors from an out–of–state source.

ENFORCEMENT

- Allows administrative inspections by authorized personnel.
- Punishes the knowing manufacture or transfer of a precursor unauthorized by an individual's license.
- Punishes the transfer of precursors to an unauthorized recipient.
- Punishes the manufacture, sale, transfer, or furnishing of a precursor with knowledge or intent the recipient will use it to unlawfully manufacture a precursor or controlled substance.
- Punishes the failure to comply with licensing or permit requirements.
- Punishes the knowing falsification of documents.

ARKANSAS

Detailed Summary
of

H.B. 2004 (1991) relating to control of drug precursors, amending Ark. Stat. Ann. 5-64-101 to 5-64-608 (Advance Code Service, 1990-1991). Controlled Substances Act.

SECTION 1

5-64-415. DEFINITIONS

(a) **Drug precursor** – any substance, material, compound, mixture, or preparation listed in rules and regulations or any of their salts or isomers.

Excludes substances, materials, compounds, mixtures, or preparations prepared for distribution over-the-counter or pursuant to a prescription.

(b) **Authority to control drug precursors.**

(1) The Department of Health (department) shall schedule drug precursors, and may reschedule substances, or add to or delete from the list of substances pursuant to the State Administrative Procedure Act.

(2) In making a scheduling determination, the department shall consider:
- (A) whether the substance is an immediate precursor;
- (B) the actual or relative potential for abuse;
- (C) the scientific evidence of its pharmacological effect;
- (D) the current scientific knowledge regarding the substance or the substance for which it is a precursor;
- (E) the history and pattern of abuse of the substance for which it is a precursor;
- (F) the scope, duration, and significance of abuse of the substance for which it is a precursor;
- (G) the risk to public health;
- (H) the potential to produce psychic or physiological dependence liability.

(3) The Food and Drug Administration (FDA) findings regarding the factors in (2) may be considered prima facie evidence.

(4) If the substance has a potential for abuse, the department shall so find and control the substance as a drug precursor. Substances are not subject to control solely because they are precursors of the controlled precursor.

(5) Authority to control does not extend to tobacco or alcoholic beverages.

(c) **License required for drug precursos.**

(1) The department may regulate and charge reasonable fees not exceeding $25.00 relating to the licensing and control of drug precursor activities. The state treasurer shall credit fees collected by the department to the drug precursor cash fund.

(2) Every person who manufactures, possesses, transfers, or transports precursors or proposes to engage in such activities must annually obtain a license.

(3) Licensees may manufacture, possess, transfer or transport drug precursors only as authorized by their licenses and this law.

(4) The following persons are exempted from licensing requirements:
- (A) physicians, dentists, pharmacists, and veterinarians;
- (B) agents of licensed manufacturers acting in the usual course of business or employment;
- (C) employees of licensed carriers or warehousemen acting in the usual course of business;
- (D) college students using precursors for a bona fide educational purpose if the chemistry department possesses the necessary licenses;
- (E) officers or employees of governmental and law enforcement agencies acting pursuant to official duties;
- (F) researchers licensed by the department.

(d) The department may waive licensing requirements for certain manufacturers if it is consistent with public health and safety.

(e) **Issuance of license–fees.**

(1) The department shall license applicants unless it would be inconsistent with the public interest. In determining the public interest, the department shall consider:
- (A) maintenance of effective controls against illegal diversion of precursors;
- (B) compliance with applicable state and local law;
- (C) convictions for violations of federal or state substance or precursor laws;
- (D) past experience with precursors and establishment of effective controls against illegal diversion;
- (E) furnishing of false or fraudulent material in an application;
- (F) suspension or revocation of a federal registration;
- (G) other public health and safety factors.

(2) Licensees may manufacture, possess, transfer, or transport precursors only as allowed by their licenses.

(f) **Denial, revocation, or suspension of license.**

(1) A license may be denied, suspended or revoked if the licensee:

(A) has been convicted of or pled guilty or *nolo contendere* to a felony under a state or federal substance or precursor law; or

(B) has had his federal registration relating to substances or precursors revoked.

The department may limit suspension or revocation to a particular substance or precursor.

(C) has committed an unlawful act listed in (g).

(2) Upon suspension or revocation, the department may place all substances or precursors under seal. No disposition may be made until the time for making an appeal has lapsed or all appeals have been concluded, unless the court orders a sale. Upon a revocation order becoming final, all substances and precursors may be forfeited to the state.

(g) **Unlawful acts– licenses– penalties.**

(1) Following acts are unlawful:

(A) knowingly transferring precursors except to an authorized licensee;

(B) knowingly using a license number which is fictitious, revoked, suspended, or issued to another person;

(C) knowingly acquiring or attempting to acquire a precursor by misrepresentation,fraud, forgery, deception, or subterfuge.

(D) knowingly furnishing false or fraudulent material in, or omitting material information from, an application, report, or document.

(E) having knowledge of the unauthorized manufacture or transfer of a precursor;

(F) refusing entry for an inspection;

(G) manufacturing, possessing, transferring, or transporting precursors without the appropriate license or in violation of rules and regulations.

(2) Violation of (g) is a Class D felony.

(h) **Records to be kept – order forms.**

(1) A person who manufactures, sells, transfers or furnishes precursors shall keep and maintain accurate records of transactions for two years.

(2) Before selling, transferring or furnishing a precursor, a person shall obtain:

(A) from a non–business recipient:

(i) a driver's license or identification number, birthdate, and address from a driver's license or personal identification card;

(ii) the year, state, and license number of the recipient's vehicle;

(iii) a description of the substance's use; and

(iv) a signature; or

(B) from a business recipient:

(i) an authorization letter which includes the license or tax identification number, address, phone number and description of the substance's use; and

(ii) a signature; and

(C) for any recipient, sign as a witness to the identification and signature.

(3) A person who sells, manufactures, transfers, or furnishes precursors shall report to the department and the State Police at least 21 days prior to delivery.

(i) (1) A person shall report the theft or loss of a precursor to the department and the State Police within three days of the discovery.

(2) A person shall report to the department the difference between the quantity of precursor received and shipped within three days of actual knowledge of the discrepancy. When applicable, the report shall include the name of the transporter and the shipment date.

(3) A person shall report to the department the receipt of a precursor from an out–of–state source.

(4) Violation of (i) is a Class A misdemeanor.

(5) The department may authorize a comprehensive monthly report if:
(A) the furnisher and the recipient maintain a regular supply and purchase relationship; or
(B) the recipient has a record of lawful use of the precursor.

SECTION 2

List of substances deemed to be precursors until department schedules precursors.

SECTION 3

The State Police are empowered to investigate violations of and enforce the Act. The department and State Police are required to share information, and may inspect licensees' records during normal business hours and all other reasonable times.

SECTION 4

The department may promulgate necessary rules and regulations to implement this Act.

...

ACT 954 1991

State of Arkansas
78th General Assembly
Regular Session, 1991
By: Representative Hutchinson

A Bill

HOUSE BILL 2004

For An Act To Be Entitled

"AN ACT TO AMEND SUBCHAPTER 4 OF CHAPTER 64 OF TITLE 5, ARKANSAS CODE ANNOTATED TO ADD A NEW SECTION DEFINING 'DRUG PRECURSORS'; AND FOR OTHER PURPOSES."

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. Subchapter 4 of Chapter 64 of Title 5, Arkansas Code Annotated is amended by adding a new section to read as follows:

"5-64-415. Definitions.

(a) 'Drug precursor' means any substance, material, compound, mixture, or preparation listed in rules and regulations promulgated or adopted pursuant to this act or any of their salts or isomers. Drug precursor specifically excludes those substances, materials, compounds, mixtures, or preparations which are prepared for dispensing pursuant to a prescription or over-the-counter distribution as a substance which is generally recognized as safe and effective within the meaning of the federal Food, Drug, and Cosmetic Act as amended, or have been manufactured, distributed, or possessed in conformance with the provisions of an approved new drug application or an exemption for investigational use within the meaning of Section 505 of the federal Food, Drug, and Cosmetic Act, as amended.

(b) Authority to control drug precursors by rule and regulation.

(1) The Arkansas Department of Health, hereafter, the department, shall promulgate by rule and regulation a list of drug precursors, comprised of any substance, material, compound, mixture, or preparation or any of their salts or isomers which are drug precursors. The department may add substances to, delete substances from, and reschedule substances listed in such drug precursors list pursuant to the 'Arkansas Administrative Procedure Act', Arkansas Code Annotated

SPEAKER OF THE HOUSE

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§25-15-201 et seq.

(2) In making a determination regarding a substance to be placed on the drug precursor list, the department shall consider the following:

(A) Whether the substance is an immediate precursor of a controlled substance;

(B) The actual or relative potential for abuse;

(C) The scientific evidence of its pharmacological effect, if known;

(D) The state of current scientific knowledge regarding the substance or the controlled substance for which it is a precursor;

(E) The history and current pattern of abuse of the controlled substance for which it is a precursor;

(F) The scope, duration, and significance of abuse of the controlled substance for which it is a precursor;

(G) The risk to the public health;

(H) The potential of the substance or the controlled substance to produce psychic or physiological dependence liability.

(3) The Health Department may consider findings of the federal Food and Drug Administration or federal Drug Enforcement Administration as prima facie evidence relating to one (1) or more of the factors in connection with its determination.

(4) After considering the factors enumerated in this subsection, the department shall make findings with respect thereto and shall promulgate a rule controlling a substance as a drug precursor upon a finding that the substance has a potential for abuse. If the department designates a substance as an immediate drug precursor, substances that are precursors of the controlled precursor are not subject to control solely because they are precursors of the controlled precursor.

(5) Authority to control under this section does not extend to alcoholic beverages or alcoholic liquors, fermented malt beverages, or tobacco.

(c) License required - controlled substances drug precursors.

(1) The department may promulgate regulations and charge reasonable fees of not more than twenty-five dollars ($25.00) relating

to the licensing and control of the manufacture, possession, transfer, and transportation of drug precursors. The fees established under this subsection shall be collected by the department and transmitted to the state treasurer, who shall credit the same to the Health Department Drug Precursor Cash Fund, which fund is hereby created. This fund shall be administered by the Division of Pharmacy Services and Drug Controlled Department of Health.

(2) Every person who manufactures, possesses, transfers, or transports any drug precursor or who proposes to engage in the manufacture, possession, transfer, or transportation of any drug precursor must obtain, annually, a license issued by the department.

(3) Persons licensed by the department to manufacture, possess, transfer, or transport drug precursors may manufacture, possess, transfer, or transport those substances to the extent authorized by their licenses and in conformity with other provisions of law.

(4) The following persons are not required to be licensed under this subsection and may lawfully possess drug precursors:

(A) Physicians, dentists, pharmacists, veterinarians, and podiatrists;

(B) An agent of any manufacturer, or wholesaler of any drug precursor if he is acting in the usual course of his principal's business or employment;

(C) An employee of a licensed common or contract carrier or licensed warehouseman whose possession of any drug precursor is in the usual course of the licensed common or contract carrier or licensed warehouseman's business;

(D) A student enrolled in a college chemistry class for credit if the student's use of the drug precursor is for a bona fide educational purpose and the educational institution otherwise possesses all the necessary licenses required by the department;

(E) Officers or employees of appropriate agencies of federal, state, or local government and law enforcement agencies acting pursuant to their official duties;

(F) Every researcher, including analytical laboratories, experimenting with, studying, or testing any drug analog

who is licensed by the department pursuant to the requirements of this subsection.

(d) The department may waive by regulation the requirement for licensing of certain manufacturers if it is consistent with the public health and safety.

(e) Issuance of license - fees.

(1) The department shall license an applicant to manufacture, possess, transfer, or transport drug precursors unless it determines that the issuance of such license would be inconsistent with the public interest. In determining the public interest, the department shall consider the following factors:

(A) Maintenance of effective controls against diversion of drug precursors other than legitimate medical, scientific, or industrial channels;

(B) Compliance with applicable state and local law;

(C) Any conviction of the applicant under federal or state laws relating to any controlled substances or drug precursor;

(D) Past experience in the manufacture, possession, transfer, or transportation of drug precursors and the existence in the applicant's establishment of effective controls against diversion;

(E) Furnishing by the applicant of false or fraudulent material in any application filed under subsection (c);

(F) Suspension or revocation of the applicant's federal registration to manufacture, distribute, or dispense controlled substances or drug precursors authorized by federal law; and

(G) Any other factor relevant to and consistent with the public health and safety.

(2) Licensing under this section does not entitle a licensee to manufacture, possess, transfer, or transport drug precursors other than those allowed in the license.

(f) Denial, revocation, or suspension of license.

(1) The department may deny, revoke, or suspend a license issued pursuant to subsection (c) for any of the following reasons:

(A) If a licensee is convicted of, or has accepted by a court a plea of guilty or nolo contendere to a felony under any state or federal law relating to a controlled substance or a drug precursor; or

(B) If a licensee has his federal registration to manufacture, conduct research on, distribute, or dispense a controlled substance or a drug precursor suspended or revoked, The department may limit revocation or suspension of a license to the particular controlled substance or drug precursor which was the basis for revocation or suspension; or

(C) If a licensee commits an unlawful act as enumerated in subsection (g).

(2) When the department suspends or revokes a license, all controlled substances or drug precursors owned or possessed by the licensee at the time of the suspension or on the effective date of the revocation order may be placed under seal. No disposition may be made of substances or precursors under seal until the time for making an appeal has elapsed or until all appeals have been concluded unless a court orders otherwise or orders the sale of any perishable controlled substances or drug precursors and the deposit of the proceeds with the court. Upon revocation orders becoming final, all controlled substances and all drug precursors may be forfeited to the department, and all expenses of disposing of the forfeited controlled substances or drug precursors shall be borne by the licensee, and the court may order the licensee to pay a reasonable sum of money to the Department of Health to cover the expenses of disposition, and the Department of Health is authorized to seek enforcement of the order of payment, or reimbursement for any expenses through all lawful means.

(g) Unlawful acts - licenses - penalties.

(1) It shall be unlawful to:

(A) Knowingly transfer drug precursors except to an authorized licensee;

(B) Knowingly use in the course of the manufacture or transfer of a drug precursor a license number which is fictitious, revoked, suspended, or issued to another person;

(C) Knowingly acquire or obtain, or attempt to acquire or obtain, possession of a drug precursor by misrepresentation, fraud, forgery, deception of subterfuge;

(D) Knowingly furnish false or fraudulent material information in, or omitting any material information from, any

application, report, or other document required to be kept or filed under this act or any record required to be kept by this act;

(E) Have knowledge of the manufacture of a drug precursor not authorized by a licensee's license, or have knowledge of the transfer of a drug precursor not authorized by his license to another licensee or authorized person;

(F) Refuse entry into any premises for any inspection authorized by this act; or

(G) Manufacture, possess, transfer, or transport a drug precursor without the appropriate license or in violation of any rule or regulation of the department.

(2) Any person who violates the provisions of this subsection is guilty of a Class D felony.

(h) Records to be kept - order forms.

(1) A manufacturer, wholesaler, retailer, or other person who sells, transfers, or otherwise furnishes any drug precursor to a person shall make an accurate and legible record of the transaction and maintain the record for a period of at least two (2) years after the date of the transaction.

(2) Before selling, transferring, or otherwise furnishing to a person in this state a precursor substance subject to paragraph (1) of this subsection (h), a manufacturer, wholesaler, retailer, or other person shall:

(A) If the recipient does not represent a business, obtain from the recipient:

(i) The recipient's driver's license number or other personal identification certificate number, date of birth, and residential or mailing address, other than a post office box number, from a driver's license or personal identification card issued by the department of revenue that contains a photograph of the recipient;

(ii) The year, state, and number of the motor vehicle license of the motor vehicle owned or operated by the recipient;

(iii) A complete description of how the substance is to be used; and

(iv) The recipient's signature; or

(B) If the recipient represents a business, obtain from

SPEAKER OF THE HOUSE

the recipient:

(i) A letter of authorization from the business that includes the business license or comptroller tax identification number, address, area code, and telephone number and a complete description of how the substance is to be used;

(ii) The recipient's signature; and

(iii) For any recipient, sign as a witness to the signature and identification of the recipient.

(3) Except as otherwise provided in this act, a manufacturer, wholesaler, retailer, or other person who sells, transfers, or otherwise furnishes to a person in this state a drug precursor shall submit to the department, at least twenty-one (21) days before the delivery of the drug precursor, a report of the transaction on a form obtained from the department that includes the information required by subparagraph (A) or (B) of paragraph (2) of this subsection. A copy of this report shall be transmitted to the Arkansas State Police.

(i)(1) The theft or loss of any drug precursor discovered by any person regulated by this act shall be reported to the department and the Arkansas State Police within three (3) days after such discovery.

(2) Any differences between the quantity of any drug precursor received and the quantity shipped shall be reported to the department within three (3) days after the receipt of actual knowledge of the discrepancy. When applicable, any report made pursuant to this subsection shall also include the name of any common carrier or person who transported the substance and the date of shipment of the substance.

(3) On or after the effective date of this act, any manufacturer, wholesaler, retailer, or other person subject to any other reporting requirements in this act who receives from a source outside of this state any drug precursor specified in rules and regulations promulgated pursuant to this act shall submit a report of such transaction to the department in accordance with rules adopted by the department.

(4) Any person violating any of the provisions of this subsection is guilty of a Class A misdemeanor.

(5) The department may authorize a manufacturer, wholesaler, retailer, or other person to submit a comprehensive monthly report

SPEAKER OF THE HOUSE

instead of the report required by paragraph (3)(A) of this subsection if the director determines that:

(A) There is a pattern of regular supply and purchase of the drug precursor between the furnisher and the recipient; or

(B) The recipient has established a record of utilization of the drug precursor solely for a lawful purpose."

SECTION 2. Until such time that the Health Department adopts the schedule of precursors, the following shall be deemed to be precursors:

1. D-Lysergic acid.
2. Ergotamine and its salts.
3. Ergonovine and its salts.
4. Methylamine.
5. Ethylamine.
6. Phenyl-2-Propanone.
7. Phenylacetic acid and its salts.
8. Ephedrine, its salts, optical isomers and salts of optical isomers.
9. Norpseudoephedrine, its salts, optical isomers, and salts of optical isomers.
10. Phenylpropanolamine, its salts, optical isomers and salts of optical isomers.
11. Benzyl cyanide.
12. N-methylephedrine, its salts, optical isomers and salts of optical isomers.
13. Pseudoephedrine, its salts, optical isomers and salts of optical isomers.
14. Chloroephedrine, its salts, optical isomers and salts of optical isomers.
15. Piperidine and its salts.
16. Pyrrolidine and its salts.
17. Propionic anhydride.
18. Isosafrole.
19. Safrols.
20. Piperonal.

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SECTION 3. The Arkansas State Police is specifically empowered to investigate any violations of the provisions of this act, and enforce its provisions. Further, the Arkansas State Police and the Department of Health are authorized and directed to exchange information gathered or received by either agency under the provisions of this act. All records kept by licensees pursuant to this act shall be open to inspection by authorized investigators of the Arkansas State Police and the Department of Health during normal business hours and at all other reasonable times.

SECTION 4. In addition to rules and regulations authorized by the provisions of this act, the Department of Health may promulgate necessary rules and regulations to carry out the provisions of this act.

SECTION 5. All provisions of this act of a general and permanent nature are amendatory to the Arkansas Code of 1987 Annotated and the Arkansas Code Revision Commission shall incorporate the same in the Code.

SECTION 6. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

SECTION 7. All laws and parts of laws in conflict with this act are hereby repealed.

Tim Hutchinson

PRESIDENT OF THE SENATE

APPROVED [signature]
3-29-97 GOVERNOR

SPEAKER OF THE HOUSE

COLORADO

Detailed Summary
of

Colo. Rev. Stat. Ann. 12-22-303 to 12-22-324 (Supp. 1990)
(incorporated into the state Controlled Substances Act).

12-22-303. Definitions.

...

(13.5) Drug precursor – any substance, material, compound, mixture, or preparation listed in rules and regulations pursuant to § 12-22-323 or in regulations pursuant to 12-22-304 or any of their salts or isomers.

Excludes substances, materials, compounds, mixtures, or preparations prepared for distribution over-the-counter or pursuant to a prescription.

...

12-22-304. License required – controlled substances – drug precursors.

...

(2.5) (a) The department may regulate and charge reasonable fees relating to the licensing and control of drug precursor activities. The state treasurer shall credit fees collected by the department to the drug precursor cash fund.

(b) Every person who manufactures, possesses, transfers, or transports precursors
or proposes to engage in such activities must annually obtain a license.

(c) Licensees may manufacture, possess, transfers or transport drug precursors only as authorized by their licenses and this law.

...

(5.5) (a) The following persons are exempted from licensing requirements:
(II) physicians, dentists, pharmacists, and veterinarians;
(II) agents of licensed manufacturers acting in the usual course of business or employment;
(III) employees of licensed carriers or warehousemen acting in the usual course of business;
(IV) college students using precursors for a bona fide educational purpose if the chemistry department possesses the necessary licenses;
(V) officers or employees of governmental and law enforcement agencies acting pursuant to official duties;
(VI) researchers licensed by the department.

(5.6) (a) The department may waive licensing requirements for certain manufacturers if it is consistent with public health and safety.

...

12-22-305. Issuance of license-fees.

...

(1.5) (a) The department shall license applicants unless it would be inconsistent with the public interest. In determining the public interest, the department shall consider:

(I) maintenance of effective controls against illegal diversion of precursors;

(II) compliance with applicable state and local law;

(III) convictions for violations of federal or state substance or precursor laws;

(IV) past experience with precursors and establishment of effective controls against illegal diversion;

(V) furnishing of false or fraudulent material in an application;

(VI) suspension or revocation of a federal registration;

(VII) other public health and safety factors.

(b) Licensees may manufacture, possess, transfer, or transport precursors only as allowed by their licenses.

...

12-22-308. Denial, revocation, or suspension of license.

(1) A license may be denied, suspended or revoked if the licensee:

...

(b) has been convicted of or pled guilty or *nolo contendere* to a felony under a state or federal substance or precursor law; or

(c) has had his federal registration relating to substances or precursors revoked.

...

(2) The department may limit revocation or suspension to a particular substance or precursor.

(3) Upon suspension or revocation, the department may place all substances or precursors under seal. No disposition may be made until the time for making an appeal has lapsed or all appeals have been concluded, unless the court orders a sale. Upon a revocation order becoming final, all substances and precursors may be forfeited to the state.

...

12-22-314. Unlawful acts- licenses- penalties.

...

(1) Following acts are unlawful:

(n) knowingly transferring precursors except to an authorized licensee;
(o) knowingly using a license number which is fictitious, revoked, suspended, or issued to another person;
(p) knowingly acquiring or attempting to acquire a precursor by misrepresentation, fraud, forgery, deception, or subterfuge.
(q) knowingly furnishing false or fraudulent material in, or omitting material information from, an application, report, or document.
(r) knowingly manufacturing or transferring a precursor not authorized by a license;
(s) refusing entry for an inspection;
(t) manufacturing, possessing, transferring, or transporting precursors without the appropriate license or in violation of rules and regulations.

...

(4) Violation of (n) – (t) is a class 4 felony.

...

12-22-318. Records to be kept – order forms.

(1) (a) Licensees shall keep detailed and accurate records and inventories of substances for two years.
(b) Licensees shall keep accurate records of precursors.

...

(7) (a) A person who manufactures, sells, transfers or furnishes precursors shall keep and maintain accurate records of transactions for two years.

(b) Before selling, transferring or furnishing a precursor, a person shall obtain:
(I) from a non-business recipient:
(A) a driver's license or identification number, birthdate, and address from a driver's license or personal identification card;
(B) the year, state, and license number of the recipient's vehicle;
(C) a description of the substance's use; and
(D) a signature; or
(II) from a business recipient:
(A) an authorization letter which includes the license or tax identification number, address, phone number and description of the substance's use; and
(B) a signature; and
(III) for any recipient, sign as a witness to the identification and signature.

(c) A person who sells, manufacturers, transfers, or furnishes precursors shall report to the department at least 21 days prior to delivery.

(8) (a) A person shall report the theft or loss of a precursor to the department within three days of the discovery.

...

(9) (a) A person shall report the difference between the quantity of a precursor received and shipped within three days of actual knowledge of the discovery. When applicable, the report shall include the name of of the transporter and the shipment date.

...

(10) (a) A person shall report to the department the receipt of a precursor from an out–of–state source.

(b) Failure to submit a report is a class 1 misdemeanor.

...

(11) The department may authorize a comprehensive monthly report if:
(a) the furnisher and the recipient maintain a regular supply and purchase relationship; or

(b) the recipient has a record of lawful use of the precursor.

...

12–22–319. Enforcement and cooperation.

...

(2) The board shall make necessary inspections, investigations and reports and cooperate with state and federal enforcement agencies.

...

12–22–321. Rules and regulations.

(1) The department and board shall promulgate rules and regulations pursuant to Article 4 of Title 24 C.R.S.

(2) (a) The department may promulgate reasonable rules pertaining to precursors, including a common reporting form which contains:
(I) the name of the substance;
(II) the quantity of the substance sold, transferred, or furnished;
(III) the date the substance was sold, transferred, or furnished;

(IV) the name and address of the recipient or purchaser; and
(V) the name and address of the seller or transferor.

...

12-22-323. Authority to control drug precursors by rule and regulation.

(1) The department of health (department) shall schedule drug precursors, and may reschedule substances, or add to or delete from the list of substances pursuant to the State Administrative Procedure Act.

(2) In making a scheduling determination, the department shall consider:
(a) whether the substance is an immediate precursor;
(b) the actual or relative potential for abuse;
(c) the scientific evidence of its pharmacological effect;
(d) the current scientific knowledge regarding the substance or the substance for which it is a precursor;
(e) the history and pattern of abuse of the substance for which it is a precursor;
(f) the scope, duration, and significance of abuse of the substance for which it is a precursor;
(g) the risk to public health;
(h) the potential to produce psychic or physiological dependence liability.

(3) The Food and Drug Administration (FDA) findings regarding the factors in (2) may be considered prima facie evidence.

(4) If the substance has a potential for abuse, the department shall so find and control the substance as a drug precursor. Substances are not subject to control solely because they are precursors of the controlled precursor.

(5) Authority to control does not extend to tobacco or alcoholic beverages.

12-22-324. Defenses and 18-18-110. Defenses

The procuring agent defense is unavailable.

Jurisdiction	Statutory Citation
Pennsylvania	35 P.S. §§ 780–101 to 780–144.
Puerto Rico	24 L.P.R.A. §§ 2101 to 2607.
Rhode Island	Gen.Laws 1956, §§ 21–28–1.01 to 21–28–6.02.
South Carolina	Code 1976, §§ 44–53–110 to 44–53–590.
South Dakota	SDCL 34–20B–1 to 34–20B–114.
Tennessee	T.C.A. §§ 39–6–401 to 39–6–419, 53–11–301 to 53–11–414.
Texas	Vernon's Ann.Texas Civ.St. art. 4476–15.
Utah	U.C.A. 1953, 58–37–1 to 58–37–19.
Virgin Islands	19 V.I.C. §§ 591 to 630a.
Virginia	Code 1950, § 54.1–3400 et seq.
Washington	West's RCWA §§ 69.50.101 to 69.50.608.
West Virginia	Code, 60A–1–101 to 60A–6–605.
Wisconsin	W.S.A. 161.001 to 161.62.
Wyoming	W.S.1977, §§ 35–7–1001 to 35–7–1057.

§ 12–22–303. Definitions

As used in this part 3, unless the context otherwise requires:

[See main volume for text of (1) to (7)]

(7.5)(a) "Controlled substance analog" means a substance the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II and:

(I) Which has a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance included in schedule I or II; or

(II) With respect to a particular individual, which that individual represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance included in schedule I or II.

(b) "Controlled substance analog" does not include:

(I) A controlled substance;

(II) Any substance for which there is an approved new drug application;

(III) With respect to a particular person, any substance, if an exemption is in effect for investigational use, for that person, under section 505 of the "Federal Food, Drug, and Cosmetic Act", 21 U.S.C. 355, as amended, to the extent that conduct with respect to the substance is pursuant to the exemption; or

(IV) Any substance to the extent not intended for human consumption before such an exemption takes effect with respect to the substance.

[See main volume for text of (8) to (13)]

(13.5) "Drug precursor" means any substance, material, compound, mixture, or preparation listed in rules and regulations promulgated pursuant to section 12–22–323 or in regulations adopted pursuant to section 12–22–304(2.5) or any of their salts or isomers. "Drug precursor" specifically excludes those substances, materials, compounds, mixtures, or preparations which are prepared for dispensing pursuant to a prescription or over-the-counter distribution as a substance which is generally recognized as safe and effective within the meaning of the "Federal Food, Drug, and Cosmetic Act", 21 U.S.C. 355, as amended, or have been manufactured, distributed, or possessed in conformance with the provisions of an approved new drug application or an exemption for investigational use within the meaning of section 505 of the "Federal Food, Drug, and Cosmetic Act", 21 U.S.C. 355, as amended.

[See main volume for text of (14) to (35)]

(13.5), (7.5) added by Laws 1990, S.B.90–117, §§ 4, 18, eff. July 1, 1990.

Historical and Statutory Notes

The 1990 amendment added subsecs. (7.5) and (13.5).

Section 21 of Laws 1990, S.B.90-117, provides, in pertinent part:

"Effective date—applicability. Sections 1 through 8 and 11 through 22 of this act shall take effect July 1, 1990, and apply to offenses committed on or after said date. * * *"

Cross References

Accountants, administrative penalties for habitual intemperance, see § 12-2-123.

Aircraft, operating under the influence of alcohol or drugs, see § 41-2-102.

Dismissal of teachers, procedure and review, see § 22-63-302.

§ 12-22-304. License required—controlled substances—drug precursors—fund created

[See main volume for text of (1), (2)]

(2.5)(a) The department may promulgate regulations and charge reasonable fees relating to the licensing and control of the manufacture, possession, transfer, and transportation of drug precursors. The fees established under this subsection (2.5) shall be collected by the department and transmitted to the state treasurer, who shall credit the same to the drug precursor cash fund, which fund is hereby created.

(b) Every person who manufactures, possesses, transfers, or transports any drug precursor or who proposes to engage in the manufacture, possession, transfer, or transportation of any drug precursor must obtain, annually, a license issued by the department.

(c) Persons licensed by the department to manufacture, possess, transfer, or transport drug precursors may manufacture, possess, transfer, or transport those substances to the extent authorized by their licenses and in conformity with the other provisions of this part 3.

(d) This subsection (2.5) is repealed, effective July 1, 1992.

[See main volume for text of (3) to (5)]

(5.5)(a) The following persons are not required to be licensed under subsection (2.5) of this section and may lawfully possess drug precursors:

(I) Physicians, dentists, pharmacists, and veterinarians;

(II) An agent of any licensed manufacturer of any drug precursor if he is acting in the usual course of his principal's business or employment;

(III) An employee of a licensed common or contract carrier or licensed warehouseman whose possession of any drug precursor is in the usual course of the licensed common or contract carrier or licensed warehouseman's business;

(IV) A student enrolled in a college chemistry class for credit if the student's use of the drug precursor is for a bona fide educational purpose and if the chemistry department of the educational institution otherwise possesses all the necessary licenses required by the department;

(V) Officers or employees of appropriate agencies of federal, state, or local governments and law enforcement agencies acting pursuant to their official duties;

(VI) Every researcher, including analytical laboratories, experimenting with, studying, or testing any drug analog who is licensed by the department pursuant to the requirements of subsection (1) of this section.

(b) This subsection (5.5) is repealed, effective July 1, 1992.

(5.6)(a) The department may waive by regulation the requirement for licensing of certain manufacturers if it is consistent with the public health and safety.

(b) This subsection (5.6) is repealed, effective July 1, 1992.

[See main volume for text of (6), (7)]

(2.5), (5.5), (5.6) added by Laws 1990, S.B.90-117, § 6, eff. July 1, 1990.

Historical and Statutory Notes

For effective date and applicability of Laws 1990, S.B.90-117, see Historical and Statutory Note following § 12-22-303.

§ 12-22-305. Issuance of license—fees

[See main volume for text of (1)]

(1.5)(a) The department shall license an applicant to manufacture, possess, transfer, or transport drug precursors unless it determines that the issuance of such license would be inconsistent with the public interest. In determining the public interest, the department shall consider the following factors:

(I) Maintenance of effective controls against diversion of drug precursors into other than legitimate medical, scientific, or industrial channels;

(II) Compliance with applicable state and local law;

(III) Any conviction of the applicant under federal or state laws relating to any controlled substance or drug precursor;

(IV) Past experience in the manufacture, possession, transfer, or transportation of drug precursors and the existence in the applicant's establishment of effective controls against diversion;

(V) Furnishing by the applicant of false or fraudulent material in any application filed under this part 3;

(VI) Suspension or revocation of the applicant's federal registration to manufacture, distribute, or dispense controlled substances or drug precursors as authorized by federal law; and

(VII) Any other factors relevant to and consistent with the public health and safety.

(b) Licensing under this section does not entitle a licensee to manufacture, possess, transfer, or transport drug precursors other than those allowed in the license.

(c) This subsection (1.5) is repealed, effective July 1, 1992.

[See main volume for text of (2) to (5)]

(1.5) added by Laws 1990, S.B.90-117, § 7, eff. July 1, 1990.

Historical and Statutory Notes

For effective date and applicability of Laws 1990, S.B.90-117, see Historical and Statutory Note following § 12-22-303.

§ 12-22-308. Denial, revocation, or suspension of license

(1) A license issued under this part 3 may be denied, suspended, or revoked by the department or by the board pursuant to article 4 of title 24, C.R.S., upon a finding that the licensee:

[See main volume for text of (1)(a)]

(b) Has been convicted of, or has had accepted by a court a plea of guilty or nolo contendere to, a felony under any state or federal law relating to a controlled substance or a drug precursor;

(c) Has had his federal registration to manufacture, conduct research on, distribute, or dispense a controlled substance or a drug precursor suspended or revoked; or

[See main volume for text of (1)(d)]

(2) The department or the board may limit revocation or suspension of a license to the particular controlled substance or drug precursor which was the basis for revocation or suspension.

(3) If the department or the board suspends or revokes a license, all controlled substances or drug precursors owned or possessed by the licensee at the time of the suspension or on the effective date of the revocation order may be placed under seal. No disposition may be made of substances or precursors under seal until the time for making an appeal has elapsed or until all appeals have been concluded unless a court orders otherwise or orders the sale of any perishable controlled substances or drug precursors and the deposit of the proceeds with the court. Upon a revocation order's becoming final, all controlled substances and all drug precursors may be forfeited to the state.

[See main volume for text of (4)]

(1)(b), (1)(c), (2), (3) amended by Laws 1990, S.B.90-117, § 8, eff. July 1, 1990.

Historical and Statutory Notes

The 1990 amendment inserted references to drug precursors throughout.

For effective date and applicability of Laws 1990, S.B.90-117, see Historical and Statutory Note following § 12-22-303.

§ 12-22-310. Controlled substances—schedule II

[See main volume for text of (1)]

(2) The following substances are declared to have a currently accepted medical use in treatment in the United States or currently accepted medical use with severe restrictions, to have a high potential for abuse, and, if abused, to potentially lead to severe physical or psychological dependence and are classified as schedule II controlled substances:

[See main volume for text of (2)(a) to (2)(c)]

(d) **Controlled substance analog.** Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which is a controlled substance analog, as defined in section 12-22-303(7.5), the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule II of this part 3 or that was specifically designed to produce an effect substantially similar to or greater than the effect of a controlled substance in schedule II of this part 3, all or part of which is intended for human consumption, shall be treated for the purposes of this article as a controlled substance in schedule II of this part 3.

(2)(d) added by Laws 1990, S.B.90-117, § 17, eff. July 1, 1990.

Historical and Statutory Notes

The 1990 amendment added par. (2)(d).

For effective date and applicability of Laws 1990, S.B.90-117, see Historical and Statutory Note following § 12-22-303.

§ 12-22-314. Unlawful acts—licenses—penalties

(1) Except as otherwise provided in this part 3, the following acts are unlawful:

[See main volume for text of (1)(a) to (1)(m)]

(n) Knowingly transferring drug precursors except to an authorized licensee;

(o) Knowingly using in the course of the manufacture or transfer of a drug precursor a license number which is fictitious, revoked, suspended, or issued to another person;

(p) Knowingly acquiring or obtaining, or attempting to acquire or obtain, possession of a drug precursor by misrepresentation, fraud, forgery, deception, or subterfuge;

(q) Knowingly furnishing false or fraudulent material information in, or omitting any material information from, any application, report, or other document required to be kept or filed under this part 3 or any record required to be kept by this part 3;

(r) The knowing manufacture by a licensee of a drug precursor not authorized by his license, or the knowing transfer of a drug precursor not authorized by his license to another licensee or authorized person;

(s) The refusal of entry into any premises for any inspection authorized by this part 3;

(t) The manufacture, possession, transferring, or transporting of a drug precursor without the appropriate license or in violation of any rule or regulation of the department.

[See main volume for text of (2) to (3)]

(4) Any person who violates paragraph (n), (o), (p), (q), (r), (s), or (t) of subsection (1) of this section commits a class 4 felony.

(1)(n), (1)(o), (1)(p), (1)(q), (1)(r), (1)(s), (1)(t), (4) added by Laws 1990, S.B.90-117, §§ 9, 10, eff. Oct. 1990.

Historical and Statutory Notes

The 1990 amendment added pars. (1)(n) to (t); and added subsec. (4).

Section 21 of Laws 1990, S.B.90-117, provides, in pertinent part:

"Effective date—applicability. • • • Sections 9 and 10 of this act shall take effect October 1, 1990, and apply to offenses committed on or after said date."

§ 12-22-318. Records to be kept—order forms

(1)(a) Each person licensed or otherwise authorized under this part 3 or other laws of this state to manufacture, purchase, distribute, dispense, administer, store, use in research, or otherwise handle controlled substances shall keep and maintain separate detailed and accurate records and inventories relating to controlled substances and retain all such records and inventories for a period of two years after the respective dates of such transactions as shown on such records and inventories.

(b)(I) Each person licensed under section 12-22-304(2.5) who manufactures, possesses, transfers, or transports a drug precursor shall maintain, on a current basis, a complete and accurate record of each substance manufactured, possessed, transferred, or transported by the licensee in accordance with regulations of the department.

(II) This paragraph (b) is repealed, effective July 1, 1992.

[See main volume for text of (2) to (6)]

(7)(a) A manufacturer, wholesaler, retailer, or other person who sells, transfers, or otherwise furnishes any drug precursor to a person shall make an accurate and legible record of the transaction and maintain the record for a period of at least two years after the date of the transaction.

(b) Before selling, transferring, or otherwise furnishing to a person in this state a precursor substance subject to paragraph (a) of this subsection (7), a manufacturer, wholesaler, retailer, or other person shall:

(I) If the recipient does not represent a business, obtain from the recipient:

(A) The recipient's driver's license number or other personal identification certificate number, date of birth, and residential or mailing address, other than a post office box number, from a driver's license or personal identification card issued by the department of revenue that contains a photograph of the recipient;

(B) The year, state, and number of the motor vehicle license of the motor vehicle owned or operated by the recipient;

(C) A complete description of how the substance is to be used; and

(D) The recipient's signature; or

(II) If the recipient represents a business, obtain from the recipient:

(A) A letter of authorization from the business that includes the business license or comptroller tax identification number, address, area code and telephone number, and a complete description of how the substance is to be used;

(B) The recipient's signature; and

(III) For any recipient, sign as a witness to the signature and identification of the recipient.

(c) Except as otherwise provided in this part 3, a manufacturer, wholesaler, retailer, or other person who sells, transfers, or otherwise furnishes to a person in this state a drug precursor subject to paragraph (a) of this subsection (7) shall submit to the department, at least twenty-one days before the delivery of the drug precursor, a report of the transaction on a form obtained from the department that includes the information required by subparagraph (I) or (II) of paragraph (b) of this subsection (7)

(d) This subsection (7) is repealed, effective July 1, 1992.

(8)(a) The theft or loss of any drug precursor discovered by any person regulated by this part 3 shall be reported to the department within three days after such discovery.

(b) This subsection (8) is repealed, effective July 1, 1992.

(9)(a) Any difference between the quantity of any drug precursor received and the quantity shipped shall be reported to the department within three days after the receipt of actual knowledge of the discrepancy. When applicable, any report made pursuant to this subsection (9) shall also include the name of any common carrier or person who transported the substance and the date of shipment of the substance.

(b) This subsection (9) is repealed, effective July 1, 1992.

(10)(a) On or after July 1, 1990, any manufacturer, wholesaler, retailer, or other person subject to any other reporting requirements in this part 3, who receives from a source outside of this state any drug precursor specified in rules and regulations promulgated pursuant to section 12-22-323, shall submit a report of such transaction to the department in accordance with rules adopted by the department.

(b) Any person specified in paragraph (a) of this subsection (10) who does not submit a report as required by such paragraph (a) is guilty of a class 1 misdemeanor.

(c) This subsection (10) is repealed, effective July 1, 1992.

(11)(a) The department may authorize a manufacturer, wholesaler, retailer, or other person to submit a comprehensive monthly report instead of the report required by paragraph (c) of subsection (7) of this section if the director determines that:

(I) There is a pattern of regular supply and purchase of the drug precursor between the furnisher and the recipient; or

(II) The recipient has established a record of utilization of the drug precursor solely for a lawful purpose.

(b) This subsection (11) is repealed, effective July 1, 1992.

(1) amended and (7), (8), (9), (10), (11) added by Laws 1990, S.B.90-117, §§ 11, 12, eff. July 1, 1990.

Historical and Statutory Notes

For effective date and applicability of Laws 1990, S.B.90-117, see Historical and Statutory Note following § 12-22-303.

§ 12-22-319. Enforcement and cooperation

[See main volume for text of (1)]

(2) The board shall make any inspections, investigations, and reports that may be necessary to determine compliance with the provisions of this part 3 as they pertain to pharmacies, pharmacists, and manufacturers and wholesalers of controlled substances and to persons who manufacture, possess, transfer, or transport drug precursors and shall cooperate with all agencies charged with the enforcement of the laws of this state, all other states, and the United States relating to controlled substances.

[See main volume for text of (3)]

(2) amended by Laws 1990, S.B.90-117, § 13, eff. July 1, 1990.

Historical and Statutory Notes

For effective date and applicability of Laws 1990, S.B.90-117, see Historical and Statutory Note following § 12-22-303.

§ 12-22-321. Rules and regulations

(1) The department and the board shall promulgate rules and regulations to implement the provisions of this part 3 pursuant to the procedures of article 4 of title 24, C.R.S.

(2)(a) In addition to rules and regulations promulgated pursuant to sections 12-22-304(2.5) and (5.6), 12-22-318, and 12-22-323, the department may promulgate

reasonable rules necessary to implement the provisions of this article relating to the control of drug precursors, including rules specifying a common reporting form for substances that are drug precursors that contains at least the following information:

(I) The name of the substance;

(II) The quantity of the substance sold, transferred, or furnished;

(III) The date the substance was sold, transferred, or furnished;

(IV) The name and address of the person buying or receiving the substance; and

(V) The name and address of the manufacturer, wholesaler, retailer, or other person selling or transferring the substance.

(b) Rules and regulations promulgated pursuant to this section and sections 12–22–304(2.5) and (5.6) and 12–22–318 to implement the provisions of this article relating to the control of drug precursors shall be promulgated no later than October 1, 1990.

Amended by Laws 1990, S.B.90–117, § 14, eff. July 1, 1990.

Historical and Statutory Notes

For effective date and applicability of Laws 1990, S.B.90–117, see Historical and Statutory Note following § 12–22–303.

§ 12–22–323. Authority to control drug precursors by rule and regulation

(1) The department shall promulgate by rule and regulation a list of drug precursors, comprised of any substance, material, compound, mixture, or preparation or any of their salts or isomers which are drug precursors. The department may add substances to, delete substances from, and reschedule substances listed in such drug precursor list pursuant to the procedures of the "State Administrative Procedure Act", article 4 of title 24, C.R.S.

(2) In making a determination regarding a substance to be placed on the drug precursor list, the department shall consider the following:

(a) Whether the substance is an immediate precursor of a controlled substance;

(b) The actual or relative potential for abuse;

(c) The scientific evidence of its pharmacological effect, if known;

(d) The state of current scientific knowledge regarding the substance or the controlled substance for which it is a precursor;

(e) The history and current pattern of abuse of the controlled substance for which it is a precursor;

(f) The scope, duration, and significance of abuse of the controlled substance for which it is a precursor;

(g) The risk to the public health;

(h) The potential of the substance or the controlled substance to produce psychic or physiological dependence liability.

(3) The department may consider findings of the federal food and drug administration or bureau as prima facie evidence relating to one or more of the factors in connection with its determination.

(4) After considering the factors enumerated in subsection (2) of this section, the department shall make findings with respect thereto and shall promulgate a rule controlling a substance as a drug precursor upon a finding that the substance has a potential for abuse. If the department designates a substance as an immediate drug precursor, substances that are precursors of the controlled precursor are not subject to control solely because they are precursors of the controlled precursor.

(5) Authority to control under this section does not extend to alcoholic beverages or alcoholic liquors, fermented malt beverages, or tobacco.

(6) This section is repealed, effective July 1, 1992.

Added by Laws 1990, S.B.90-117, § 5, eff. July 1, 1990.

Historical and Statutory Notes

For effective date and applicability of Laws 1990, S.B.90-117, see Historical and Statutory Note following § 12-22-303.

§ 12-22-324. Defenses

The common law defense known as the "procuring agent defense" is not a defense to any crime in this article or in title 18, C.R.S.

Added by Laws 1990, S.B.90-117, § 15, eff. July 1, 1990.

Historical and Statutory Notes

For effective date and applicability of Laws 1990, S.B.90-117, see Historical and Statutory Note following § 12-22-303.

ARTICLE 23

Electricians

§ 12-23-106. License requirements

[See main volume for text of (1) to (4)]

(5)(a) No person, firm, copartnership, association, or combination thereof shall engage in the business of an electrical contractor without having first registered with the board. The board shall register such contractor upon payment of the fee as provided in section 12-23-112, presentation of evidence that the applicant has complied with the applicable workers' compensation and unemployment compensation laws of this state, and satisfaction of the requirements of paragraph (b) or (c) of this subsection (5).

[See main volume for text of (5)(b) to (5)(d)]

(5)(a) amended by Laws 1990, H.B.90-1160, § 31, eff. July 1, 1990.

HEALTH-CARE

ARTICLE 31

Child Health Associates

§§ 12-31-101 to 12-31-114. Repealed by Laws 1986, H.B.1032, § 6, eff. July 1, 1990.

§ 12-31-116. Repealed by Laws 1986, H.B.1032, § 6, eff. July 1, 1990

ARTICLE 32

Podiatrists

Cross References

General assembly review of regulatory agencies, see § 24-34-104.

§ 12-32-101. Definitions

As used in this article, unless the context otherwise requires:

[See main volume for text of (1), (2)]

NEW MEXICO

Detailed Summary
of

N.M. Stat. Ann. § 30-31B-1 to 30-31B-18 (1989). Drug Precursors.

30-31B-1. Short Title.

Act may be cited as the Drug Precursor Act.

30-31B-2. Definitions.

A. Administer – direct application to a patient or research subject by a practitioner or an agent.

B. Agent – person authorized to act on behalf of a manufacturer, distributor, or dispenser. Excludes common or contract carrier, warehouseman or their employees.

C. Board – board of pharmacy.

D. Bureau – bureau of narcotics and dangerous drugs of U.S. Department of Justice, or its successor agency.

E. Controlled substance – Schedule I–V substance.

F. Controlled substance analog – substance which is substantially similar chemically to a Schedule I–V substance or was designed to produce substantially similar effects. Excludes safe and effective substances under the Food, Drug and Cosmetic Act or substances subject to a new drug application or exemption for investigational use.

G. Deliver – actual, constructive or attempted transfer.

H. Dispense – to deliver to an ultimate user or research subject pursuant to a practitioner's lawful order, including labelling and preparation.

I. Dispenser – a practitioner who dispenses, including hospitals and pharmacies.

J. Distribute – to deliver other than by administering or dispensing.

K. Drug – substance in the U.S. pharmacopoeia, official homeopathic pharmacopoeia of the U.S., official homeopathic pharmacopoeia of the U.S., official national formulary or their supplements. Excludes devices or their components, parts or accessories.

L. Drug precursor – substance, material, compound, mixture or preparation listed in the Drug Precursor Act or their salts or isomers. Excludes substances, materials, compounds, or mixtures prepared for distribution pursuant to a prescription or over–the–counter.

M. Immediate precursor – a compound commonly used or produced primarily as an immediate chemical intermediary.

N. License – license to manufacture, possess, transfer or transport a precursor.

O. Manufacture – production, preparation, or processing a precursor by extraction or synthesis or a combination, including packaging and labeling except:

(1) as an incident to administering or dispensing in the course of practitioner's professional practice; or

(2) by a practitioner's agent under his supervision for research, teaching or analysis and not for sale.

P. Person – an individual, proprietorship, partnership, corporation, association, the state or a legal entity and its political or legal subdivision.

Q. Possession – active or constructive dominion.

R. Practitioner – a physician, dentist, veterinarian or other person licensed to prescribe and administer drugs.

S. Prescription – an order given for a person for whom a controlled substance is prescribed.

T. Transfer – sale, possession with intent to sell, barter or giving away.

30–31B–3. Drug precursors list.

List of precursors, including ephedrine.

30–31B–4. Duty to administer.

The board shall administer the Act and promulgate regulations pursuant to the Uniform Licensing Act.

A. The board may add substances to the list after considering:

(1) whether the substance is an immediate precursor of a controlled substance;

(2) the ease by which the substance can facilitate the manufacture of a substance;

(3) legitimate uses which would be hampered by listing the substance; and

(4) other public health and safety factors.

B. The board shall regulate a substance as a precursor if the substance has a significant potential for use in manufacturing a substance.

C. Substances are not subject to control solely because they are precursors of a drug precursor.

D. If a substance is controlled under federal law, the board may similarly control the substance after providing a hearing pursuant to the Uniform Licensing Act.

E. Authority to control does not extend to tobacco, pesticides or alcoholic beverages.

30-31B-5. Nomenclature.

Precursors are included by their designated official, common, usual, chemical or trade name.

30-31B-6. Regulations.

The board may regulate and charge reasonable fees relating to the licensing and control of precursor transactions. Fees shall be a minimum of $250.00 per license.

A. Every person who manufactures, possesses, transfers or transports any precursor or proposes to engage in such activities must annually obtain a license.

B. Licenses may engage in precursor transactions only to the extent of their licenses and the Act.

C. The following persons are exempted from licensing requirements:
   (1) physicians;
   (2) an agent of a manufacturer acting in the usual course of business;
   (3) an employee of a carrier or warehouseman acting in the usual course of business; or
   (4) a college student using a precursor for a bona fide educational purpose and the chemistry department has the necessary licenses.

D. The board may waive licensing requirements for certain manufacturers if it is consistent with public health and safety.

E. The board may inspect the establishment of a licensee.

30-31B-7. Licenses.

A. The board shall license an applicant unless to do so would be inconsistent with the public interest. In determining the public interest, the board shall consider:

(1) maintenance of effective controls against illegal diversion of precursors;
(2) compliance with applicable state and local law;
(3) convictions under federal or state substance or precursor laws;
(4) past experience in precursor transactions and the establishment of effective controls against diversion;
(5) furnishing of false or fraudulent material in an application;
(6) suspension or revocation of a federal registration;
(7) other public health and safety factors.

B. Licensees may manufacture, possess, transfer or transport precursors only as allowed in their license.

30-31B-8. Revocation and suspension of license.

A. A license may be suspended or revoked if the registrant:
(1) has furnished false or fraudulent material information in an application;
(2) has been convicted of a felony under a state or federal substance or precursor law;
(3) had a federal registration suspended or revoked; or
(4) violated the Drug Precursor Act, Controlled Substances Act, or any rules or regulations.

B. A revocation or suspension hearing shall be held by a special panel.

C. The panel may limit revocation or suspension to a particular precursor.

D. The licensee's precursors at the time of suspension or revocation may be placed under seal. Unless the court orders a sale, no disposition may be made before all appeals have been concluded or the time for taking an appeal has elapsed.

E. Upon a revocation order becoming final, the court may order the sale or destruction of the precursors.

F. The board shall promptly notify the bureau of orders suspending or revoking licenses.

G. The standard of proof for revocation or suspension is preponderance of the evidence. Rules of evidence are not strictly applicable and all evidentiary matters are finally determined by the panel.

30-31B-9. Order to show cause.

A. The board shall issue an order to show cause why the license should not be denied, revoked or suspended or why the renewal should not be refused. The order shall:

(1) state the order's basis; and
(2) require the licensee or applicant to appear before the board not less than 30 days after the date of the order. However, in the case of renewals the order shall be served notless than 30 days before expiration of the license, unless suspension or revocation is involved.

Proceedings are conducted in accordance with the Uniform Licensing Act. The existing license remains effective pending the hearing's outcome.

B. The board may suspend a license or refuse a renewal if there is a substantial and imminent danger to public health or safety. Simultaneously, the board shall institute revocation or suspension hearings. Suspension is effective until conclusion of the proceedings, unless withdrawn by the board or a court.

30-31B-10. Records of licenses.

Licensees shall keep complete and accurate records of precursor transactions.

30-31B-11. Distribution by manufacturers.

Licensed manufacturers or transferors may transfer precursors to licensed manufacturers, possessors or transporters.

30-31B-12. Drug precursors; prohibited acts; penalties.

A. It is unlawful for any person:
(1) to transfer precursors except to authorized licenses;
(2) to intentionally use a license number which is fictitious, revoked, suspended or issued to another person;
(3) to acquire or attempt to acquire a precursor by misrepresentation, fraud, forgery, deception or subterfuge;
(4) to intentionally furnish false or fraudulent material information in, or omit material information from any document or record;
(5) who is a licensee to intentionally manufacture or transfer an unauthorized precursor.
(6) to intentionally refuse to keep or furnish records or information required under the Act;
(7) to intentionally refuse entry for an inspection;
(8) to manufacture, possess, transfer or transport a precursor without the appropriate license or in violation or rules and regulations.

B. Any person who commits:
(1) a first offense is guilty of a misdemeanor;
(2) a second offense is guilty of a fourth degree felony;
(3) a third or subsequent offense is guilty of a third degree felony.

30-31B-13. Powers of enforcement personnel.

Any law enforcement officer may:

A. serve search, arrest, and inspection warrants;

B. make warrantless arrests under specified circumstances; and

C. seize property.

30-31B-14. Administrative inspection warrants.

A. Issuance and execution of administrative inspection warrants.

(1) Upon a showing of probable cause, a magistrate may issue warrants to conduct administrative inspections and seizures; and

(2) A warrant shall be issued only upon an affidavit sworn to by an officer or board employee having actual knowledge of the facts and which establishes grounds for a warrant. The warrant shall specify the purpose of the inspection and the area and property to be inspected.

B. The warrant shall:

(1) state grounds for its issuance and the affiant's name;

(2) direct an authorized person to execute it;

(3) command the person to inspect the designated area and seize property;

(4) identify property to be seized;

(5) allow the sale or destruction of substances or equipment and deposit of the proceeds with the court; and

(6) require it to be served during normal business or designated hours and returned to the magistrate.

C. A warrant shall be returned with a written inventory within five days of its issuance, unless the court orders otherwise. The inventory shall be made in the presence of the person serving the warrant and the person from whom the property is seized, or at least one credible person other than the person serving the warrant. A copy of the warrant and the inventory is given to the person from whom the property is seized. The applicant for the warrant also receives a copy of the inventory.

D. The return and all relevant papers are filed with the clerk of the magistrate court.

30-31B-15. Administrative inspections.

A. An officer or board employee may conduct an administrative inspection, upon presenting a warrant and proper credentials.

B. An officer or board employee may:
   (1) inspect and copy records;
   (2) inspect and sample controlled premises, equipment, records and other relevant materials;
   (3) inventory precursors and obtain samples.

C. Warrantless inspections may be conducted:
   (1) if the person in charge of the premises consents;
   (2) if there is a substantial imminent danger to health or safety; or
   (3) in situations where a warrant is not constitutionally required.

D. An inspection shall not extend to financial or sales data, other than shipment and price information, unless the person in charge of the premises consents.

E. The court may order the sale or destruction of property and deposit the proceeds.

F. Controlled premises means places:
   (1) where records are required to be kept; and
   (2) where precursors are held, manufactured, processed or disposed of.

30-31B-16. Injunctions.

A. The court may restrain or enjoin violations.

B. The defendant has a right to a trial by jury.

30-31B-17. Summary forfeiture.

A. Unauthorized precursors are contraband and summarily forfeited to the state.

B. Precursors which are seized or come into the possession of the state and the owners are unknown are contraband and shall be summarily forfeited to the state.

30-31B-18. Burden of proof.

It is unnecessary for the state to negate any exemptions or exceptions in any document or proceeding. The burden of proof of any exception or exemption is on the claimant.

History: Laws 1983, ch. 148, § 11.

30-31A-12. Powers of enforcement personnel.

Any officer or employee designated by the board or other law enforcement officer may:

A. serve search warrants, arrest warrants and administrative inspection warrants;

B. make arrests without warrant for any offense under the Imitation Controlled Substances Act [30-31A-1 to 30-31A-15 NMSA 1978] committed in his presence or if he has probable cause to believe that the person to be arrested has committed or is committing a violation of the Imitation Controlled Substances Act which may constitute a felony; or

C. make seizures of property pursuant to the Imitation Controlled Substances Act.

History: Laws 1983, ch. 148, § 12.

30-31A-13. Administrative inspections and warrants.

Magistrate or metropolitan courts may issue administrative inspection warrants upon a showing of probable cause.

History: Laws 1983, ch. 148, § 13.

30-31A-14. Injunctions.

The district courts may exercise jurisdiction to restrain or enjoin violations of the Imitation Controlled Substances Act [30-31A-1 to 30-31A-15 NMSA 1978].

History: Laws 1983, ch. 148, § 14.

30-31A-15. Immunity.

No civil or criminal liability shall be imposed by virtue of the Imitation Controlled Substances Act [30-31A-1 to 30-31A-15 NMSA 1978] on any person registered under the Controlled Substances Act who manufactures, distributes or possesses an imitation controlled substance for use as a placebo by a registered practitioner in the course of professional practice or research.

History: Laws 1983, ch. 148, § 15.

Controlled Substances Act. — See 30-31-1 NMSA 1978 and notes thereto.

ARTICLE 31B

Drug Precursors

L. "drug precursor" means any substance, material, compound, mixture or preparation listed in Section 3 [30-31B-3 NMSA 1978] of the Drug Precursor Act or regulations adopted thereto or any of their salts or isomers. "Drug precursor" specifically excludes those substances, materials, compounds, mixtures or preparations which are prepared for dispensing pursuant to a prescription or over-the-counter distribution as a substance which is generally recognized as safe and effective within the meaning of the Federal Food, Drug and Cosmetic Act or have been manufactured, distributed or possessed in conformance with the provisions of an approved new drug application or an exemption for investigational use within the meaning of Section 505 of the Federal Food, Drug and Cosmetic Act;

M. "immediate precursor" means a substance which is a compound commonly used or produced primarily as an immediate chemical intermediary used in the manufacture of a controlled substance, the control of which is necessary to prevent, curtail or limit the manufacture of controlled substances;

N. "license" means a license issued by the board to manufacture, possess, transfer or transport a drug precursor;

O. "manufacture" means the production, preparation, compounding, conversion or processing of a drug precursor by extraction from substances of natural origin, 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, except that this term does not include the preparation or compounding of a controlled substance by a practitioner:

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

(2) by his agent under his supervision, for the purpose of or as an incident to research, teaching or chemical analysis and not for sale;

P. "person" includes an individual, sole proprietorship, partnership, corporation, association, the state or any political subdivision of the state or other legal entity;

Q. "possession" means to actively or constructively exercise dominion over;

R. "practitioner" means a physician, dentist, veterinarian or other person licensed to prescribe and administer drugs which are subject to the Controlled Substances Act;

S. "prescription" means an order given individually for the person for whom is prescribed a controlled substance, either directly from the prescriber to the pharmacist or indirectly by means of a written order signed by the prescriber and in accordance with the Controlled Substances Act or regulations adopted thereto; and

T. "transfer" means the sale, possession with intent to sell, barter or giving away of a controlled substance.

History: Laws 1989, ch. 177, § 2.

Effective dates. — Laws 1989, ch. 177, § 21 makes the Drug Precursor Act effective on July 1, 1989.

Controlled Substances Act. — See 30-31-1 NMSA 1978 and notes thereto.

Federal Food, Drug and Cosmetic Act. — The Federal Food, Drug and Cosmetic Act, referred to in Subsections F and L, appears as 21 U.S.C. § 301 et seq. Section 505 of that act, also referred to in Subsections F and L, appears as 21 U.S.C. § 355.

30-31B-3. Drug precursors list.

Any substance, material, compound, mixture or preparation of the following substances or any of their salts or isomers are subject to regulation by the board and to the requirements of the Drug Precursor Act [30-31B-1 to 30-31B-18 NMSA 1978]:

A. 1-phenylcyclohexylamine;
B. 1-piperidinocyclohexanecarbonitrile;
C. ephedrine;
D. psuedoephedrine;
E. methylamine;
F. methylformamide;
G. phenylacetic acid; and
H. phenylacetone.

30-31B-1. Short title.

Sections 1 through 18 [30-31B-1 to 30-31B-18 NMSA 1978] of this act may be cited as the "Drug Precursor Act".

History: Laws 1989, ch. 177, § 1. Effective dates. — Laws 1989, ch. 177, § 21 makes the Drug Precursor Act effective on July 1, 1989.

30-31B-2. Definitions.

As used in the Drug Precursor Act [30-31B-1 to 30-31B-18 NMSA 1978]:

A. "administer" means the direct application of a controlled substance by any means to the body of a patient or research subject by a practitioner or his agent;

B. "agent" includes an authorized person who acts on behalf of a manufacturer, distributor or dispenser. "Agent" does not include a common or contract carrier, public warehouseman or employee of the carrier or warehouseman;

C. "board" means the board of pharmacy;

D. "bureau" means the bureau of narcotics and dangerous drugs of the United States department of justice, or its successor agency;

E. "controlled substance" means a drug or substance listed in Schedules I through V of the Controlled Substances Act or regulations adopted thereto;

F. "controlled substance analog" means a substance other than a controlled substance that has a chemical structure substantially similar to that of a controlled substance in Schedule I, II, III, IV or V or which was specifically designed to produce effects substantially similar to that of controlled substances in Schedule I, II, III, IV or V. Examples of chemical classes in which controlled substance analogs are found include, but are not limited to, the following:

(1) phenethylamines;
(2) N-substituted piperidines;
(3) morphinans;
(4) ecogonines;
(5) quinazolinones;
(6) substituted indoles; and
(7) arylcycloalkylamines.

Specifically excluded from the definition of "controlled substance analog" are those substances which are generally recognized as safe and effective within the meaning of the Federal Food, Drug and Cosmetic Act or have been manufactured, distributed or possessed in conformance with the provisions of an approved new drug application or an exemption for investigational use within the meaning of Section 505 of the Federal Food, Drug and Cosmetic Act;

G. "deliver" means the actual, constructive or attempted transfer from one person to another of a controlled substance or controlled substance analog, whether or not there is an agency relationship;

H. "dispense" means to deliver a controlled substance to an ultimate user or research subject pursuant to the lawful order of a practitioner, including the administering, prescribing, packaging, labeling or compounding necessary to prepare the controlled substance for that delivery;

I. "dispenser" means a practitioner who dispenses and includes hospitals, pharmacies and clinics where controlled substances are dispensed;

J. "distribute" means to deliver other than by administering or dispensing a controlled substance or controlled substance analog;

K. "drug" means substances recognized as drugs in the official United States pharmacopoeia, official homeopathic pharmacopoeia of the United States, official national formulary or any respective supplement to these publications. "Drug" does not include devices or their components, parts or accessories;

History: Laws 1989, ch. 177, § 3.
Effective dates. — Laws 1989, ch. 177, § 21 makes the Drug Precursor Act effective on July 1, 1989.

30-31B-4. Duty to administer.

The board shall administer the Drug Precursor Act [30-31B-1 to 30-31B-18 NMSA 1978] and by regulation may add substances to the list of drug precursors enumerated in Section 3 [30-31B-3 NMSA 1978] of the Drug Precursor Act. The board shall promulgate regulations pursuant to the procedures of the Uniform Licensing Act [61-1-1 to 61-1-31 NMSA 1978].

A. In determining whether a substance, material, compound, mixture or preparation should be added to the list of drug precursors, the board shall consider:

(1) whether the substance, material, compound, mixture or preparation is an immediate precursor of a substance already controlled under the Controlled Substances Act;

(2) the relative ease by which use of the substance, material, compound, mixture or preparation can facilitate the manufacture of a controlled substance;

(3) legitimate uses which would be unduly hampered by listing the substance, material, compound, mixture or preparation as a drug precursor; and

(4) any other factors relevant to and consistent with the public health and safety.

B. After considering the factors enumerated in Subsection A of this section, the board shall make findings and issue regulations listing the substance, material, compound, mixture or preparation as a drug precursor if it finds that the substance, material, compound, mixture or preparation has a significant potential for use in the manufacture of controlled substances.

C. If the board designates a substance, material, compound, mixture or preparation as a drug precursor, then substances, materials, compounds, mixtures or preparations which are precursors of the drug precursor so designated shall not be subject to control solely because they are precursors of a drug precursor.

D. If any substance, material, compound, mixture or preparation is designated as controlled under federal law and notice is given to the board, the board may, by regulation, similarly control the substance under the Drug Precursor Act after providing for a hearing pursuant to the Uniform Licensing Act.

E. Authority to control under this section does not extend to distilled spirits, wine, malt beverages, tobacco or pesticides as defined in the Pesticide Control Act [76-4-1 to 76-4-39 NMSA 1978].

History: Laws 1989, ch. 177, § 4.
Effective dates. — Laws 1989, ch. 177, § 21 makes the Drug Precursor Act effective on July 1, 1989.

Controlled Substances Act. — See 30-31-1 NMSA 1978 and notes thereto.

30-31B-5. Nomenclature.

The drug precursors listed in Section 3 [30-31B-3 NMSA 1978] of the Drug Precursor Act are included by whatever official, common, usual, chemical or trade name designated.

History: Laws 1989, ch. 177, § 5.
Effective dates. — Laws 1989, ch. 177, § 21 makes the Drug Precursor Act effective on July 1, 1989.

30-31B-6. Regulations.

The board may promulgate regulations and charge reasonable fees relating to the licensing and control of the manufacture, possession, transfer and transportation of drug precursors, which fees shall not be less than two hundred fifty dollars ($250) per license.

A. Every person who manufactures, possesses, transfers or transports any drug precursor or who proposes to engage in the manufacture, possession, transfer or transportation of any drug precursor must obtain, annually, a license issued by the board.

B. Persons licensed by the board to manufacture, possess, transfer or transport drug precursors may manufacture, possess, transfer or transport those substances to the extent authorized by their license and in conformity with the other provisions of the Drug Precursor Act [30-31B-1 to 30-31B-18 NMSA 1978].

C. The following persons need not be licensed under the Drug Precursor Act and may lawfully possess drug precursors:

(1) physicians;

(2) an agent of any licensed manufacturer of any drug precursor if he is acting in the usual course of his principal's business or employment;

(3) an employee of a licensed common or contract carrier or licensed warehouseman whose possession of any drug precursor is in the usual course of the licensed common or contract carrier or licensed warehouseman's business; or

(4) a student enrolled in a college chemistry class for credit; provided, however, that the student's use of the drug precursor is for a bona fide educational purpose and that the chemistry department of the educational institution otherwise possesses all the necessary licenses required by the board.

D. The board may waive by regulation the requirement for licensing of certain manufacturers if it is consistent with the public health and safety.

E. The board may inspect the establishment of a licensee or applicant for license in accordance with the board's regulations.

History: Laws 1989, ch. 177, § 6.
Effective dates. — Laws 1989, ch. 177, § 21 makes the Drug Precursor Act effective on July 1, 1989.

30-31B-7. Licenses.

A. The board shall license an applicant to manufacture, possess, transfer or transport drug precursors unless it determines that the issuance of that license would be inconsistent with the public interest. In determining the public interest, the board shall consider the following factors:

(1) maintenance of effective controls against diversion of drug precursors into other than legitimate medical, scientific or industrial channels;

(2) compliance with applicable state and local law;

(3) any conviction of the applicant under federal or state laws relating to any controlled substance or drug precursor;

(4) past experience in the manufacture, possession, transfer or transportation of drug precursors and the existence in the applicant's establishment of effective controls against diversion;

(5) furnishing by the applicant of false or fraudulent material in any application filed under the Drug Precursor Act [30-31B-1 to 30-31B-18 NMSA 1978] or the Controlled Substances Act;

(6) suspension or revocation of the applicant's federal registration to manufacture, distribute or dispense controlled substances or drug precursors as authorized by federal law; and

(7) any other factors relevant to and consistent with the public health and safety.

B. Licensing under this section does not entitle a licensee to manufacture, possess, transfer or transport drug precursors other than those allowed in the license.

History: Laws 1989, ch. 177, § 7.
Effective dates. — Laws 1989, ch. 177, § 21 makes the Drug Precursor Act effective on July 1, 1989.

Controlled Substances Act. — See 30-31B-1 NMSA 1978 and notes thereto.

A. A license to manufacture, possess, transfer or transport a drug precursor under Section 7 [30-31B-7 NMSA 1978] of the Drug Precursor Act may be suspended or revoked upon a finding that the registrant has:

(1) furnished false or fraudulent material information in any application filed with the board;

(2) been convicted of a felony under any state or federal law relating to a controlled substance or drug precursor;

(3) had his federal registration to manufacture, distribute or dispense controlled substances or drug precursors suspended or revoked; or

(4) violated any rule or regulation of the board with regard to drug precursors or controlled substances or any provision of the Drug Precursor Act [30-31B-1 to 30-31B-18 NMSA 1978] or the Controlled Substances Act.

B. A hearing to revoke or suspend a license shall be held by a special hearing panel consisting of the board and two additional persons designated by the board to sit on the hearing panel.

C. The special hearing panel may limit revocation or suspension of a license to the particular drug precursor if grounds for revocation or suspension exist.

D. If the special hearing panel suspends or revokes a license, all drug precursors owned or possessed by the licensee at the time of suspension or the effective date of the revocation may be placed under seal. No disposition may be made of substances under seal until the time for taking an appeal has elapsed or until all appeals have been concluded, unless a court, upon application, orders the sale or destruction of perishable or dangerous substances and the deposit of the proceeds of any sale with the court.

E. Upon a revocation order becoming final, the board may apply to the court for an order to sell or destroy all drug precursors under seal. The court shall order the sale or destruction of such drug precursors under such terms and conditions that the court deems appropriate.

F. The board shall promptly notify the bureau of all orders suspending or revoking licenses.

G. The standard of proof necessary to revoke or suspend a license under this section shall be a preponderance of the evidence. The rules of evidence are not strictly applicable to a hearing under this section and all evidentiary matters are to be finally determined by the special hearing panel.

History: Laws 1989, ch. 177, § 8.

Effective dates. — Laws 1989, ch. 177, § 21 makes the Drug Precursor Act effective on July 1, 1989.

Controlled Substances Act. — See 30-31-1 NMSA 1978 and notes thereto.

30-31B-9. Order to show cause.

A. Before denying, suspending or revoking a license or refusing a renewal of the license, the board shall serve upon the applicant or licensee an order to show cause why the license should not be denied, revoked or suspended or why the renewal should not be refused. The order to show cause shall contain a statement of the basis of the order and shall require the applicant or registrant to appear before the board not less than thirty days after the date of service of the order, but in the case of a denial of renewal of the license, the order shall be served not later than thirty days before the expiration of the license unless the proceedings relate to suspension or revocation of a license. These proceedings shall be conducted in accordance with the Uniform Licensing Act [61-1-1 to 61-1-31 NMSA 1978] without regard to any criminal prosecution or other proceeding. Proceedings to suspend or revoke a license or to refuse renewal of a license shall not abate the existing license which shall remain in effect pending the outcome of the proceeding.

B. The board may suspend, without an order to show cause, any license simultaneously with the institution of proceedings to revoke or suspend a registration under Section

30-31-14 NMSA 1978 or where renewal of the license is refused if it finds that there is such a substantial and imminent danger to the public health or safety which warrants this action. The suspension shall continue in effect until the conclusion of the proceedings, including judicial review, unless sooner withdrawn by the board or dissolved by a court of competent jurisdiction.

History: Laws 1989, ch. 177, § 9.
Effective dates. — Laws 1989, ch. 177, § 21 makes the Drug Precursor Act effective on July 1, 1989.

30-31B-10. Records of licensees.

Every licensee under the Drug Precursor Act [30-31B-1 to 30-31B-18 NMSA 1978] manufacturing, possessing, transferring or transporting a drug precursor shall maintain, on a current basis, a complete and accurate record of each substance manufactured, possessed, transferred or transported by the licensee in accordance with regulations of the board.

History: Laws 1989, ch. 177, § 10.
Effective dates. — Laws 1989, ch. 177, § 21 makes the Drug Precursor Act effective on July 1, 1989.

30-31B-11. Distribution by manufacturers.

A licensed manufacturer or transferer may transfer drug precursors to a licensed manufacturer, licensed possessor or licensed transporter.

History: Laws 1989, ch. 177, § 11.
Effective dates. — Laws 1989, ch. 177, § 21 makes the Drug Precursor Act effective on July 1, 1989.

30-31B-12. Drug precursors; prohibited acts; penalties.

A. It is unlawful for any person:

(1) to transfer drug precursors except to an authorized licensee;

(2) to intentionally use in the course of the manufacture or transfer of a drug precursor a license number which is fictitious, revoked, suspended or issued to another person;

(3) to intentionally acquire or obtain, or attempt to acquire or obtain, possession of a drug precursor by misrepresentation, fraud, forgery, deception or subterfuge;

(4) to intentionally furnish false or fraudulent material information in, or omit any material information from, any application, report or other document required to be kept or filed under the Drug Precursor Act [30-31B-1 to 30-31B-18 NMSA 1978], or any record required to be kept by that act;

(5) who is a licensee to intentionally manufacture a drug precursor not authorized by his license, or to intentionally transfer a drug precursor not authorized by his license to another licensee or authorized person;

(6) to intentionally refuse or fail to make, keep or furnish any record, notification, order form, statement, invoice or information required under the Drug Precursor Act;

(7) to intentionally refuse an entry into any premises for any inspection authorized by the Drug Precursor Act; or

(8) to manufacture, possess, transfer or transport a drug precursor without the appropriate license or in violation of any rule or regulation of the board.

B. Any person who violates any provision of this section is:

(1) for the first offense, guilty of a misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978;

(2) for the second offense, guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(3) for the third or subsequent offense, guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

History: Laws 1989, ch. 177, § 12.
Effective dates. — Laws 1989, ch. 177, § 21 makes the Drug Precursor Act effective on July 1, 1989.

30-31B-13. Powers of enforcement personnel.

Any law enforcement officer:

A. serve search warrants, arrest warrants and administrative inspection warrants;

B. make arrests without a warrant for any offense under the Drug Precursor Act [30-31B-1 to 30-31B-18 NMSA 1978] committed in his presence, or if he has probable cause to believe that the person to be arrested has committed or is committing a violation of the Drug Precursor Act which may constitute a felony; and

C. make seizures of property pursuant to the Drug Precursor Act.

History: Laws 1989, ch. 177, § 13.
Effective dates. — Laws 1989, ch. 177, § 21 makes the Drug Precursor Act effective on July 1, 1989.

30-31B-14. Administrative inspection warrants.

A. Issuance and execution of administrative inspection warrants shall be as follows:

(1) a magistrate, within his jurisdiction and upon proper oath or affirmation showing probable cause, may issue warrants for the purpose of conducting administrative inspections and seizures of property authorized by the Drug Precursor Act [30-31B-1 to 30-31B-18 NMSA 1978]. For purposes of the issuance of administrative inspection warrants, probable cause exists upon showing a valid public interest in the effective enforcement of the Drug Precursor Act sufficient to justify administrative inspection of the area, premises, building or conveyance in the circumstances specified in the application for the warrant; and

(2) a warrant shall be issued only upon an affidavit of a law enforcement officer or employee of the board having actual knowledge of the alleged facts, sworn to before the magistrate and establishing the grounds for issuing the warrant. If the magistrate is satisfied that grounds for the warrant exist, he shall issue a warrant identifying the area, premises, building or conveyance to be inspected, the purpose of the inspection and, if appropriate, the type of property to be inspected, if any.

B. The warrant shall:

(1) state the grounds for its issuance and the name of the affiant;

(2) be directed to a person authorized by this section to serve and carry out the warrant;

(3) command the person to whom it is directed to inspect the area, premises, building or conveyance identified for the purpose specified and, if appropriate, direct the seizure of the property specified;

(4) identify the items or types of property to be seized, if any;

(5) allow the sale or destruction of perishable or dangerous substances or equipment and deposit the proceeds of any sale with the court; and

(6) direct that it be served during normal business hours or other hours designated by the magistrate and designate the magistrate to whom it shall be returned.

C. A warrant issued pursuant to this section must be served and returned within five days of its date of issue unless, upon a showing of a need for additional time, the court orders otherwise. If property is seized pursuant to a warrant, a copy of the warrant shall be given to the person from whom or from whose premises the property is taken, together with a receipt for the property taken. The return of the warrant shall be made promptly, accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the person serving the warrant and of the person from whose possession or premises the property was taken, if present, or in the presence of at least one credible person other than the person serving the warrant. A copy of the inventory shall be delivered to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

D. The magistrate who has issued a warrant shall attach a copy of the return and all papers returnable in connection with it and file them with the clerk of the magistrate court.

History: Laws 1989, ch. 177, § 14. makes the Drug Precursor Act effective on July 1, Effective dates. — Laws 1989, ch. 177, § 21 1989.

30-31B-15. Administrative inspections.

A. When authorized by an administrative inspection warrant issued pursuant to the Drug Precursor Act [30-31B-1 to 30-31B-18 NMSA 1978], a law enforcement officer or employee of the board, upon presenting the warrant and appropriate credentials to the owner, operator or agent in charge, may enter the controlled premises for the purpose of conducting an administrative inspection.

B. When authorized by an administrative inspection warrant, a law enforcement officer or employee of the board may:

(1) inspect and copy records required to be kept by the Drug Precursor Act;

(2) inspect and sample, within reasonable limits and in a reasonable manner, controlled premises and all pertinent equipment, finished and unfinished material, containers and labeling found therein, and, except as provided in Subsection D of this section, all other things bearing on violation of the Drug Precursor Act, including records, files, papers, processes, controls and facilities; and

(3) inventory any stock of any drug precursor and obtain samples.

C. This section does not prevent entries and administrative inspections, including seizures of property, without a warrant:

(1) if the owner, operator or agent in charge of the controlled premises consents;

(2) in situations presenting substantial imminent danger to health or safety; or

(3) in all other situations in which a warrant is not constitutionally required.

D. An inspection authorized by this section shall not extend to financial data, sales data other than shipment data or pricing data unless the owner, operator or agent in charge of the controlled premises consents in writing.

E. When perishable or dangerous substances or equipment are seized pursuant to Subsection C of this section, the law enforcement officer or employee of the board may apply to the district court for an order to sell or destroy said property and deposit the proceeds of any sale with the court.

F. For purposes of this section "controlled premises" means:

(1) places where persons licensed or exempted from license requirements under the Drug Precursor Act are required to keep records; and

(2) places, including factories, warehouses, establishments and conveyances in which persons licensed or exempted from license requirements under the Drug Precursor Act are permitted to hold, manufacture, compound, process, sell, deliver or otherwise dispose of any drug precursor.

History: Laws 1989, ch. 177, § 15. makes the Drug Precursor Act effective on July 1, Effective dates. — Laws 1989, ch. 177, § 21 1989.

30-31B-16. Injunctions.

A. The district courts may exercise jurisdiction to restrain or enjoin violations of the Drug Precursor Act [30-31B-1 to 30-31B-18 NMSA 1978].

B. The defendant may demand trial by jury for an alleged violation of an injunction or restraining order under this section.

History: Laws 1989, ch. 177, § 16. makes the Drug Precursor Act effective on July 1, Effective dates. — Laws 1989, ch. 177, § 21 1989.

30-31B-17. Summary forfeiture.

A. Drug precursors that are manufactured in violation of the Drug Precursor Act [30-31B-1 to 30-31B-18 NMSA 1978] are contraband and shall be seized and summarily forfeited to the state.

B. Drug precursors which are seized or come into the possession of the state, the owners of which are unknown, are contraband and shall be summarily forfeited to the state.

History: Laws 1989, ch. 177, § 17.
Effective dates. — Laws 1989, ch. 177, § 21 makes the Drug Precursor Act effective on July 1, 1989.

30-31B-18. Burden of proof.

It is not necessary for the state to negate any exemption or exception in the Drug Precursor Act [30-31B-1 to 30-31B-18 NMSA 1978] in any complaint, information, indictment or other pleading or in any trial, hearing or other proceeding under the Drug Precursor Act. The burden of proof of any exception or exemption is upon the person claiming it.

History: Laws 1989, ch. 177, § 18.
Effective dates. — Laws 1989, ch. 177, § 21 makes the Drug Precursor Act effective on July 1, 1989.

ARTICLE 32
Forest Fires

30-32-1. Fires extinguished by officers; responsibility for costs.

A. As used in this section "forest fire" means a fire burning uncontrolled on lands covered wholly or in part by timber, brush, grass, grain or other inflammable vegetation.

B. Any forest fire in New Mexico without proper precaution being taken to prevent its spread is hereby declared to be a public nuisance by reason of its menace to life or property.

C. Any person, firm or corporation responsible for either the starting or the existence of such fire is hereby required to commence efforts with reasonably available equipment and personnel to control or to extinguish it immediately, and if the responsible person, firm or corporation refuses, neglects or fails to commence and to continue reasonable efforts to do so, the state forester or his agents, or peace officers of the state upon investigation and finding of fact that life and property are endangered may declare the fire a public nuisance and may summarily abate the nuisance thus constituted, by controlling or extinguishing the fire and the cost thereof may be recovered from the responsible person, firm or corporation by action for debt.

History: Laws 1921, ch. 33, § 4; C.S. 1929, § 35-1409; 1941 Comp., § 14-1804; 1953 Comp., § 40-18-4; Laws 1967, ch. 136, § 1.

Cross-references. — As to public nuisances in general, see 30-8-1 NMSA 1978. For offenses of improper handling of fire and negligent arson, see 30-17-1 and 30-17-5 NMSA 1978, respectively.

State forester. — Section 68-2-3 NMSA 1978 makes the director of the forestry division of the minerals and natural resources department the "state forester."

Law reviews. — For note, "Forest Fire Protection on Public and Private Lands in New Mexico," see 4 Nat. Resources J. 374 (1964).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Liability for spread of fire purposely and lawfully kindled, 24 A.L.R.2d 241.

OKLAHOMA*

Detailed Summary of

Okla. Stat. Ann. tit.63, § 2-321 to 2-329 (West Supp. 1991). Precursor Substances Act.

§ 2-321. Short Title.

Act may be cited as the Precursor Substances Act.

§ 2-322. Precursor substances - License or permit.

A. A person shall have a permit or license to possess, sell, manufacture, transfer or furnish precursors. List of controlled precursors, including ephedrine and piperidine.

B. The Director (director) of the Oklahoma State Bureau of Narcotics and Dangerous Drugs Control shall deny or grant a permit application.

§ 2-323. License to sell, transfer or otherwise furnish - Application - Records - Fee.

A. A person who manufactures, sells, transfers, or furnishes a precursor must obtain an annual license from the director.

B. To obtain a license, a person shall:
   1. obtain an application;
   2. submit the application to the director; and
   3. demonstrate a legitimate reason to sell, transfer, or furnish precursors.

C. The application shall include:
   1. the name of the business;
   2. the business address;
   3. the business phone number;
   4. the names and addresses of the business owners;
   5. the location of the storage facility;
   6. the identification of the precursors to be sold; and
   7. the applicant's criminal history.

D. A licensee shall keep an accurate record of transactions and the following information for at least two years:

***See Appendix for analysis of clandestine lab problem in Oklahoma which prompted drafting and passage of the Precursor Substances Act.**

1. inventory;
2. purchase receipts;
3. manufacturing records;
4. copies of permits or written authorizations waiving the permit requirements; and
5. records of substance disposal.

E. The license shall cost $100.00 annually, and may be renewed annually. Fees shall be payable to the Oklahoma State Bureau of Narcotics Revolving Fund.

§ 2-324. Permit to possess - Application - Fee- Regular report in lieu of permit.

A. A person or business shall apply in person to the director or his designee for a permit to possess precursors.

B. The following must be submitted in person to the director or his designee:
1. a driver's license or other personal identification number, birth date, address, and driver's license or personal identification card containing a photograph. The person applying for a corporation shall furnish the required information and disclose his relationship to the corporation;
2. a description of the substance's use; and
3. the location where the substance is to be stored and used.

C. The three parts of the permit include:

1. a copy to be retained by the Oklahoma State Bureau of Narcotic and Dangerous Drugs Control;
2. a copy to be retained by the person furnishing the precursor; and
3. a copy to be attached to the container of the precursor.

D. The permit shall cost $10.00 and shall be payable to the Oklahoma State Bureau of Narcotics and Dangerous Drugs Control Revolving Fund.

E. The director may authorize in writing a comprehensive monthly report in lieu of the permit if the recipient has a record of lawful use of the substance.

§ 2-325. Denial, suspension or revocation of license or permit - Grounds- Order to show cause - Administrative proceedings - Suspension without order to show cause.

A. The director may deny, suspend, or revoke a license or permit if the licensee or permit holder:
1. has materially falsified an application;
2. has been convicted of a misdemeanor relating to precursors or a felony under state or federal law;
3. has failed to maintain effective controls against illegal diversion.

B. The director shall issue an order to show cause why a license or permit should not be denied, suspended, or revoked. The order shall state its basis and require the applicant, licensee, or permit holder to appear before the appropriate person or agency within 30 days of the date of the order. Proceedings shall be conducted in accordance with the Administrative Procedures Act.

C. The director shall suspend without an order to show cause any license or permit if there is imminent danger to the public health or safety. Simultaneously, proceedings under B shall be commenced. The suspension is effective until conclusion of the proceedings unless withdrawn by the director or vacated by a court.

§ 2–326. Discovery of loss or theft – Disposal – Reports – Other duties.

A. A licensed or permitted business or person who discovers a loss or theft of, or disposes of a precursor shall:

1. report the loss, theft, or disposal to the director no later than the third business day after the discovery or actual disposal; and
2. include the amount of loss, theft or disposal in the report. Disposal shall be in accordance with the rules and regulations of the U.S. Environmental Protection Administration and shall be performed at the permit or license holder's expense.

B. A person who manufactures, sells, transfers, possesses, uses, or furnishes precursors shall:

1. maintain required records;
2. permit authorized inspections; and
3. cooperate with the inspections.

§ 2–327. Application of act – Sale or transfer of certain non–narcotic products.

Sections 2–322 to 2–326 are inapplicable to non–narcotic products that include precursors and may be lawfully sold with a prescription or over–the–counter. This act is inapplicable to common carriers.

§ 2–328. Violations – Penalties.

A. A person or business who manufactures, sells, transfers, furnishes, or receives a precursor commits an offense if the person:

1. does not comply with Sections 2–322, 2–323, or 2–326; or
2. knowingly makes a false statement in a report or record.

B. Except as provided by C, an offense under A is a misdemeanor and punishable by a jail term not to exceed one year or a fine not to exceed $10,000.00.

C. A person commits an offense if he manufactures, sells, transfers, or otherwise furnishes a precursor with knowledge or intent that the recipient shall use the precursor to unlawfully manufacture a substance or analog.

D. A second or subsequent violation shall be a felony punishable by a penitentiary term not more than ten years or by a fine not to exceed $25,000.00 or by both fine and imprisonment. The imprisonment shall not run concurrent with imprisonment sentences for other violations of Title 63.

E. A person commits an offense if the person:

1. purchases, obtains, or possesses a precursor without obtaining a required permit;
2. possesses or controls a precursor with no attached permit;
3. knowingly makes a false statement in an application or report; or
4. manufactures, sells, transfers, or furnishes a precursor to a person or business who does not have a permit.

F. An offense under C or E is a felony punishable by a penitentiary term not more than ten years or by a fine not to exceed $25,000.00 or by both fine and imprisonment. The imprisonment shall not run concurrent with imprisonment sentences for other violations of Title 63.

§ 2-329. Drug cleanup fines - Disposition of fines collected.

A. The following drug cleanup fine shall be imposed in addition to any fine or imprisonment:

1. Ten thousand dollars ($10,000.00) for violations of subsection A of Section 2-328.
2. One hundred thousand dollars ($100,000.00) for violations of subsections C,D, or E of Section 2-328.

B. All collected fines shall be transferred to the OSBI Revolving Fund.

Historical and Statutory Notes

Prior to repeal § 2-313.14 was amended by Laws 1987, c. 118, § 56.

LABELS

§ 2-314. Labels

DESTRUCTION OF CONTROLLED DANGEROUS SUBSTANCES

§ 2-315. Submission of out of date controlled dangerous substances for destruction

A. Any person required to obtain an annual registration pursuant to Section 2-302 of Title 63 of the Oklahoma Statutes, or any group home, or residential care home as defined by Section 1-820 of this title shall submit for destruction all controlled dangerous substances which are out of date, which are unwanted, unused or which are abandoned by their owner at their facility due to death or other circumstances.

B. All such controlled dangerous substances shall be submitted to the Oklahoma City laboratory of the Oklahoma State Bureau of Investigation, along with all required information on forms provided by the Oklahoma State Bureau of Investigation, or to the Federal Drug Enforcement Administration. When any such substance is transported by private contract or common carrier or United States Postal Service for the purpose of destruction, the sender shall require a receipt from such private contract or common carrier or United States Postal Service, and such receipt shall be retained as a permanent record by the sender.

C. Controlled dangerous substances submitted to the Oklahoma State Bureau of Investigation pursuant to the provisions of this section shall be destroyed pursuant to the procedures provided in subsection A of Section 2-508 of Title 63 of the Oklahoma Statutes.

D. This section shall constitute a part of the Uniform Controlled Dangerous Substances Act.[1]

Added by Laws 1988, c. 308, § 10, operative Jan. 1, 1989. Amended by Laws 1990, c. 144, § 7, emerg. eff. May 1, 1990.

[1] Section 2-101 et seq. of this title.

Historical and Statutory Notes

Section 14 of Laws 1988, c. 308 provides for an operative date.

Notes of Decisions

Residential care facilities 1

1. Residential care facilities

A "nursing home" is a "residential care facility" required to submit for destruction all controlled dangerous substances which are out of date, unwanted, unused, or abandoned by their owner at its facility due to death or other circumstances. 63 Okl.St.Ann. § 2-315. Op.Atty.Gen. No. 88-86 (April 4, 1989).

PRECURSOR SUBSTANCES ACT [NEW]

§ 2-321. Short title

Sections 3 through 11 of this act[1] shall constitute a part of the Uniform Controlled Dangerous Substances Act[2] and shall be known and may be cited as the "Precursor Substances Act".[3]

Added by Laws 1990, c. 220, § 3, eff. Sept. 1, 1990.

[1] Sections 2-321 to 2-329 of this title.
[2] Section 2-101 et seq. of this title.
[3] Sections 2-321 to 2-329 of this title.

Historical and Statutory Notes

Title of Act:

An Act relating to public health and safety; amending 63 O.S.1981, Sections 2-206, as last amended by Section 2, Chapter 43, O.S.L.1988, and 2-509, as amended by Section 12, Chapter 138, O.S.L.1987 (63 O.S.Supp.1989, Sections 2-206 and 2-509), which relate to the Uniform Controlled Dangerous Substances Act; modifying scheduling; increasing certain penalty; creating the Precursor Substances Act; providing short title; requiring certain permits or license; providing procedures; requiring records of certain transactions; providing for issuance and renewal of permits; establishing conditions for denial, suspension or revocation of permit or license; providing for hearing; providing for exception to certain permit; requiring certain reports within certain time; providing for audits and inspections; providing exceptions; prohibiting certain acts and providing penalties therefor; providing additional penalty for drug cleanup; transferring certain fines to OSBI Revolving Fund; providing for codification; and providing an effective date. Laws 1990, c. 220.

§ 2–322. Precursor substances—License or permit

A. No person or business shall possess, sell, manufacture, transfer, or otherwise furnish any of the following precursor substances without first having a permit or license issued by the Director of the Oklahoma State Bureau of Narcotics and Dangerous Drugs Control, except as provided in Section 9 of this act:[1]

1. D-Lysergic acid.
2. Ergotamine and its salts.
3. Ergonovine and its salts.
4. Methylamine.
5. Ethylamine.
6. Phenyl-2-Propanone.
7. Phenylacetic acid and its salts.
8. Ephedrine, its salts, optical isomers and salts of optical isomers.
9. Norpseudoephedrine, its salts, optical isomers, and salts of optical isomers.
10. Phenylpropanolamine, its salts, optical isomers and salts of optical isomers.
11. Benzyl cyanide.
12. N-methylephedrine, its salts, optical isomers and salts of optical isomers.
13. Pseudoephedrine, its salts, optical isomers and salts of optical isomers.
14. Chloroephedrine, its salts, optical isomers and salts of optical isomers.
15. Piperidine and its salts.
16. Pyrrolidine and its salts.
17. Propionic anhydride.
18. Isosafrole.
19. Safrole.
20. Piperonal.

B. Upon completion of an application for a license pursuant to Section 5 of this act,[2] or a permit pursuant to Section 6 of this act,[3] the Director of the Oklahoma State Bureau of Narcotics and Dangerous Drugs Control shall either grant or deny such license or permit. A denial of an application for a permit or license shall be handled as provided by Section 7 of this act.[4]

Added by Laws 1990, c. 220, § 4, eff. Sept. 1, 1990.

[1] Section 2-327 of this title

[2] Section 2-323 of this title

[3] Section 2-324 of this title

[4] Section 2-325 of this title

§ 2-323. License to sell, transfer or otherwise furnish—Application—Records—Fee

A. A manufacturer, wholesaler, retailer, or other person who sells, transfers, or otherwise furnishes any precursor substance defined in Section 4 of this act [1] must first obtain a license annually from the Director of the Oklahoma State Bureau of Narcotics and Dangerous Drugs Control.

B. The procedure for obtaining a license to sell, transfer, manufacture, purchase for resale, or otherwise furnish a precursor substance shall be as follows:

1. Obtain an application from the Oklahoma State Bureau of Narcotics and Dangerous Drugs Control;

2. Submit the application to the Director of the Oklahoma State Bureau of Narcotics and Dangerous Drugs Control; and

3. Demonstrate a legitimate reason to sell, transfer, or otherwise furnish precursor chemicals.

C. The content of the application for a license shall include, but not be limited to, the following information:

1. Name of business;

2. Address of business other than a post office box number;

3. Phone number of business;

4. Names and addresses of business owners;

5. Location of storage facility;

6. Identification of precursor substances to be sold; and

7. Criminal history of applicant.

D. A licensee shall make an accurate and legible record of any transaction of precursor substances and maintain such record together with the following records for a period of at least two (2) years:

1. Inventory on hand;

2. Purchase receipts;

3. Manufacturing records including the date and quantity of any precursor substance manufactured, the quantity of precursor substances used in manufacturing any other substance or product, and the inventory on hand of precursor substances after the manufacturing of any other substance or product;

4. Copies of the Oklahoma Bureau of Narcotics purchase permits or written authorization waiving the permit requirement, as provided by subsection E of Section 6 of this act;[2] and

5. Records of substance disposal.

E. The license shall cost One Hundred Dollars ($100.00) annually and shall be renewable on July 1 of each year. The fee shall be payable to the Oklahoma State Bureau of Narcotics Revolving Fund.

Added by Laws 1990, c. 220, § 5, eff. Sept. 1, 1990.

[1] Section 2-322 of this title.

[2] Section 2-324 of this title.

§ 2-324. Permit to possess—Application—Fee—Regular report in lieu of permit

A. Any person or business having a legitimate need for using precursor substances defined in Section 4 of this act,[1] shall apply in person to the Director of Oklahoma State Bureau of Narcotics and Dangerous Drugs Control, or his designee, for a permit to possess such substances each time said substance is obtained.

B. The following must be submitted in person to the Director of Oklahoma Bureau of Narcotics and Dangerous Drugs Control, or his designee, to receive a permit for possession of precursor substances:

1. A driver's license number or other personal identification certificate number, date of birth, residential or mailing address, other than a post office box number, and a driver's license or personal identification card issued by the Department of Public Safety which contains a photograph of the recipient. In the event the applicant is a corporation, the information in this paragraph shall be required of the person making application for the permit. In addition, the person making application for the permit on behalf of a corporation shall disclose his relationship to the corporation;

2. A complete description of how the substance is to be used; and

3. The location where the substance is to be stored and used.

C. The permit shall consist of three parts, including:

1. A copy to be retained by the Oklahoma State Bureau of Narcotics and Dangerous Drugs Control;

2. A copy to be retained by the manufacturer, wholesaler, retailer, or other person furnishing precursor substances; and

3. A copy to be attached to the container of the precursor substances and to be kept with the substances at all times.

D. The permit shall cost Ten Dollars ($10.00) and shall be payable to the Oklahoma State Bureau of Narcotics and Dangerous Drugs Control Revolving Fund.

E. The Director may authorize in writing any person or business to submit a comprehensive monthly report in lieu of the permit required by this section, if the Director determines that the recipient has established a record of utilization of the substance solely for a lawful purpose.

Added by Laws 1990, c. 220, § 6, eff. Sept. 1, 1990.

[1] Section 2-322 of this title.

§ 2-325. Denial, suspension or revocation of license or permit—Grounds—Order to show cause—Administrative proceedings—Suspension without order to show cause

A. A license or permit, obtained pursuant to Sections 5 or 6 of this act,[1] shall be denied, suspended, or revoked by the Director upon finding that the licensee or permit holder has:

1. Materially falsified any application filed pursuant to this act or required by this act;

2. Been convicted of a misdemeanor relating to any precursor substance defined in Section 4 of this act[2] or any felony under the laws of this state or the United States; or

3. Failed to maintain effective controls against the diversion of said precursors to unauthorized persons or entities.

B. Before denying, suspending, or revoking a license or permit, the Director shall cause to be served upon the applicant, licensee, or permit holder an order to show cause why a license or a permit should not be denied, suspended, or revoked. The order to show cause shall contain a statement of the basis therefor and shall call upon the applicant, licensee, or permit holder to appear before the appropriate person or agency at the time and place within thirty (30) days after the date of service of the order. The proceedings shall be conducted in accordance with the Administrative Procedures Act[3] without regard to any criminal prosecution or other proceeding.

C. The Director shall suspend, without an order to show cause, any license or permit simultaneously with the institution of proceedings described in subsection B of this section if he finds there is imminent danger to the public health or safety which warrants this action. The suspension shall continue in effect until the conclusion of the proceedings, including judicial review thereof, unless withdrawn by the Director or dissolved by a court of competent jurisdiction.

Added by Laws 1990, c. 220, § 7, eff. Sept. 1, 1990.

[1] Sections 2-323, 2-324 of this title.
[2] Section 2-322 of this title.
[3] Section 250 et seq. and § 301 et seq. of title 75.

§ 2-326. Discovery of loss or theft—Disposal—Reports—Other duties

A. Any person or business, licensed or permitted, who discovers a loss or theft of, or disposes of a substance listed in Section 4 of this act [1] shall:

1. Submit a report of the loss, theft, or disposal to the Director of the Oklahoma Bureau of Narcotics and Dangerous Drugs Control no later than the third business day after the date the manufacturer, wholesaler, retailer, or other person discovers the loss or theft, or after the actual disposal; and

2. Include the amount of loss, theft, or disposal in the report. Any disposal of precursor substances must be done in accordance with the rules and regulations of the United States Environmental Protection Administration and shall be performed at the expense of the permit or license holder.

B. A manufacturer, wholesaler, retailer, or other person who sells, transfers, possesses, uses, or otherwise furnishes any precursor substance shall:

1. Maintain records as specified in Section 5 of this act;[2]

2. Permit agents of the Oklahoma State Bureau of Narcotics and Dangerous Drugs Control to conduct on-site audits, inspect inventory on hand and inspect all records made in accordance with this act at any reasonable time; and

3. Cooperate with the audit, and the full and complete inspection or copying of any records.

Added by Laws 1990, c. 220, § 8, eff. Sept. 1, 1990.

[1] Section 2-322 of this title.
[2] Section 2-323 of this title.

§ 2-327. Application of act—Sale or transfer of certain nonnarcotic products

Sections 4 through 8 of this act [1] shall not apply to the sale or transfer of a nonnarcotic product that includes a precursor substance defined in Section 4 of this act, if the product may be sold lawfully with a prescription or over the counter without a prescription pursuant to the Federal Food, Drug and Cosmetic Act, 21 U.S.C. Section 301 et seq., or a rule adopted pursuant thereto. Further, this act shall not apply to common carriers in the transaction of business as common carriers.

Added by Laws 1990, c. 220, § 9, eff. Sept. 1, 1990.

[1] Sections 2-322 to 2-326 of this title.

§ 2-328. Violations—Penalties

A. A person or business who manufactures, sells, transfers, furnishes, or receives a precursor substance defined in Section 4 of this act [1] commits an offense if the person:

1. Does not comply with the requirements of Sections 4, 5 or 8 of this act;[2] or

2. Knowingly makes a false statement in a report or record required by Section 5 or 8 of this act.

B. Except as provided by subsection C of this section, an offense under subsection A of this section is a misdemeanor and punishable by imprisonment in the county jail for a term not to exceed one year or by a fine not to exceed Ten Thousand Dollars ($10,000.00).

C. A person who manufactures, sells, transfers, or otherwise furnishes a precursor substance defined in Section 4 of this act commits an offense if the person manufactures, sells, transfers, or furnishes the substance with the knowledge or intent that the recipient shall use the substance to unlawfully manufacture a controlled substance or a controlled substance analog.

D. A second or subsequent violation of subsection A of this section shall be a felony punishable by imprisonment in the State Penitentiary for a term not more than ten (10) years or by a fine not to exceed Twenty-five Thousand Dollars ($25,000.00) or by both such fine and imprisonment. Said imprisonment shall not run concurrent with other imprisonment sentences for violations of other provisions of Title 63 of the Oklahoma Statutes.

E. A person who is required by Sections 4 or 6 of this act [3] to have a permit for precursor substances commits an offense if the person:

1. Purchases, obtains, or possesses a precursor substance without having first obtained a permit;

2. Has in his possession or immediate control a precursor substance with no attached permit;

3. Knowingly makes a false statement in an application or report required by Sections 6 or 8 of this act; or

4. Manufacturers, sells, transfers, or otherwise furnishes any person or business a precursor substance defined in Section 4 of this act, who does not have a permit.

F. An offense under subsection C or E of this section is a felony punishable by imprisonment in the State Penitentiary for a term not more than ten (10) years or by a fine not to exceed Twenty-five Thousand Dollars ($25,000.00) or by both such fine and imprisonment. Said imprisonment shall not run concurrent with other imprisonment sentences for violations of other provisions of Title 63 of the Oklahoma Statutes.

Added by Laws 1990, c. 220, § 10, eff. Sept. 1, 1990.

[1] Section 2-322 of this title.

[2] Sections 2-322, 2-323, 2-326 of this title.

[3] Sections 2-322, 2-324 of this title.

§ 2-329. Drug cleanup fines—Disposition of fines collected

A. In addition to any fine or imprisonment imposed under Section 10 of this act,[1] the following drug cleanup fine shall be imposed:

1. Ten Thousand Dollars ($10,000.00) for violations described in subsection A of Section 10 of this act; and

2. One Hundred Thousand Dollars ($100,000.00) for violations described in subsections C, D or E of Section 10 of this act.

B. All fines collected under this section shall be transferred to the OSBI Revolving Fund, pursuant to Section 150.19a of Title 74 of the Oklahoma Statutes.

Added by Laws 1990, c. 220, § 11, eff. Sept. 1, 1990.

[1] Section 2-328 of this title.

ARTICLE IV. OFFENSES AND PENALTIES

§ 2-401. Prohibited acts A—Penalties

A. Except as authorized by the Uniform Controlled Dangerous Substances Act, Section 2-101 et seq. of this title, it shall be unlawful for any person:

1. To distribute, dispense, or solicit the use of or use the services of a person less than eighteen (18) years of age to distribute or dispense a controlled dangerous substance or possess with intent to manufacture, distribute, or dispense, a controlled dangerous substance;

2. To create, distribute, or possess with intent to distribute, a counterfeit controlled dangerous substance; or

3. To distribute any imitation controlled substance as defined by Section 2-101 of this title, except when authorized by the Food and Drug Administration of the United States Department of Health and Human Services.

B. Any person who violates the provisions of this section with respect to:

TEXAS

Detailed Summary of

Texas Health and Safety Code Ann. § 481.077 - 481.082 (1991) (incorporated into the state Controlled Substances Act).

§ 481.077. Chemical Precursor Records and Reports.

(a) Except as provided in (l), a person who sells, transfers, or furnishes listed precursors shall keep accurate records of transactions for at least two years. List of controlled precursors, including ephedrine and piperidine.

(b) The Director of the Department of Public Safety (director) may add or delete substances from the list after determining whether the substance jeopardizes public health and welfare or is used in the illegal manufacture of a controlled substance or analog.

(c) The Department of Public Safety shall file with the Secretary of State certified copies of rules.

(d) Before selling, transferring, or furnishing a precursor, a person shall:
- (1) obtain from a non-business recipient:
  - (A) a license number or personal identification number, birth date and address from a driver's license or personal identification card;
  - (B) the years, state, and motor vehicle license number;
  - (C) a description of the substance's use and;
  - (D) a signature.
- (2) obtain from a business recipient:
  - (A) an authorization letter which includes the business license or tax identification number, address, telephone number and description of the substance's use; and
  - (B) a signature.
- (3) for any recipient, sign as a witness to the signature and identification.

(e) A non-business recipient shall present to a manufacturer or other person a properly issued permit.

(f) Except as provided by (h), a person who manufactures, sells, transfers or furnishes precursors shall report to the director at least 21 days before delivery.

(g) The director shall supply forms for the submission of:
- (1) the report in (f);
- (2) the name and amount of delivered precursor;

(3) other information required by the director.

(h) The director may authorize submission of a comprehensive monthly report if eh determines that:
- (1) the furnisher and recipient have a regular supply and purchase relationship; or
- (2) the recipient has a record of lawful use of the substance.

(i) A person who receives a precursor from out–of–state or discovers a loss or theft of a precursor shall:
- (1) submit a report to the director; and
- (2) include in the report:
  - (A) the difference between the amount shipped and received; or
  - (B) the amount of loss or theft.

(j) A report under (i) must:
- (1) be made not later than the third day after discovery of the discrepancy, loss, or theft; and
- (2) if appropriate, include the name of the carrier or transporter and the shipment date.

(k) A person who manufactures, sells, transfers, or furnishes a precursor shall maintain records and inventories and allow authorized inspections. This subsection is inapplicable to a recipient who has obtained a precursor subject to (a) and is a permit holder.

(i) This section is inapplicable to non–narcotics which include precursors and may be sold lawfully with a prescription or over–the–counter.

§ 481.078. Chemical Precursor Transfer Permit.

(a) A person must obtain a permit:
- (1) to sell, transfer, or furnish a precursor;
- (2) to receive a precursor from out–of–state; or
- (3) to receive a precursor if the recipient does not represent a business.

(b) The Department of Public Safety shall develop procedures for the issuance and renewal of a permit for:
- (1) one sale, transfer, receipt or furnishing of a precursor; or
- (2) multiple transactions.

(c) A permit is valid for one year after issuance or renewal and only for the indicated transactions.

(d) A permit holder must report to the director a change in business name, address, and telephone number not later than the seventh day after the change.

(e) The Department of Public Safety shall file with the Secretary of State certified copies of rules.

§ 481.079. Offense: Unlawful Transfer or Receipt of Chemical Precursor.

(a) A person who sells, transfers, furnishes, or receives a precursor commits an offense if the person:
- (1) does not have a required permit;
- (2) does not comply with § 481.077; or
- (3) knowingly falsifies statements in a report or record.

(b) A person who sells, transfers or furnishes a precursor commits an offense if the person knows or intends the recipient to use a precursor to unlawfully manufacture a substance or analog.

(c) An offense under (a) is a Class A misdemeanor unless the defendant has prior convictions, in which case the offense is a third degree felony.

(d) An offense under (b) is a third degree felony.

§ 481.080. Chemical Laboratory Apparatus Record-keeping Requirements and Penalties.

(a) Chemical laboratory apparatus - equipment designed, made, or adapted to manufacture a controlled substance, including:
- (1) condensers;
- (2) distilling apparatus;
- (3) vacuum dryers;
- (4) three-neck flasks;
- (5) distilling flask;
- (6) tableting machines; or
- (7) encapsulating machines.

(b) A person who manufactures, sells, transfers, or furnishes chemical laboratory apparatus shall keep accurate records for at least two years.

(c) The director may adopt rules.

(d) The director may name additional chemical laboratory apparatus if public health and welfare are jeopardized by use of the apparatus to illicitly manufacture a substance or analog.

(e) The Department of Public Safety shall file certified copies of rules with the Secretary of State.

(f) Before selling, transferring, or otherwise furnishing an apparatus, a person shall:
- (1) obtain from a non-business recipient:
  - (A) a driver's license number or other personal identification number, birth date and address from a driver's license or personal identification card;
  - (B) the year, state, and license number of the motor vehicle;
  - (C) a description of the apparatus' use; and

(D) the recipient's signature; and

(2) obtain from a business recipient:

(A) an authorization letter which includes the business license or tax identification number, address, telephone number and description of the apparatus' use; and

(B) a signature.

(3) for any recipient, sign as a witness to the signature and identification.

(g) A non–business recipient shall present to a manufacturer or other person a properly issued permit.

(h) Except as provided by (j), a person who manufactures, sells, transfers, or furnishes an apparatus shall report to the director at least 21 days before delivery.

(i) The director shall supply a form for the submission of:

(1) the report in (h);

(2) the name and number of the delivered apparatus; and

(3) any other required information.

(j) The director may authorize a comprehensive monthly report if:

(1) the furnisher and recipient have a regular supply and purchase relationship; or (2) the recipient has a record of lawful use of the apparatus.

(k) A person who receives an apparatus from out–of–state or discovers a loss or theft of an apparatus shall:

(1) submit a report to the director; and

(2) include in the report:

(A) the difference between the number received and shipped; or

(B) the number of the loss or theft.

(l) A report must:

(1) be made not later than the third day after discovery of the discrepancy, loss,or theft; and

(2) if appropriate, include the name of the carrier or transporter and the shipment date.

(m) A person who manufactures, sells, transfers, or furnishes an apparatus shall maintain records and inventories, and allow authorized inspections. This section is inapplicable to a person who has obtained an apparatus under (a) and is a permit holder.

§ 481.081. Chemical Laboratory Apparatus Transfer Permit.

(a) A person must obtain a permit:

(1) to sell, transfer, or furnish an apparatus;

(2) to receive an apparatus from out–of–state; or

(3) to receive an apparatus if the recipient does not represent a business.

(b) The Department if Public Safety shall develop procedures for the issuance and renewal of a permit for:

(1) one sale, transfer, receipt or furnishing of an apparatus, or
(2) multiple transactions.

(c) A permit is valid for one year after issuance or renewal and only for the indicated transactions.

(d) A permit holder must report to the director a change in business name, address, and telephone number not later than the seventh day after the change.

(e) The Department of Public Safety shall file with the Secretary of State certified copies of rules.

§ 481.082. Offense: Unlawful Transfer or Receipt of Chemical Laboratory Apparatus.

(a) A person who sells, transfers, furnishes, or receives an apparatus commits an offense if the person:

(1) does not have a required permit;
(2) does not comply with § 481.080; or
(3) knowingly falsifies a report or record.

(b) A person who sells, transfers or furnishes an apparatus commits an offense if the person knows or intends the recipient to use the apparatus to unlawfully manufacture a substance or analog.

(c) An offense under (a) is a Class A misdemeanor unless the defendant has prior convictions, in which case the offense is a third degree felony.

(d) An offense under (b) is a third degree felony.

to comply with this subsection is subject to disciplinary action, including dismissal.

Acts 1989, 71st Leg., ch. 678, § 1, eff. Sept. 1, 1989.

Historical Note

Prior Law:
Acts 1905, 29th Leg., p. 45.
Acts 1919, 36th Leg., pp. 277, 278.
Acts 1919, 36th Leg., 2nd C.S., p. 156.
Acts 1931, 42nd Leg., p. 154, ch. 97.
Acts 1933, 43rd Leg., p. 609, ch. 204.
Vernon's Ann.P.C. (1925) arts. 720 to 725a.
Acts 1937, 45th Leg., p. 333, ch. 169.
Acts 1941, 47th Leg., p. 647, ch. 392, §§ 1, 2.
Acts 1943, 48th Leg., p. 346, ch. 225, § 1.
Acts 1943, 48th Leg., p. 703, ch. 391.
Acts 1953, 53rd Leg., p. 812, ch. 328, §§ 1 to 7.
Acts 1954, 53rd Leg., 1st C.S., p. 103, ch. 50, § 1.
Acts 1955, 54th Leg., p. 903, ch. 354, § 1.
Acts 1955, 54th Leg., p. 1027, ch. 386, § 1.
Acts 1955, 54th Leg., p. 1215, ch. 486, § 1.
Acts 1957, 55th Leg., p. 215, ch. 101, § 1.
Acts 1961, 57th Leg., p. 315, ch. 167, § 1.
Acts 1963, 58th Leg., p. 570, ch. 206, §§ 1, 2.
Acts 1969, 61st Leg., p. 703, ch. 242, § 1.
Acts 1971, 62nd Leg., p. 2913, ch. 963, §§ 1, 2.
Acts 1971, 62nd Leg., p. 3069, ch. 1023, §§ 1 to 4.
Vernon's Ann.P.C. (1925) art. 725b.
Acts 1953, 53rd Leg., p. 594, ch. 237.
Acts 1955, 54th Leg., p. 1026, ch. 385, § 1.
Acts 1961, 57th Leg., p. 310, ch. 161, § 1.
Vernon's Ann.P.C. (1925) art. 725c.
Acts 1955, 54th Leg., p. 810, ch. 300.
Acts 1971, 62nd Leg., p. 2805, ch. 908, §§ 1 to 4.
Vernon's Ann.P.C. (1925) art. 725d.
Acts 1971, 62nd Leg., p. 816, ch. 87.
Vernon's Ann.Civ.St. art. 4413(37).
Acts 1973, 63rd Leg., p. 995, ch. 399, § 5.
Vernon's Ann.P.C. (1925) art. 725f.
Acts 1973, 63rd Leg., p. 1132, ch. 429.
Acts 1981, 67th Leg., p. 2314, ch. 570, § 2.
Acts 1985, 69th Leg., ch. 17, § 2.
Vernon's Ann.Civ.St. art. 4476-15, § 3.09(g) to (j).

Cross References

Access to public information, exception for triplicate prescription information, see Vernon's Ann.Civ.St. art. 6252-17a, § 3.

§ 481.077. Chemical Precursor Records and Reports

(a) Except as provided by Subsection (*l*), a person who sells, transfers, or otherwise furnishes any of the following precursor substances to a person shall make an accurate and legible record of the transaction and maintain the record for at least two years after the date of the transaction:

(1) Methylamine;
(2) Ethylamine;
(3) D-lysergic acid;
(4) Ergotamine tartrate;
(5) Diethyl malonate;
(6) Malonic acid;
(7) Ethyl malonate;
(8) Barbituric acid;
(9) Piperidine;
(10) N-acetylanthranilic acid;
(11) Pyrrolidine;
(12) Phenylacetic acid;

(13) Anthranilic acid;

(14) Morpholine;

(15) Ephedrine;

(16) Pseudoephedrine or norpseudoephedrine; or

(17) Phenylpropanolamine.

(b) The director by rule may name additional substances as precursors for purposes of Subsection (a) if public health and welfare are jeopardized by evidenced proliferation of a chemical substance used in the illicit manufacture of a controlled substance or controlled substance analogue. The director by rule may delete a substance named as a precursor for purposes of Subsection (a) if the director determines that the substance does not jeopardize public health and welfare or is not used in the illicit manufacture of a controlled substance or a controlled substance analogue.

(c) The Department of Public Safety shall file with the secretary of state a certified copy of a rule adopted under this section.

(d) Before selling, transferring, or otherwise furnishing to a person in this state a precursor substance subject to Subsection (a), a manufacturer, wholesaler, retailer, or other person shall:

(1) if the recipient does not represent a business, obtain from the recipient:

(A) the recipient's driver's license number or other personal identification certificate number, date of birth, and residential or mailing address, other than a post office box number, from a driver's license or personal identification card issued by the Department of Public Safety that contains a photograph of the recipient;

(B) the year, state, and number of the motor vehicle license of the motor vehicle owned or operated by the recipient;

(C) a complete description of how the substance is to be used; and

(D) the recipient's signature; or

(2) if the recipient represents a business, obtain from the recipient:

(A) a letter of authorization from the business that includes the business license or comptroller tax identification number, address, area code, and telephone number and a complete description of how the substance is to be used; and

(B) the recipient's signature; and

(3) for any recipient, sign as a witness to the signature and identification of the recipient.

(e) If the recipient does not represent a business, the recipient shall present to the manufacturer, wholesaler, retailer, or other person a permit issued in the name of the recipient by the Department of Public Safety under Section 481.078.

(f) Except as provided by Subsection (h), a manufacturer, wholesaler, retailer, or other person who sells, transfers, or otherwise furnishes to a

person in this state a precursor substance subject to Subsection (a) shall submit, at least 21 days before the delivery of the substance, a report of the transaction on a form obtained from the director that includes the information required by Subsection (d).

(g) The director shall supply to a manufacturer, wholesaler, retailer, or other person who sells, transfers, or otherwise furnishes a precursor substance subject to Subsection (a) a form for the submission of:

(1) the report required by Subsection (f);

(2) the name and measured amount of the precursor substance delivered; and

(3) any other information required by the director.

(h) The director may authorize a manufacturer, wholesaler, retailer, or other person to submit a comprehensive monthly report instead of the report required by Subsection (f) if the director determines that:

(1) there is a pattern of regular supply and purchase of the substance between the furnisher and the recipient; or

(2) the recipient has established a record of use of the substance solely for a lawful purpose.

(i) A manufacturer, wholesaler, retailer, or other person who receives from a source outside this state a substance subject to Subsection (a) or who discovers a loss or theft of a substance subject to Subsection (a) shall:

(1) submit a report of the transaction to the director in accordance with department rule; and

(2) include in the report:

(A) any difference between the amount of the substance actually received and the amount of the substance shipped according to the shipping statement or invoice; or

(B) the amount of the loss or theft.

(j) A report under Subsection (i) must:

(1) be made not later than the third day after the date that the manufacturer, wholesaler, retailer, or other person learns of the discrepancy, loss, or theft; and

(2) if the discrepancy, loss, or theft occurred during a shipment of the substance, include the name of the common carrier or person who transported the substance and the date that the substance was shipped.

(k) A manufacturer, wholesaler, retailer, or other person who sells, transfers, or otherwise furnishes any substance subject to Subsection (a) shall maintain records and inventories in accordance with rules established by the director and shall allow a peace officer to conduct audits and inspect records of purchases and all other records made in accordance with this section at any reasonable time and may not interfere with the audit or with the full and complete inspection or copying of those records. This subsection does not

apply to a recipient who has obtained a precursor substance subject to Subsection (a) and who is a permit holder under Section 481.078.

(*l*) This section does not apply to the sale or transfer of a nonnarcotic product that includes a precursor substance subject to Subsection (a) if the product may be sold lawfully with a prescription or over the counter without a prescription under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. Section 301 et seq.) or a rule adopted under that Act.

Acts 1989, 71st Leg., ch. 678, § 1, eff. Sept. 1, 1989. Amended by Acts 1989, 71st Leg., ch. 1100, § 5.02(k), eff. Sept. 1, 1989.

Historical Note

The 1989 amendment, to conform to Acts 1989, 71st Leg., ch. 776, § 14, in subsec. (a) substituted "Subsection (*l*)" for "Subsection (g)" in the introductory language; deleted former subsecs. (b) to (f), relating to additional substances, record information, inspection of records, report information, and notice of changed information; inserted subsecs. (b) to (k); redesignated former subsec. (g) as subsec. (*l*); in subsec. (*l*) inserted "with a prescription or" following "lawfully" and inserted "or a rule adopted under that Act".

Prior Law:

Acts 1905, 29th Leg., p. 45.
Acts 1919, 36th Leg., pp. 277, 278.
Acts 1919, 36th Leg., 2nd C.S., p. 156.
Acts 1931, 42nd Leg., p. 154, ch. 97.
Acts 1933, 43rd Leg., p. 609, ch. 204.
Vernon's Ann.P.C. (1925) arts. 720 to 725a.
Acts 1937, 45th Leg., p. 333, ch. 169.
Acts 1941, 47th Leg., p. 647, ch. 392, §§ 1, 2.
Acts 1943, 48th Leg., p. 346, ch. 225, § 1.
Acts 1943, 48th Leg., p. 703, ch. 391.
Acts 1953, 53rd Leg., p. 812, ch. 328, §§ 1 to 7.
Acts 1954, 53rd Leg., 1st C.S., p. 103, ch. 50, § 1.
Acts 1955, 54th Leg., p. 903, ch. 354, § 1.
Acts 1955, 54th Leg., p. 1027, ch. 386, § 1.
Acts 1955, 54th Leg., p. 1215, ch. 486, § 1.
Acts 1957, 55th Leg., p. 215, ch. 101, § 1.
Acts 1961, 57th Leg., p. 315, ch. 167, § 1.
Acts 1963, 58th Leg., p. 570, ch. 206, §§ 1, 2.
Acts 1969, 61st Leg., p. 703, ch. 242, § 1.
Acts 1971, 62nd Leg., p. 2913, ch. 963, §§ 1, 2.
Acts 1971, 62nd Leg., p. 3069, ch. 1023, §§ 1 to 4.
Vernon's Ann.P.C. (1925) art. 725b.
Acts 1953, 53rd Leg., p. 594, ch. 237.
Acts 1955, 54th Leg., p. 1026, ch. 385, § 1.
Acts 1961, 57th Leg., p. 310, ch. 161, § 1.
Vernon's Ann.P.C. (1925) art. 725c.
Acts 1955, 54th Leg., p. 810, ch. 300.
Acts 1971, 62nd Leg., p. 2805, ch. 908, §§ 1 to 4.
Vernon's Ann.P.C. (1925) art. 725d.
Acts 1971, 62nd Leg., p. 816, ch. 87.
Vernon's Ann.Civ.St. art. 4413(37).
Acts 1973, 63rd Leg., p. 995, ch. 399, § 5.
Vernon's Ann.P.C. (1925) art. 725f.
Acts 1973, 63rd Leg., p. 1132, ch. 429.
Acts 1987, 70th Leg., ch. 388, § 4.
Vernon's Ann.Civ.St. art. 4476-15, § 3.11(a) to (f), (j).

Cross References

Penalties, see § 481.124.

§ 481.078. Chemical Precursor Transfer Permit

(a) A person must obtain a chemical precursor transfer permit from the Department of Public Safety to be eligible:

(1) to sell, transfer, or otherwise furnish a precursor substance subject to Section 481.077(a) to a person in this state;

(2) to receive a precursor substance subject to Section 481.077(a) from a source outside this state; or

(3) to receive a precursor substance subject to Section 481.077(a) if the person, in receiving the substance, does not represent a business.

(b) The Department of Public Safety by rule shall develop procedures for the issuance and renewal of:

(1) a permit for one sale, transfer, receipt, or otherwise furnishing of a controlled substance precursor; or

(2) a permit for more than one sale, transfer, receipt, or otherwise furnishing of a controlled substance precursor.

(c) A permit issued or renewed under Subsection (b)(1) is valid only for the transaction indicated on the permit. A permit issued or renewed under Subsection (b)(2) is valid for one year after the date of issuance or renewal.

(d) A permit holder must report in writing or by telephone to the director a change in the holder's business name, address, area code, and telephone number not later than the seventh day after the date of the change.

(e) The Department of Public Safety shall file with the secretary of state a certified copy of a rule adopted under this section.

Added by Acts 1989, 71st Leg., ch. 1100, § 5.02(*l*), eff. Sept. 1, 1989.

Historical Note

The 1989 Act added this section to conform to Acts 1989, 71st Leg., ch. 776, § 15.

Prior Law:
Acts 1989, 71st Leg., ch. 776, § 15.
Vernon's Ann.Civ.St. art. 4476–15, § 3.111.

§ 481.079. Offense: Unlawful Transfer or Receipt of Chemical Precursor

(a) A person who sells, transfers, furnishes, or receives a precursor substance subject to Section 481.077(a) commits an offense if the person:

(1) is required by Section 481.078 to have a precursor transfer permit and does not have a precursor transfer permit at the time of the transaction;

(2) does not comply with Section 481.077; or

(3) knowingly makes a false statement in a report or record required by Section 481.077 or 481.078.

(b) A person who sells, transfers, or otherwise furnishes a precursor substance subject to Section 481.077(a) commits an offense if the person sells, transfers, or furnishes the substance with the knowledge or intent that the recipient will use the substance to unlawfully manufacture a controlled substance or controlled substance analogue.

(c) An offense under Subsection (a) is a Class A misdemeanor, unless it is shown on the trial of a defendant that the defendant was convicted previously under this section, in which event the offense is a felony of the third degree.

(d) An offense under Subsection (b) is a felony of the third degree.

Added by Acts 1989, 71st Leg., ch. 1100, § 5.02(*l*), eff. Sept. 1, 1989.

Historical Note

The 1989 Act added this section to conform to Acts 1989, 71st Leg. ch. 776, § 16.

Prior Law:
Acts 1989, 71st Leg., ch. 776, § 16.
Vernon's Ann.Civ.St. art. 4476-15, § 3.112.

Cross References

Punishment,
Class A misdemeanor, see V.T.C.A. Penal Code, § 12.21.
Third-degree felony, see V.T.C.A. Penal Code, § 12.34.

§ 481.080. Chemical Laboratory Apparatus Record-Keeping Requirements and Penalties

(a) In this section, "chemical laboratory apparatus" means any equipment designed, made, or adapted to manufacture a controlled substance, including:

(1) condensers;

(2) distilling apparatus;

(3) vacuum dryers;

(4) three-neck flasks;

(5) distilling flasks;

(6) tableting machines; or

(7) encapsulating machines.

(b) A manufacturer, wholesaler, retailer, or other person who sells, transfers, or otherwise furnishes chemical laboratory apparatus shall make an accurate and legible record of the transaction and maintain the record for at least two years after the date of the transaction.

(c) The director may adopt rules to implement this section.

(d) The director by rule may name additional chemical laboratory apparatus for purposes of Subsection (a) if public health and welfare are jeopardized by evidenced use of a chemical laboratory apparatus in the illicit manufacture of a controlled substance or controlled substance analogue. The director by rule may delete an apparatus listed in Subsection (a) if the director determines that the apparatus does not jeopardize public health and welfare or is not used in the illicit manufacture of a controlled substance or a controlled substance analogue.

(e) The Department of Public Safety shall file with the secretary of state a certified copy of a rule adopted under this section.

(f) Before selling, transferring, or otherwise furnishing to a person in this state an apparatus subject to Subsection (a), a manufacturer, wholesaler, retailer, or other person shall:

(1) if the recipient does not represent a business, obtain from the recipient:

(A) the recipient's driver's license number or other personal identification certificate number, date of birth, and residential or mailing address, other than a post office box number, from a driver's license or personal

identification card issued by the Department of Public Safety that contains a photograph of the recipient;

(B) the year, state, and number of the motor vehicle license of the motor vehicle owned or operated by the recipient;

(C) a complete description of how the apparatus is to be used; and

(D) the recipient's signature; or

(2) if the recipient represents a business, obtain from the recipient:

(A) a letter of authorization from the business that includes the business license or comptroller tax identification number, address, area code, and telephone number and a complete description of how the apparatus is to be used; and

(B) the recipient's signature; and

(3) for any recipient, sign as a witness to the signature and identification of the recipient.

(g) If the recipient does not represent a business, the recipient shall present to the manufacturer, wholesaler, retailer, or other person a permit issued in the name of the recipient by the Department of Public Safety under Section 481.081.

(h) Except as provided by Subsection (j), a manufacturer, wholesaler, retailer, or other person who sells, transfers, or otherwise furnishes to a person in this state an apparatus subject to Subsection (a) shall, at least 21 days before the delivery of the apparatus, submit a report of the transaction on a form obtained from the director that includes the information required by Subsection (f).

(i) The director shall supply to a manufacturer, wholesaler, retailer, or other person who sells, transfers, or otherwise furnishes an apparatus subject to Subsection (a) a form for the submission of:

(1) the report required by Subsection (h);

(2) the name and number of apparatus delivered; and

(3) any other information required by the director.

(j) The director may authorize a manufacturer, wholesaler, retailer, or other person to submit a comprehensive monthly report instead of the report required by Subsection (h) if the director determines that:

(1) there is a pattern of regular supply and purchase of the apparatus between the furnisher and the recipient; or

(2) the recipient has established a record of use of the apparatus solely for a lawful purpose.

(k) A manufacturer, wholesaler, retailer, or other person who receives from a source outside this state an apparatus subject to Subsection (a) or who discovers a loss or theft of an apparatus subject to Subsection (a) shall:

(1) submit a report of the transaction to the director in accordance with department rule; and

(2) include in the report:

(A) any difference between the number of the apparatus actually received and the number of the apparatus shipped according to the shipping statement or invoice; or

(B) the number of the loss or theft.

(*l*) A report under Subsection (k) must:

(1) be made not later than the third day after the date that the manufacturer, wholesaler, retailer, or other person learns of the discrepancy, loss, or theft; and

(2) if the discrepancy, loss, or theft occurred during a shipment of the apparatus, include the name of the common carrier or person who transported the apparatus and the date that the apparatus was shipped.

(m) A manufacturer, wholesaler, retailer, or other person who sells, transfers, or otherwise furnishes any apparatus subject to Subsection (a) shall maintain records and inventories in accordance with rules established by the director and shall allow a peace officer to conduct audits and inspect records of purchases and all other records made in accordance with this section at any reasonable time and may not interfere with the audit or with the full and complete inspection or copying of those records. This subsection does not apply to a recipient who has obtained a chemical laboratory apparatus subject to Subsection (a) and who is a permit holder under Section 481.081.

Added by Acts 1989, 71st Leg., ch. 1100, § 5.02(*l*), eff. Sept. 1, 1989.

Historical Note

The 1989 Act added this section to conform to Acts 1989, 71st Leg., ch. 776, § 17.

Prior Law:
Acts 1989, 71st Leg., ch. 776, § 17.
Vernon's Ann.Civ.St. art. 4476–15, § 3.12.

§ 481.081. Chemical Laboratory Apparatus Transfer Permit

(a) A person must obtain a chemical laboratory apparatus transfer permit from the Department of Public Safety to be eligible:

(1) to sell, transfer, or otherwise furnish an apparatus subject to Section 481.080(a) to a person in this state;

(2) to receive an apparatus subject to Section 481.080(a) from a source outside this state; or

(3) to receive an apparatus subject to Section 481.080(a) if the person, in receiving the apparatus, does not represent a business.

(b) The Department of Public Safety by rule shall develop procedures for the issuance and renewal of:

(1) a permit for one sale, transfer, receipt, or otherwise furnishing of a chemical laboratory apparatus; or

(2) a permit for more than one sale, transfer, receipt, or otherwise furnishing of a chemical laboratory apparatus.

(c) A permit issued or renewed under Subsection (b)(1) is valid only for the transaction indicated on the permit. A permit issued or renewed under Subsection (b)(2) is valid for one year after the date of issuance or renewal.

(d) A permit holder must report in writing or by telephone to the director a change in the holder's business name, address, area code, and telephone number not later than the seventh day after the date of the change.

(e) The Department of Public Safety shall file with the secretary of state a certified copy of a rule adopted under this section.

Added by Acts 1989, 71st Leg., ch. 1100, § 5.02(*l*), eff. Sept. 1, 1989.

Historical Note

The 1989 Act added this section to conform to Acts 1989, 71st Leg., ch. 776, § 18.

Prior Law:
Acts 1989, 71st Leg., ch. 776, § 18.
Vernon's Ann.Civ.St. art. 4476–15, § 3.121.

§ 481.082. Offense: Unlawful Transfer or Receipt of Chemical Laboratory Apparatus

(a) A person who sells, transfers, furnishes, or receives an apparatus subject to Section 481.080(a) commits an offense if the person:

(1) is required by Section 481.081 to have an apparatus transfer permit and does not have an apparatus transfer permit at the time of the transaction;

(2) does not comply with the requirements of Section 481.080; or

(3) knowingly makes a false statement in a report or record required by Section 481.080 or 481.081.

(b) A person who sells, transfers, or otherwise furnishes an apparatus subject to Section 481.080(a) commits an offense if the person sells, transfers, or furnishes the apparatus with the knowledge or intent that the recipient will use the apparatus to unlawfully manufacture a controlled substance or controlled substance analogue.

(c) An offense under Subsection (a) is a Class A misdemeanor, unless it is shown on the trial of a defendant that the defendant was convicted previously under this section, in which event the offense is a felony of the third degree.

(d) An offense under Subsection (b) is a felony of the third degree.

Added by Acts 1989, 71st Leg., ch. 1100, § 5.02(*l*), eff. Sept. 1, 1989.

Historical Note

The 1989 Act added this section to conform to Acts 1989, 71st Leg., ch. 776, § 19.

Prior Law:
Acts 1989, 71st Leg., ch. 776, § 19.
Vernon's Ann.Civ.St. art. 4476–15, § 3.122.

Cross References

Punishment,
Class A misdemeanor, see V.T.C.A. Code, § 12.21.
Third-degree felony; see V.T.C.A. Code, § 12.34.

[Sections 481.083 to 481.100 reserved for expansion]

WASHINGTON

Detailed Summary
of

Wash. Rev. Code Ann. § 69.43.010–69.43.100 (Supp.1991). Precursor Drugs.

69.43.010. Report to state board of pharmacy – List of substances – Modification of list – Identification of purchasers – Report of transactions – Penalties.

(1) A person who manufactures, sells, transfers or furnishes listed precursors shall report to the state board of pharmacy (board). List of controlled precursors, including ephedrine and piperidine.

(2) The board may add or delete substances from the list after considering:
   (a) the likelihood the substance may be used in the illegal production of a controlled substance;
   (b) the substance's availability;
   (c) the relative appropriateness of including the substance in this chapter or in the controlled substances chapter; and
   (d) the substance's legitimate uses.

(3) The board shall inform the appropriate legislative committees of changes to the precursor list.

(4) (a) A person who manufactures, sells, transfers, or furnishes precursors shall require proper identification from a purchaser.

(b) Proper identification means, for a face–to–face purchase, a driver's license or other state–issued identification containing a photograph, address, and license number or an authorization letter from a business containing a business license number and address; a description of the substance's use; and the purchaser's signature. The person selling, transferring or furnishing a precursor shall sign as a witness to the signature and identification of the purchaser. The board shall specify the proper identification necessary in other than face–to–face purchases.

(c) Violation is a misdemeanor.

(5) A person who manufactures, sells, transfers or furnishes a precursor shall report to the board not less than 21 days before delivery. The board may authorize monthly reports with respect to repeated transactions between a furnisher and recipient if:
   (a) the furnisher and recipient have a regular supply and

purchase relationship; or

(b) the recipient has a record of lawful use of the substance.

(6) Failure to submit a report is a gross misdemeanor.

§ 69.43.020. Receipt of substance from source outside State–Report–Penalty.

(1) A person who receives a precursor from out–of–state shall report the transaction to the board.

(2) Failure to submit a report under (1) is a gross misdemeanor.

§ 69.43.030. Exemptions.

The following persons are exempted from the requirements of 69.43.010 and 69.43.020:

(1) pharmacists or authorized persons who sell or furnish a substance upon a practitioner's prescription;

(2) a practitioner who administers or furnishes a substance to patients;

(3) a licensed manufacturer or wholesaler who furnishes a substance to a licensed pharmacy or practitioner;

(4) any sale, transfer, furnishing, or receipt of a drug or cosmetic that is lawfully sold, transferred, or furnished over–the–counter without a prescription.

§ 69.43.040. Reporting form.

(1) The health department shall provide a common reporting form which contains:

(a) the name of the substance;

(b) the quantity sold, transferred, or furnished;

(c) the date sold, transferred, or furnished;

(d) the name and address of the purchaser or recipient; and

(e) the name and address of the person selling, transferring, or furnishing the substance.

(2) The department may authorize computer–generated monthly reports.

§ 69.43.050. Rules.

(1) The board shall adopt all necessary rules.

(2) Not withstanding (1), the health department may adopt necessary administrative rules.

§ 69.43.060. Theft – Missing quantity – Reporting.

(1) A person shall report to the board the theft or loss of a precursor within seven days of discovery.

(2) A person shall report to the board any difference between the quantity shipped and received with seven days of actual knowledge of the discrepancy. When applicable, the report shall include the name of the carrier or transporter and the shipment date.

§ 69.43.070. Sale, transfer, or furnishing of substance for unlawful purpose – Receipt of substance with intent to use unlawfully – – Class B felony.

(1) A person who manufactures, sells, transfers, or furnishes a precursor with knowledge or intent that the recipient will use the substance to unlawfully manufacture a substance is guilty of a class B felony.

(2) A person who receives a precursor with intent to unlawfully manufacture a substance is guilty of a class B felony.

§ 69.43.080. False Statement in report or record of Class C felony.

A person who knowingly makes a false statement relating to a report or record is guilty of a Class C felony.

§ 69.43.090. Permit to sell, transfer, furnish, or receive substance – Exemptions – Application for permit – Fee – Renewal – Penalty.

(1) A person who manufactures, sells, transfers, or furnishes a precursor or receives a precursor from out–of–state shall obtain a permit. However, a permit is unnecessary for a drug or cosmetic that contains a precursor and is lawfully sold, transferred or furnished over the counter without a prescription.

(2) Permit applications shall be in writing and signed by the applicant, and state the name and business of the applicant, the business address, and a description of the substance.

(3) Permits shall be effective for one year from issuance.

(4) Applicants shall pay permit fees.

(5) A permit may be renewed annually upon the filing of an application and payment of a fee.

(6) Permit fees shall not exceed administration costs of the health department.

(7) Selling, transferring, furnishing or receiving a precursor without a required permit is a gross misdemeanor.

§ 69.43.100. Refusal, suspension, or revocation of a manufacturer's or wholesaler's permit.

The board shall have the power to refuse, suspend, or revoke a permit upon proof that:

(1) the permit was procured through fraud, misrepresentation, or deceit;

(2) the permittee or an employee has violated state drug laws, rules and regulations.

On or before December 1 of each year, the board shall inform the appropriate legislative committees of reference of the drugs that the board has added to the steroids in RCW 69.41.300. The board shall submit a statement of rationale for the changes.

Enacted by Laws 1989, ch. 369, § 2.

69.41.320. Practitioners—Restricted use—Medical records

(1) A practitioner shall not prescribe, administer, or dispense steroids, as defined in RCW 69.41.300, or any form of autotransfusion for the purpose of manipulating hormones to increase muscle mass, strength, or weight, or for the purpose of enhancing athletic ability, without a medical necessity to do so.

(2) A practitioner shall complete and maintain patient medical records which accurately reflect the prescribing, administering, or dispensing of any substance or drug described in this section or any form of autotransfusion. Patient medical records shall indicate the diagnosis and purpose for which the substance, drug, or autotransfusion is prescribed, administered, or dispensed and any additional information upon which the diagnosis is based.

Enacted by Laws 1989, ch. 369, § 3.

69.41.330. Public warnings—School districts

The superintendent of public instruction shall develop and distribute to all school districts signs of appropriate design and dimensions advising students of the health risks that steroids present when used solely to enhance athletic ability, and of the penalties for their unlawful possession provided by RCW 69.41.070 and 69.41.300 through 69.41.340.

School districts shall post or cause the signs to be posted in a prominent place for ease of viewing on the premises of school athletic departments.

Enacted by Laws 1989, ch. 369, § 5.

69.41.340. Student athletes—Violations—Penalty.

The superintendent of public instruction, in consultation with the Washington interscholastic activity association, shall promulgate rules by January 1, 1990, regarding loss of eligibility to participate in school-sponsored athletic events for any student athlete found to have violated this chapter. The regents or trustees of each institution of higher education shall promulgate rules by January 1, 1990, regarding loss of eligibility to participate in school-sponsored athletic events for any student athlete found to have violated this chapter.

Enacted by Laws 1989, ch. 369, § 6.

CHAPTER 69.43—PRECURSOR DRUGS

Section

69.43.010. Report to state board of pharmacy—List of substances—Modification of list—Identification of purchasers—Report of transactions—Penalties

(1) Beginning July 1, 1988, a report to the state board of pharmacy shall be submitted in accordance with this chapter by a manufacturer, retailer, or other person who sells, transfers, or otherwise furnishes to any person in this state any of the following substances or their salts or isomers:

(a) Anthranilic acid;
(b) Barbituric acid;
(c) Chlorephedrine;
(d) Diethyl malonate;
(e) D-lysergic acid;
(f) Ephedrine;
(g) Ergotamine tartrate;
(h) Ethylamine;
(i) Ethyl malonate;
(j) Ethylephedrine;
(k) Lead acetate;
(*l*) Malonic acid;
(m) Methylamine;
(n) Methylformanide;
(*o*) Methylephedrine;
(p) Methylpseudoephedrine;
(q) N-acetylanthranilic acid;
(r) Norpseudoephedrine;
(s) Phenylacetic acid;
(t) Phenylpropanolamine;
(u) Piperidine;
(v) Pseudoephedrine; and
(w) Pyrrolidine.

(2) The state board of pharmacy shall administer this chapter and may, by rule adopted pursuant to chapter 34.05 RCW, add a substance to or remove a substance from the list in subsection (1) of this section. In determining whether to add or remove a substance, the board shall consider the following:

(a) The likelihood that the substance is useable as a precursor in the illegal production of a controlled substance as defined in chapter 69.50 RCW;

(b) The availability of the substance;

(c) The relative appropriateness of including the substance in this chapter or in chapter 69.50 RCW; and

(d) The extent and nature of legitimate uses for the substance.

(3) On or before December 1 of each year, the board shall inform the committees of reference of the legislature of the substances added, deleted,

or changed in subsection (1) of this section and include an explanation of these actions.

(4) (a) Beginning on July 1, 1988, any manufacturer, wholesaler, retailer, or other person shall, before selling, transferring, or otherwise furnishing any substance specified in subsection (1) of this section to a person in this state, require proper identification from the purchaser.

(b) For the purposes of this subsection, "proper identification" means, in the case of a face-to-face purchase, a motor vehicle operator's license or other official state-issued identification of the purchaser containing a photograph of the purchaser, and includes the residential or mailing address of the purchaser, other than a post office box number, the motor vehicle license number of any motor vehicle owned or operated by the purchaser, a letter of authorization from any business for which any substance specified in subsection (1) of this section is being furnished, which includes the business license number and address of the business, a description of how the substance is to be used, and the signature of the purchaser. The person selling, transferring, or otherwise furnishing any substance specified in subsection (1) of this section shall affix his or her signature as a witness to the signature and identification of the purchaser. The state board of pharmacy shall provide by rule for the proper identification of purchasers in other than face-to-face purchases.

(c) A violation of this subsection is a misdemeanor.

(5) Beginning on July 1, 1988, any manufacturer, wholesaler, retailer, or other person who sells, transfers, or otherwise furnishes the substance specified in subsection (1) of this section to a person in this state shall, not less than twenty-one days before delivery of the substance, submit a report of the transaction, which includes the identification information specified in subsection (4) of this section to the state board of pharmacy. However, the state board of pharmacy may authorize the submission of the reports on a monthly basis with respect to repeated, regular transactions between the furnisher and the recipient involving the same substance if the state board of pharmacy determines that either of the following exist:

(a) A pattern of regular supply of the substance exists between the manufacturer, wholesaler, retailer, or other person who sells, transfers, or otherwise furnishes such substance and the recipient of the substance; or

(b) The recipient has established a record of using the substance for lawful purposes.

(6) Any person specified in subsection (5) of this section who does not submit a report as required by that subsection is guilty of a gross misdemeanor.

Enacted by Laws 1988, ch. 147, § 1, eff. March 21, 1988.

69.43.020. Receipt of substance from source outside state—Report—Penalty

(1) Beginning on July 1, 1988, any manufacturer, wholesaler, retailer, or other person subject to any other reporting requirements in this chapter, who receives from a source outside of this state any substance specified in RCW 69.43.010(1), shall submit a report of such transaction to the state board of pharmacy under rules adopted by the board.

(2) Any person specified in subsection (1) of this section who does not submit a report as required by subsection (1) of this section is guilty of a gross misdemeanor.

Enacted by Laws 1988, ch. 147, § 2, eff. March 21, 1988.

69.43.030. Exemptions

RCW 69.43.010 and 69.43.020 do not apply to any of the following:

(1) Any pharmacist or other authorized person who sells or furnishes a substance upon the prescription of a practitioner, as defined in chapter 69.41 RCW;

(2) Any practitioner who administers or furnishes a substance to his or her patients;

(3) Any manufacturer or wholesaler licensed by the state board of pharmacy who sells, transfers, or otherwise furnishes a substance to a licensed pharmacy or practitioner;

(4) Any sale, transfer, furnishing, or receipt of any drug that contains ephedrine, phenylpropanolamine, or pseudoephedrine, or of any cosmetic that contains a substance specified in RCW 69.43.010(1), if such drug or cosmetic is lawfully sold, transferred, or furnished, over the counter without a prescription under chapter 69.04 or 69.41 RCW.

Enacted by Laws 1988, ch. 147, § 3, eff. March 21, 1988.

69.43.040. Reporting form

(1) The department of health, in accordance with rules developed by the state board of pharmacy shall provide a common reporting form for the substances in RCW 69.43.010 that contains at least the following information:

(a) Name of the substance;

(b) Quantity of the substance sold, transferred, or furnished;

(c) The date the substance was sold, transferred, or furnished;

(d) The name and address of the person buying or receiving the substance; and

(e) The name and address of the manufacturer, wholesaler, retailer, or other person selling, transferring, or furnishing the substance.

(2) Monthly reports authorized under subsection (1)(e) of this section may be computer-generated in accordance with rules adopted by the department.

Enacted by Laws 1988, ch. 147, § 4, eff. March 21, 1988. Amended by Laws 1989, 1st Ex.Sess., ch. 9, § 441, eff. July 1, 1989.

Historical and Statutory Notes

1989 Legislation

Laws 1989, 1st Ex.Sess., ch. 9, § 441, in subsec. (1), in the introductory language, substituted "The department of health, in accordance with rules developed by the state board of pharmacy shall provide" for "The state board of pharmacy shall provide"; and, at the end of subsec. (2), substituted "the department" for "the state board of pharmacy".

Effective date—Severability—Laws 1989, 1st Ex.Sess., ch. 9: See §§ 43.70.910 and 43.70.920.

69.43.050. Rules

(1) The state board of pharmacy may adopt all rules necessary to carry out this chapter.

(2) Notwithstanding subsection (1) of this section, the department of health may adopt rules necessary for the administration of this chapter.

Enacted by Laws 1988, ch. 147, § 5, eff. March 21, 1988. Amended by Laws 1989, 1st Ex.Sess., ch. 9, § 442, eff. July 1, 1989.

Historical and Statutory Notes

1989 Legislation

Laws 1989, 1st Ex.Sess., ch. 9, § 442, inserted subsection designation "(1)"; and added subsec. (2).

Effective date—Severability—Laws 1989, 1st Ex.Sess., ch. 9: See §§ 43.70.910 and 43.70.920.

69.43.060. Theft—Missing quantity—Reporting

(1) The theft or loss of any substance RCW 69.43.010 discovered by any person regulated by this chapter shall be reported to the state board of pharmacy within seven days after such discovery.

(2) Any difference between the quantity of any substance under RCW 69.43.010 received and the quantity shipped shall be reported to the state board of pharmacy within seven days of the receipt of actual knowledge of the discrepancy. When applicable, any report made pursuant to this subsection shall also include the name of any common carrier or person who transported the substance and the date of shipment of the substance.

Enacted by Laws 1988, ch. 147, § 6, eff. March 21, 1988.

69.43.070. Sale, transfer, or furnishing of substance for unlawful purpose—Receipt of substance with intent to use unlawfully—Class B felony

(1) Any manufacturer, wholesaler, retailer, or other person who sells, transfers, or otherwise furnishes any substance listed in RCW 69.43.010 with knowledge or the intent that the recipient will use the substance unlawfully to manufacture a controlled substance under chapter 69.50 RCW is guilty of a class B felony under chapter 9A.20 RCW.

(2) Any person who receives any substance listed in RCW 69.43.010 with intent to use the substance unlawfully to manufacture a controlled substance under chapter 69.50 RCW is guilty of a class B felony under chapter 9A.20 RCW.

Enacted by Laws 1988, ch. 147, § 7, eff. March 21, 1988.

69.43.080. False statement in report or record—Class C felony

It is unlawful for any person knowingly to make a false statement in connection with any report or record required under this chapter. A violation of this section is a class C felony under chapter 9A.20 RCW.

Enacted by Laws 1988, ch. 147, § 8, eff. March 21, 1988.

69.43.090. Permit to sell, transfer, furnish, or receive substance—Exemptions—Application for permit—Fee—Renewal—Penalty

(1) Any manufacturer, wholesaler, retailer, or other person who sells, transfers, or otherwise furnishes any substance specified in RCW 69.43.010 to a person in this state or who receives from a source outside of the state any substance specified in RCW 69.43.010 shall obtain a permit for the conduct of that business from the state board of pharmacy. However, a permit shall not be required of any manufacturer, wholesaler, retailer, or other person for the sale, transfer, furnishing, or receipt of any drug that contains ephedrine, phenylpropanolamine, or pseudoephedrine, or of any cosmetic that contains a substance specified in RCW 69.43.010(1), if such drug or cosmetic is lawfully sold, transferred, or furnished over the counter without a prescription or by a prescription under chapter 69.04 or 69.41 RCW.

(2) Applications for permits shall be filed with the department in writing and signed by the applicant, and shall set forth the name of the applicant, the business in which the applicant is engaged, the business address of the applicant, and a full description of any substance sold, transferred, or otherwise furnished, or received.

(3) The board may grant permits on forms prescribed by it. The permits shall be effective for not more than one year from the date of issuance.

(4) Each applicant shall pay at the time of filing an application for a permit a fee determined by the department.

(5) A permit granted under this chapter may be renewed on a date to be determined by the board, and annually thereafter, upon the filing of a renewal application and the payment of a permit renewal fee determined by the department.

(6) Permit fees charged by the department shall not exceed the costs incurred by the department in administering this chapter.

(7) Selling, transferring, or otherwise furnishing, or receiving any substance specified in RCW 69.43.010 without a required permit, is a gross misdemeanor.

Enacted by Laws 1988, ch. 147, § 9, eff. March 21, 1988. Amended by Laws 1989, 1st Ex.Sess., ch. 9, § 443, eff. July 1, 1989.

Historical and Statutory Notes

1989 Legislation

Laws 1989, 1st Ex.Sess., ch. 9, § 443, near the beginning of subsec. (2), following "shall be filed" inserted "with the department"; at the end of subsec. (5), following "renewal fee" inserted "determined by the department"; and, in subsec. (6), twice substituted "department" for "board".

Effective date—Severability—Laws 1989, 1st Ex.Sess., ch. 9: See §§ 43.70.910 and 43.70.920.

69.43.100. Refusal, suspension, or revocation of a manufacturer's or wholesaler's permit

The board shall have the power to refuse, suspend, or revoke the permit of any manufacturer or wholesaler upon proof that:

(1) The permit was procured through fraud, misrepresentation, or deceit;

(2) The permittee has violated or has permitted any employee to violate any of the laws of this state relating to drugs, controlled substances, cosmetics, or nonprescription drugs, or has violated any of the rules and regulations of the board of pharmacy.

Enacted by Laws 1988, ch. 147, § 10, eff. March 21, 1988.

CHAPTER 69.45—DRUG SAMPLES

Section

GENERAL SUMMARY OF STATE PRECURSOR CONTROL LAWS

PREPARED BY THE

UNITED STATES DRUG ENFORCEMENT ADMINISTRATION

ALASKA

1. Controls phenylacetone, PCH, PCC.

2. Prohibits delivery, manufacturing, possession.

ARIZONA

1. Controls 14 chemicals, 6 from the CDTA.

2. Submit a report to state:
   (a) on any transaction;
   (b) not less than 21 days before delivery;
   (c) even from sources outside the state;
   (d) monthly reporting allowed for repeated, regular transactions, subject to certain conditions;
   (e) on loss or theft within 3 days after discovery.

3. State to provide a common reporting form.

4. Exempt from reporting:
   (a) manufacturers and distributors already licensed by state;
   (b) practitioners;
   (c) those who demonstrate special circumstances.

5. Offenses:
   (a) failure to submit a report;
   (b) making a false statement in relation to a report or record;
   (c) transferring a chemical knowing that it will be used to illegally manufacture a controlled substance.

ARKANSAS

1. Controls 18 chemicals; 9 from CDTA.

2. Records required to be kept, not reported.

3. Purchaser identification:
   (a) driver's license;
   (b) permanent address;

(c) motor vehicle license number;
(d) for businesses, letter of authorization;
(e) signature of the seller.

4. Exemption for physicians, dentists, podiatrists, veterinarians, businesses licensed by Board of Pharmacy.

5. Offenses: misdemeanor.

CALIFORNIA

1. Controls 32 chemicals, 17 from CDTA?

2. Registration requirement:
   (a) for in state transfers;
   (b) for receipts from out of state;
   (c) renewed annually, with registration fee.

3. Exemptions from registration:
   (a) transferring FDA–approved OTC drugs.

4. Submit a report to state:
   (a) on any transaction;
   (b) not less than 21 days prior to delivery;
   (c) monthly reporting allowed for repeated, regular transactions, subject to certain conditions;
   (d) any receipt of chemicals from sources outside of state 21 days in advance;
   (e) any theft or loss within 3 days after such discovery;
   (f) repeated transactions, 72 hours after receipt.

5. Exemption from reporting:
   (a) any pharmacist pursuant to a prescription;
   (b) any practitioner within the scope of professional practice;
   (c) any manufacturer or distributor already licensed with state;
   (d) any transfer involving an FDA–approved OTC drug.

6. State to provide common reporting form.

7. State can add or delete any substance through administrative action.

8. Require proper identification prior to any transfer:
   (a) specifies what qualifies as proper identification.

9. Any transaction in a laboratory apparatus with a value over $100.00 which is paid in cash or cashier's check:
   (a) must have proper identification;
   (b) maintain record for 3 years in retrievable manner.

10. Offenses:
    (a) failure to submit a report;
    (b) submitting a report with false information;
    (c) transferring any chemical to a minor;
    (d) a minor possessing any chemical;
    (e) transferring a chemical knowing it will be used to illegally manufacture a controlled substance;
    (f) transferring a chemical without a registration.

11. Drug clean–up fine.

FLORIDA

1. Controls ether.

2. In state or out of state distributors must obtain annual permit.

3. Purchasers of 2.5 gallons or more must obtain a state–issued permit prior to purchase.

IDAHO

1. Controls 7 chemicals, 4 from the CDTA.

2. Exception: FDA–approved OTC drug.

LOUISIANA

1. Controls 18 chemicals; 8 from CDTA.

2. Maintain records for two years.

3. Obtain identification from the buyer:
    (a) license number;
    (b) description of intended use;
    (c) signature of recipient;
    (d) businesses must furnish letter of authorization.

4. Notify state 21 days prior to delivery.

5. Penalty for violations of above:
    (a) one year imprisonment and fine up to $1,000.00.

MISSISSIPPI

Under Uniform Controlled Substances Act, provides for penalties for distribution of immediate precursors which it defines as being "the principal compounds commonly used or produced primarily for use" of a controlled substance. It has no regulations regarding record keeping for the more common chemical precursors sold by chemical supply houses.

MISSOURI

1. Same chemicals controlled under the CDTA.

2. Submit a report of all transactions to state.

3. State can add or delete a chemical.

4. Require proper identification.

5. Specifies what proper identification is.

6. Report any transaction to the state 21 days in advance, with proper identification.

7. Repeated, regular transactions may be reported on a monthly basis, if certain conditions are previously met.

8. Exemptions on registration and reporting are granted to:
   - (a) pharmacists, pharmacies based on a prescription;
   - (b) practitioners within the scope of professional practice;
   - (c) FDA-approved OTC drugs;
   - (d) For end users;
   - (e) sales or transfers below the threshold level.

9. Offenses:
   - (a) failure to submit a report;
   - (b) failure to register;
   - (c) possess with intent to manufacture.

10. Registration requirement:
    - (a) meet certain requirements (consistent with public interest);
    - (b) for in state transactions;
    - (c) receipts from out of state;
    - (d) annual registration fee;
    - (e) subject to suspension/revocation (show cause);
    - (f) waiver granted to manufacturers, wholesalers, retailers or others if consistent with public health and safety;
    - (g) limited to chemicals applied for on application.

11. Inspection authority.

MONTANA

1. Controls phenylacetone, PCH, PCC, methylamine, n–methylformamide.
2. Prohibits delivery, manufacturing, possession.
3. Requires reporting procedures and documentation.

NEW MEXICO

1. Controls 26 chemicals; 5 from CDTA.
2. Annual registration with corresponding fee:
   - (a) if consistent with public interest;
   - (b) limited to chemicals applied for on application;
   - (c) subject to suspension/revocation (show cause);
   - (d) separate registration for each principal place of business;
   - (e) possible pre–registration investigation.
3. Exemption from registration:
   - (a) physicians;
   - (b) agent of regulated person;
   - (c) common carrier;
   - (d) college chemistry student;
   - (e) law enforcement officials;
   - (f) waiver may be granted to manufacturers;
4. Maintenance of records:
   - (a) inventories and records maintained separately and retrievable;
   - (b) perpetual inventory;
   - (c) purchasing, receipt;
   - (d) proof of identity;
   - (e) disposition of unwanted chemicals.
5. Filing of reports:
   - (a) loss or theft.
6. Security requirements.
7. Inspection authority.
8. Offenses:
   - (a) transfer to unauthorized person;
   - (b) use an invalid registration;
   - (c) obtain a chemical by misrepresentation;
   - (d) omission of required information from any application, report or document;
   - (e) failure to keep required information;
   - (f) manufacturing or transfering a chemical not authorized by registration;
   - (g) refuse to allow inspection.

9. Forfeiture of seized chemicals.

NEW YORK

1. Criminal possession of precursor; intent to manufacture a controlled substance unlawfully.

2. Controls eight chemicals; one from CDTA.

NEVADA

1. Controls ephedrine, methephedrine, pseudophedrine; only immediate precursors.

2. Prohibits import, transport, manufacture or delivery.

3. Prohibits possession.

OREGON

1. Controls 32 chemicals; 11 from CDTA.

2. State has authority to add chemicals to list.

3. Registration requirement.

4. Exceptions to registration:
   - (a) pharmacist pursuant to a prescription;
   - (b) practitioner who administers substance;
   - (c) firm already licensed with state to sell to pharmacies and practitioners;
   - (d) substances sold OTC under FDCA.

5. Maintenance of records:
   - (a) proof of identity:
     1. driver's license;
     2. mailing address other than post office box;
     3. vehicle registration number;
     4. for a business, letter of authorization.
   - (b) date, time, location, quantity and price;
   - (c) manner of payment;
   - (d) exceptions:
     1. pharmacist filling a prescription;
     2. practitioner who administers;
     3. firm already licensed by state to sell to pharmacies and practioners;

4. transactions in an OTC item.

6. Reports:
   (a) made available to state authorities;
   (b) filed quarterly to state;

7. Offenses:
   (a) providing false information – misdemeanor – not less than $1,000 and not more than $25,000 or imprisonment for not more than five years, or both;
   (b) violations of Act by regulated person – misdemeanor – nor less than $500 and not more than $5,000 or imprisonment for not more than three years, or both;
   (c) wrongful use of reports – not less than $300 and not more than $1,000 or imprisonment for not more than 90 days, or both.

TEXAS

1. Controls 17 chemicals; eight from CDTA:
   (a) state can add or delete chemicals through administrative action;

2. Records required for any transaction in chemicals
   (a) maintain for two years;
   (b) prior to any transaction, obtain proof of identity;

3. Report any transaction 21 days before delivery from either in state or out of state:
   (a) state to provide common reporting form;
   (b) monthly reporting allowed for repeat, regular transactions;
   (c) report loss or theft not later than 3 days after discovery.

4. Transfer permit required for every transaction:
   (a) in this state;
   (b) from outside this state;
   (c) if recipient is not a business;
   (d) a permit can be renewed, valid for one year;
   (e) notify state of any changes to permit.

5. Offenses:
   (a) conducting a transaction without a permit;
   (b) making a false statement on a report or record;
   (c) knowing a chemical will be used to unlawfully manufacture a controlled substance;

6. Controls laboratory apparatus: defines
   (a) state can add or delete apparatus through administrative procedure.

7. Maintain records on any transactions in laboratory apparatus for two years:
   (a) proof of identity required;
   (b) inventories required;
   (c) subject to inspection and audit by state.

8. Transfer permit required for every transaction:
   (a) if recipient is not a business;
   (b) in this state;
   (c) from outside this state;
   (d) a permit can be renewed, valid for one year.

9. Reports required on every transaction 21 days before delivery:
   (a) state to provide common reporting form;
   (b) receipts from out of state;
   (c) loss or theft reported within 3 days of discovery.

10. Offenses:
   (a) any transaction without a transfer permit;
   (b) false statement in a report or record;
   (c) knowing that the apparatus will be used to unlawfully manufacture a controlled substance.

11. State authorized to destroy laboratory evidence.

UTAH

1. Defines:
   (a) chemical mixture;
   (b) proof of identity;
   (c) regular customer;
   (d) regular supplier;
   (e) regulated person;
   (f) regulated transaction;

2. Controls 23 chemicals, 20 from CDTA.

3. Controls transactions in machines.

4. Establishes thresholds.

5. Exemptions from regulated transactions:
   (a) transfer between employees;
   (b) delivery by common carrier;

(c) any category of transaction deemed as unnecessary for the enforcement of the Act;
(d) FDA–approved OTC drugs;
(e) any transaction in a chemical mixture.

6. Offenses:
(a) possess a chemical with intent to manufacture or to facilitate the manufacture of a controlled substance
(b) possess or distribute a chemical knowing or having reasonable cause to believe it will be used to manufacture or to facilitate the manufacture of a controlled substance;
(c) cause the evasion of recordkeeping or reportin requirements, receive or distribute a reportable amount of any chemical in units small enough to avoid recordkeeping or reporting requirements;
(d) furnish false identification;
(e) to manufacture, distribute, or possess 3–neck round bottom flask machine, gelatin capsule, or equipment to manufacture or to facilitate the manufacture of a controlled substance;
(f) create, receive or possess a chemical mixture to evade the requirements of the Act;
(g) enjoined from engaging in a regulated transaction involving a chemical for not more than ten years.

7. Forfeiture provision.

WASHINGTON

1. Controls 23 chemicals, immediate precursors under schedule 2; eight from CDTA:
(a) add or delete substances through administrative action.

2. Registration requirement:
(a) transactions in this state;
(b) transactions received from outside of state;
(c) renewed annually with appropriate fee;
(d) state can refuse, revoke or suspend under certain conditions.

3. Exemptions from registration:
(a) transactions in OTC drugs containing listed chemicals.

4. Report transactions involving chemicals;

5. Require proper identification
(a) defined.

6. Submit report of transaction with proper identification not less than 21 days before delivery:
   (a) monthly reporting allowed for repeated, regular transactions, if certain conditions are met;
   (b) report receipts from out of state;
   (c) report theft or loss of chemicals within 7 days of discovery;
   (d) report discrepancies in what ordered and what received

7. Exempt from reporting:
   (a) pharmacist upon a prescription;
   (b) practitioner who administers or furnishes to patient;
   (c) manufacturer or distributor already licensed by state;
   (d) transactions in OTC drugs containing chemicals.

8. State to provide common reporting form.

9. Offenses:
   (a) knowing that a chemical will be used to illegally manufacture a controlled substance;
   (b) receiving a chemical to unlawfully manufacture a controlled substance;
   (c) making a false statement in any required report or record.

RESULTS OF THE CLANDESTINE LABORATORIES SURVEY

The Pacific Coast states have recently experienced an increase in clandestine laboratories with an apparent spread eastward to some Midwest states. As a result of this trend, a survey was developed to obtain a more accurate assessment of specific states where these illegal labs are located. The survey was sent to NASDEA members in each state. The results of the survey are listed below:

Total surveys received: 34 (68% Response Rate)

Total Number of Clandestine Labs seized: 3,698

Number of Clandestine Labs Reported Seized By Year and Percent Increase Over Previous Year:

1985 -- 451
1986 – 602 (+33.5%)
1987 – 870 (+44.5%)
1988 – 871 (+ 0.1%)
1989 – 904 (+ 3.8%)

Number of Methamphetamine Clandestine Labs seized: 3,337 (90.2% of total labs)

California and Oregon comprised 69% of all methamphetamine clandestine labs seized from 1985 through 1989.

NUMBER AND PERCENT DISTRIBUTION OF CLANDESTINE LABS SEIZED BY DRUG TYPE

	Methamphetamine	PCP	LSD	Other
1985	355 (78.7%)	38 (8.4%)	0 (0%)	58 (12.9%)
1986	542 (90.0%)	13 (2.2%)	4 (0.7%)	43 (7.1%)
1987	796 (91.5%)	11 (1.3%)	2 (0.2%)	61 (7.0%)
1988	803 (92.2%)	16 (1.8%)	3 (0.3%)	49 (5.6%)
1989	841 (93.0%)	7 (0.8%)	4 (0.4%)	52 (5.8%)
TOTAL	**3,337 (90.2%)**	**85 (2.3%)**	**13 (0.4%)**	**263 (7.1%)**

Only a few midwestern states fluctuated in the number of methamphetamine clandestine laboratories seized during the past five years with the exception of Oklahoma. The Sooner state showed over a 100% increase in labs seized from 1987 to 1988 climbing from 30 to 62 labs.

*** Of the states responding to the survey:**

15 states indicated they already have a precursor law in effect.
8 states indicated they plan to have one.
10 states indicated they have no precursor law, nor are they planning to have one in the near future.

** The survey was conducted and the results provided by the DRUG ENFORCEMENT ADMINISTRATION, U.S. DEPARTMENT OF JUSTICE.

CLANDESTINE LABORATORIES SEIZED

State	Year	Meth	PCP	LSD	Other	State	Year	Meth	PCP	LSD	Other
AR	'85	13	0	0	0	IL	'85	0	0	0	0
	'86	9	0	0	0		'86	4	1	1	0
	'87	10	0	0	0		'87	2	0	0	0
	'88	13	0	0	0		'88	6	0	0	0
	'89	22	0	0	0		'89	10	0	0	0
AS	'85	0	0	0	0	IN	'85	2	0	0	0
	'86	0	0	0	0		'86	3	0	0	0
	'87	0	0	0	0		'87	2	0	0	0
	'88	0	0	0	0		'88	4	0	0	0
	'89	1	0	0	0		'89	3	0	0	0
CA	'85	190	34	0	0	KY	'85	1	0	0	0
	'86	285	10	3	6		'86	1	0	0	0
	'87	466	11	2	7		'87	2	0	0	0
	'88	352	15	3	8		'88	1	0	0	0
	'89	412	6	4	4		'89	4	0	0	0
CO*	'85	0	0	0	0	MI	'85	1	0	0	1
	'86	0	0	0	0		'86	3	1	0	1
	'87	0	0	0	0		'87	1	0	0	0
	'88	0	0	0	0		'88	1	0	0	0
	'89	0	0	0	0		'89	1	0	0	0
CT	'85	0	0	0	0	MN	'85	2	1	0	0
	'86	0	0	0	0		'86	3	0	0	0
	'87	0	0	0	0		'87	2	0	0	0
	'88	0	0	0	0		'88	4	0	0	0
	'89	0	0	0	0		'89	5	0	0	0
DE	'85	3	0	0	1	MO	'85	4	0	0	0
	'86	0	0	0	0		'86	4	0	0	0
	'87	1	0	0	1		'87	9	0	0	0
	'88	0	0	0	0		'88	6	0	0	0
	'89	1	0	0	0		'89	8	0	0	0
FL	'85	2	3	0	21	MT	'85	3	0	0	0
	'86	1	0	0	16		'86	4	0	0	0
	'87	3	0	0	9		'87	2	0	0	0
	'88	1	0	0	10		'88	4	0	0	0
	'89	7	0	0	8		'89	6	0	0	0
IA	'85	0	0	0	0	NC	'85	0	0	0	1
	'86	0	0	0	0		'86	2	0	0	0
	'87	1	0	0	0		'87	0	0	0	0
	'88	3	0	0	0		'88	0	1	0	1
	'89	2	0	0	0		'89	1	1	0	1
ID	'85	1	0	0	0	ND	'85	1	0	0	0
	'86	7	0	0	0		'86	2	0	0	0
	'87	5	0	0	0		'87	0	0	0	0
	'88	8	0	0	0		'88	3	0	0	0
	'89	11	0	0	0		'89	0	0	0	0

CLANDESTINE LABORATORIES SEIZED

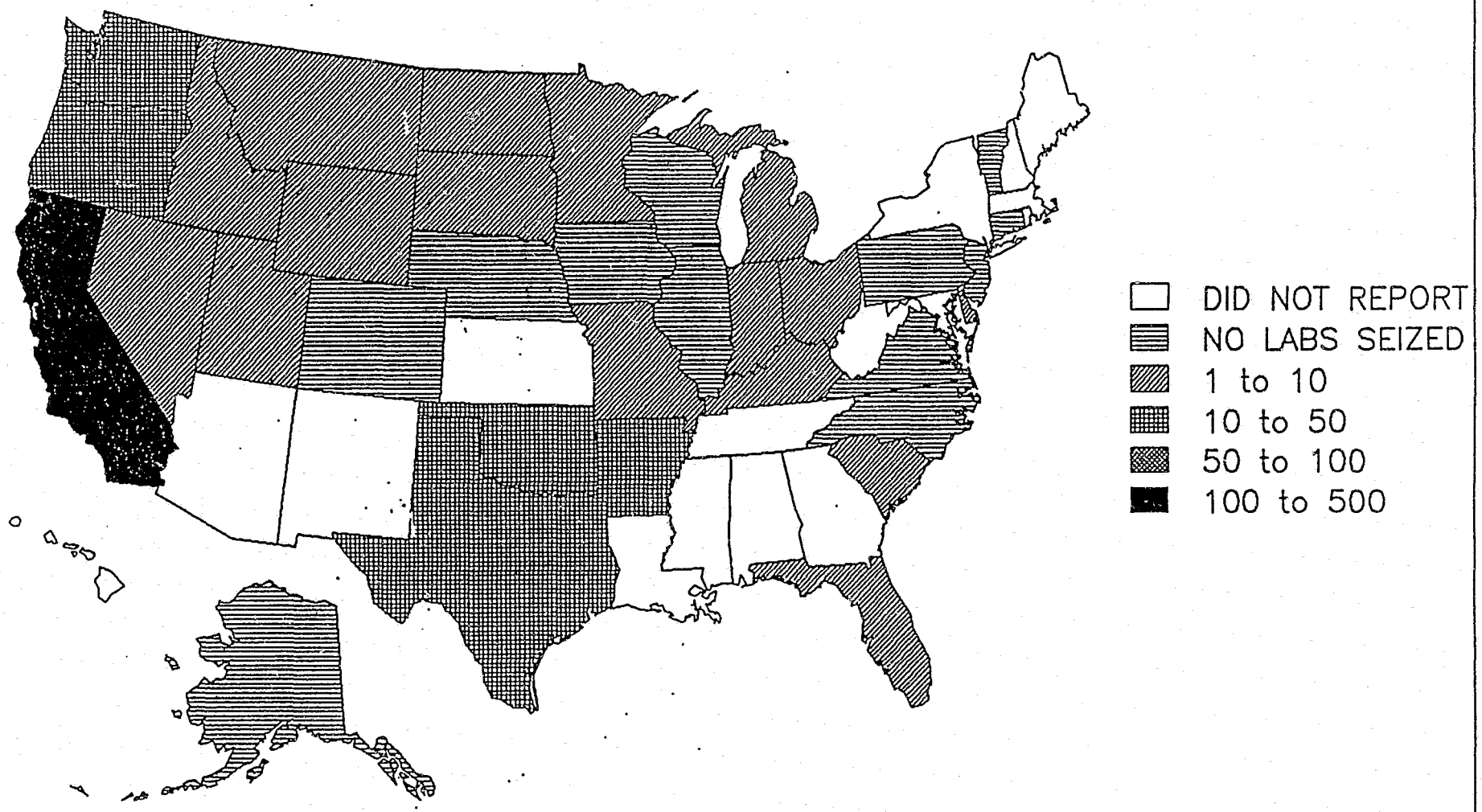
(cont'd)

State	Year	Meth	PCP	LSD	Other	State	Year	Meth	PCP	LSD	Other
NE	'85	0	0	0	0	TX	'85	39	0	0	34
	'86	0	0	0	0		'86	46	0	0	19
	'87	0	0	0	0		'87	43	0	0	43
	'88	0	0	0	0		'88	34	0	0	30
	'89	2	0	0	0		'89	34	0	0	38
NJ	'85	0	0	0	0	UT	'85	3	0	0	0
	'86	0	0	0	0		'86	3	0	0	0
	'87	0	0	0	0		'87	3	0	0	0
	'88	0	0	0	0		'88	3	0	0	0
	'89	5	0	0	1		'89	7	0	0	0
NV	'85	9	0	0	0	VA	'85	0	0	0	0
	'86	15	0	0	0		'86	1	0	0	0
	'87	34	0	0	0		'87	0	0	0	0
	'88	45	0	0	0		'88	1	0	0	0
	'89	57	0	0	0		'89	0	0	0	0
OH	'85	2	0	0	0	VT	'85	0	0	0	0
	'86	0	0	0	0		'86	0	0	0	1
	'87	2	0	0	0		'87	0	0	0	0
	'88	0	0	0	0		'88	0	0	0	0
	'89	0	0	0	0		'89	0	0	0	0
OK	'85	16	0	0	0	WA	'85	11	0	0	0
	'86	28	0	0	0		'86	14	0	0	0
	'87	30	0	0	0		'87	27	0	0	0
	'88	62	0	0	0		'88	46	0	0	0
	'89	71	0	0	0		'89	60	0	0	0
OR	'85	48	0	0	0	WI	'85	0	0	0	0
	'86	102	0	0	0		'86	2	1	0	0
	'87	143	0	0	0		'87	3	0	0	0
	'88	203	0	0	0		'88	1	0	0	0
	'89	100	0	0	0		'89	5	0	0	0
PA**	'85	0	0	0	0	WY	'85	2	0	0	0
	'86	2	0	0	0		'86	1	0	0	0
	'87	2	0	0	1		'87	2	0	0	0
	'88	0	0	0	0		'88	2	0	0	0
	'89	2	0	0	0		'89	4	0	0	0
SC	'85	1	0	0	0						
	'86	0	0	0	0						
	'87	0	0	0	0						
	'88	0	0	0	0						
	'89	0	0	0	0						
SD	'85	1	0	0	0						
	'86	0	0	0	0						
	'87	1	0	0	0						
	'88	0	0	0	0						
	'89	0	0	0	0						

*Did not have specific figures but predicted an increase of clandestine labs in rural areas during the coming year.

**Received 2 surveys. Figures used were those submitted by the Pa. Office of the Atty. General. Later survey received from the Pa. State Police revealed slightly different figures as follows: For Meth. — '85 – 7, '86 – 7, '87 – 18, '88 –12, '89 –8. No other type labs seized '85 – '89.

METHAMPHETAMINE CLANDESTINE LABORATORIES DURING 1985



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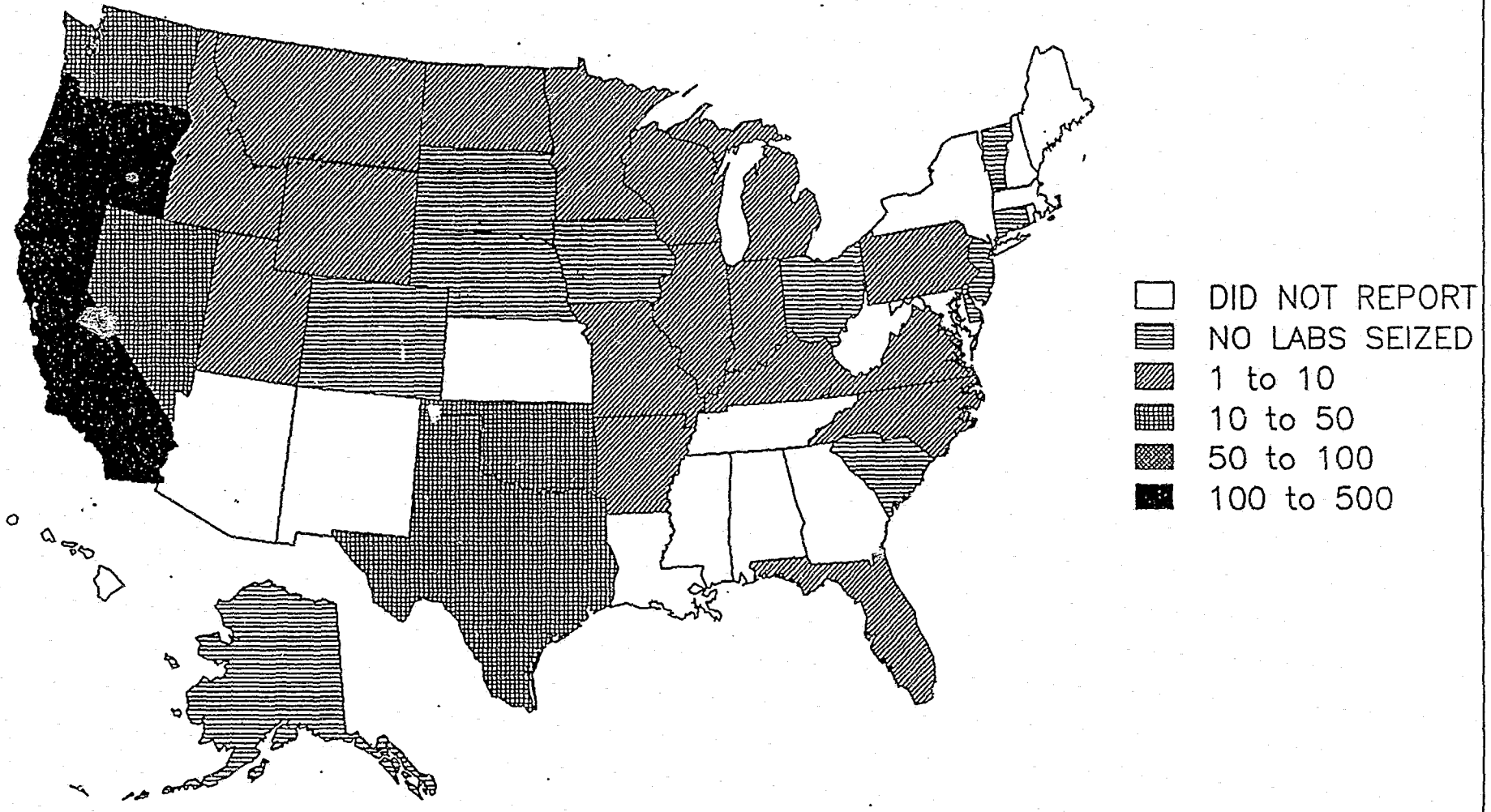

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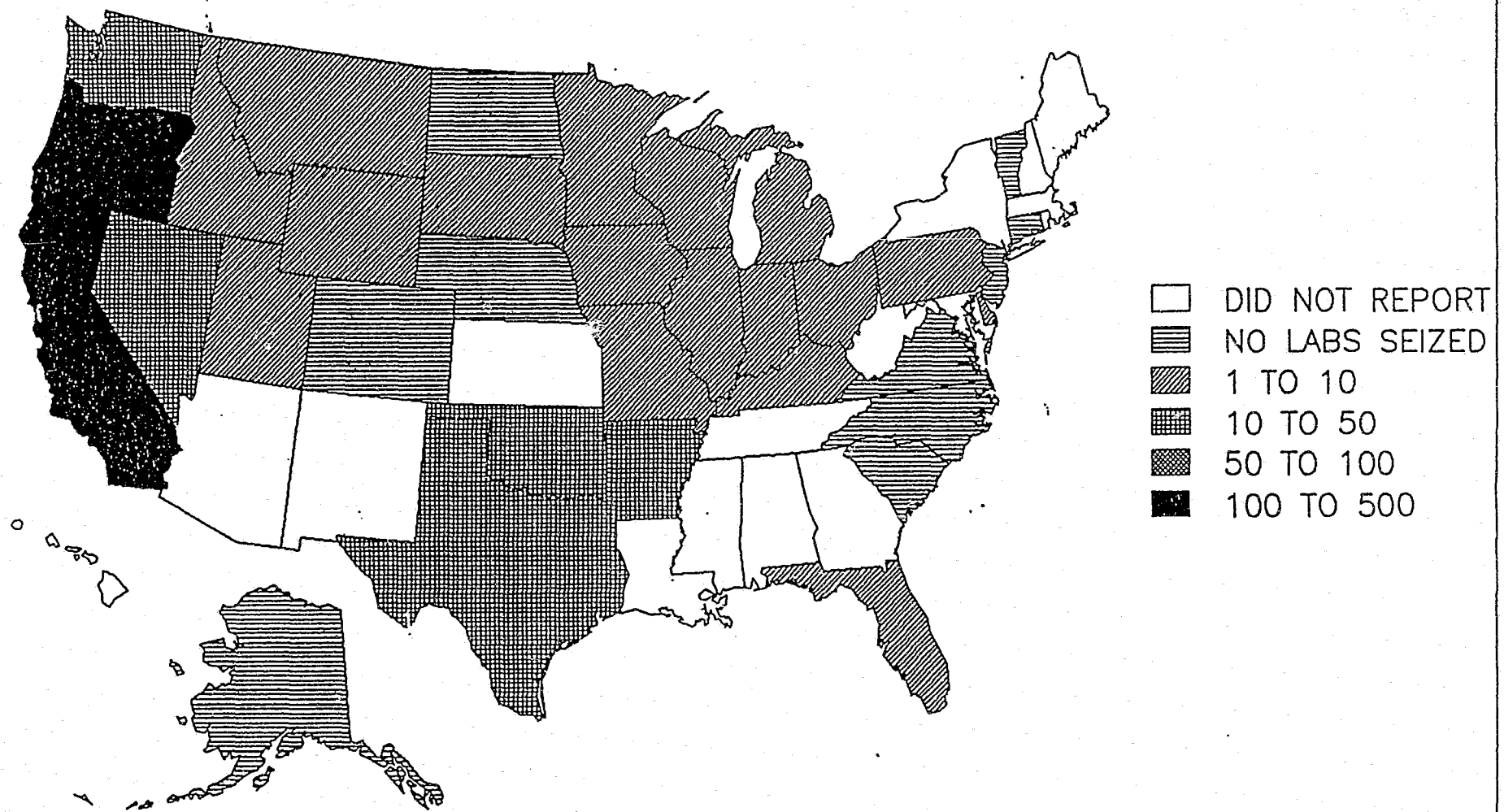
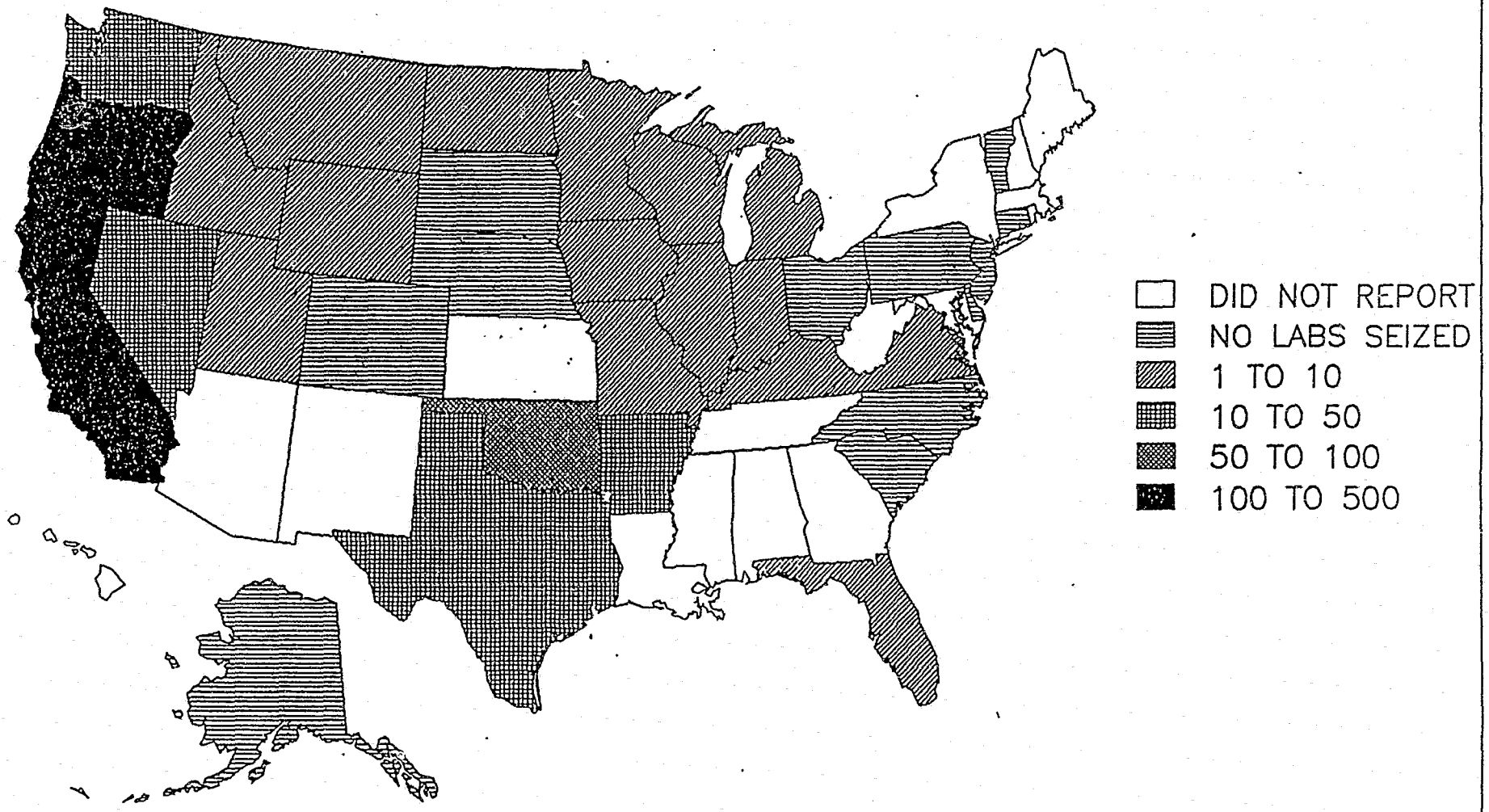
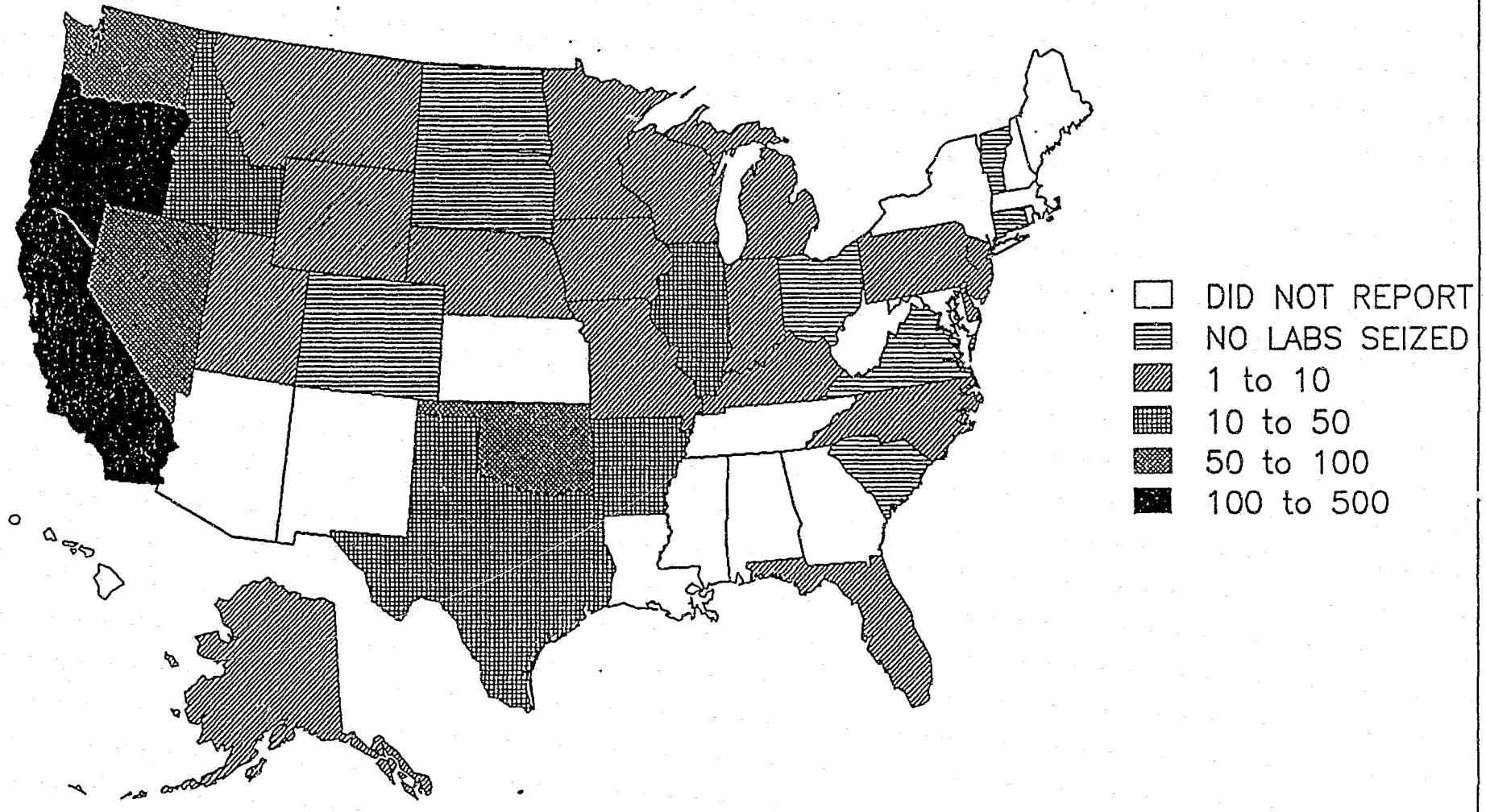


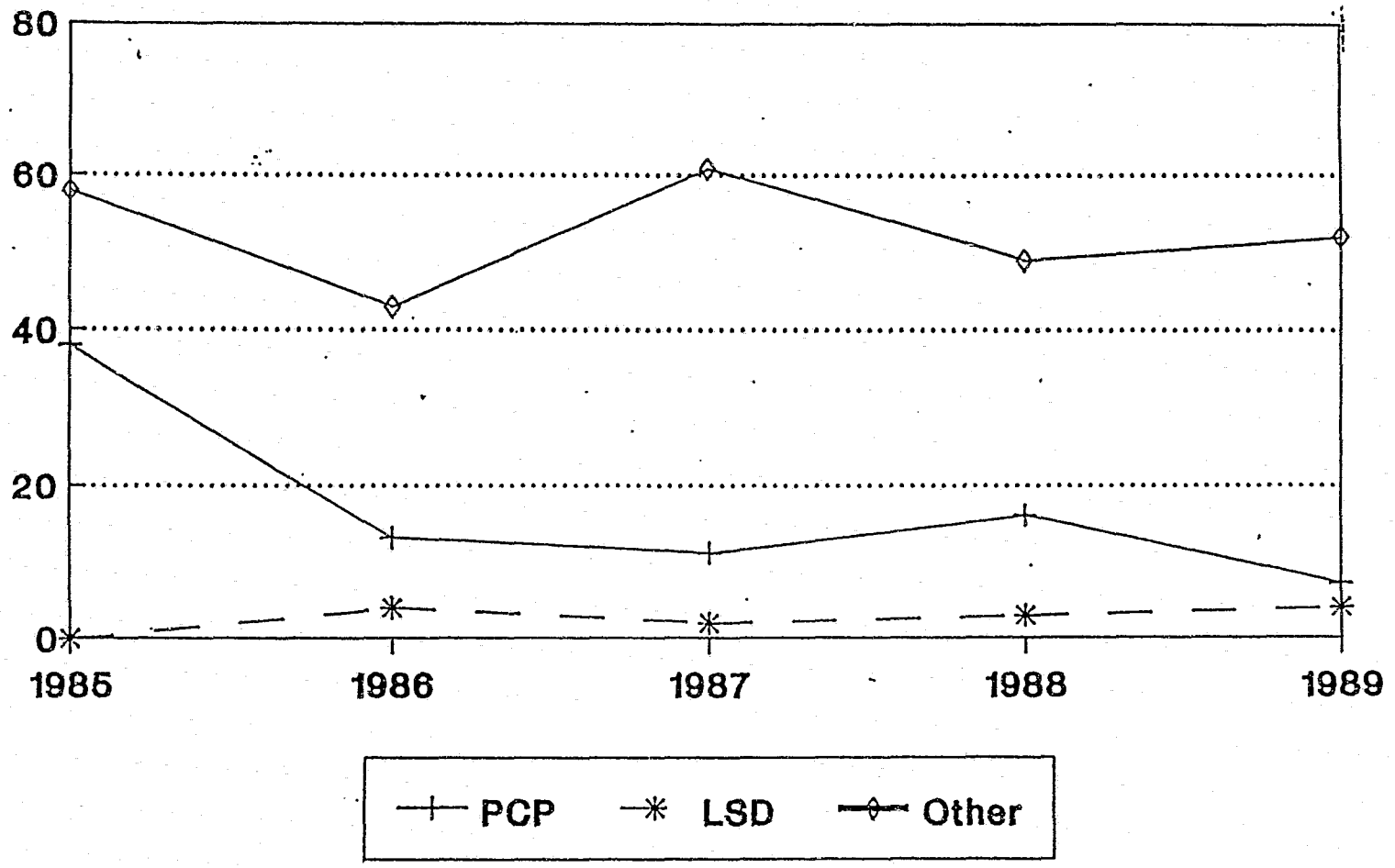
METHAMPHETAMINE CLANDESTINE LABORATORIES DURING 1988



METHAMPHETAMINE CLANDESTINE LABORATORIES DURING 1989

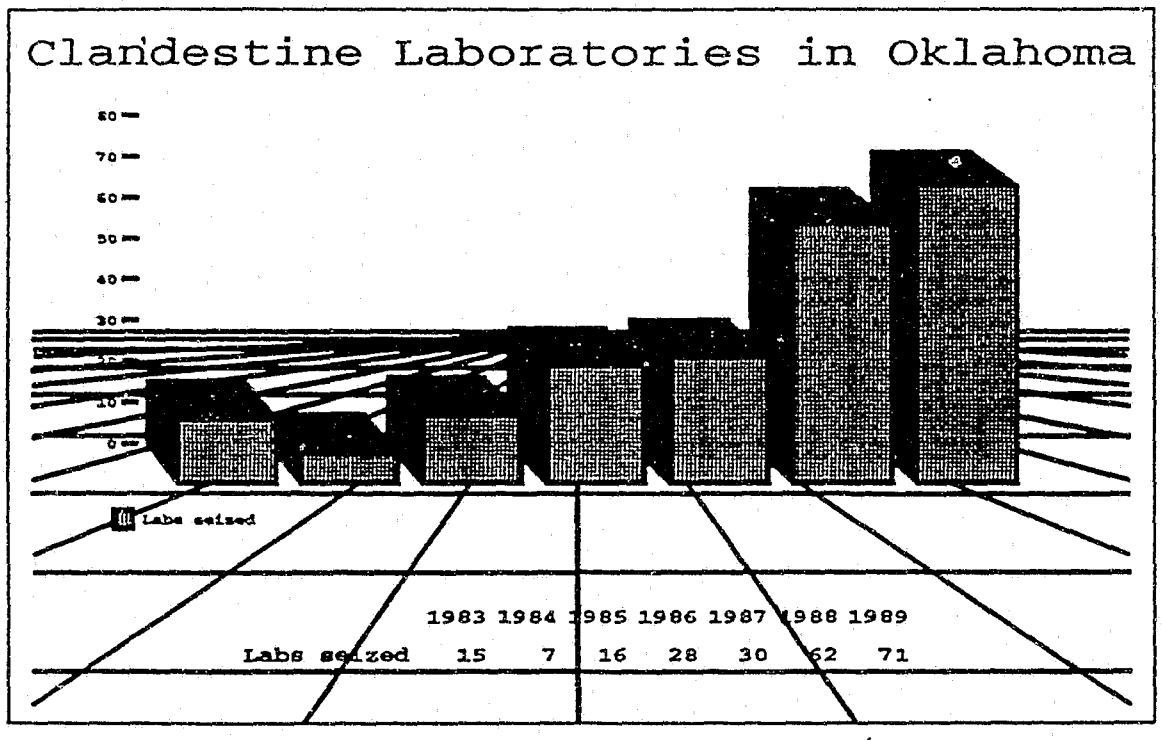


CLANDESTINE LABORATORIES
1985 - 1989



Analysis of the Recent Decrease of Clandestine Laboratories in Oklahoma

The State of Oklahoma emerged, through 1986 to the present, as one of the nation's leading producers of methamphetamine in illicit clandestine laboratories. In fact, in 1988, Oklahoma was fourth in



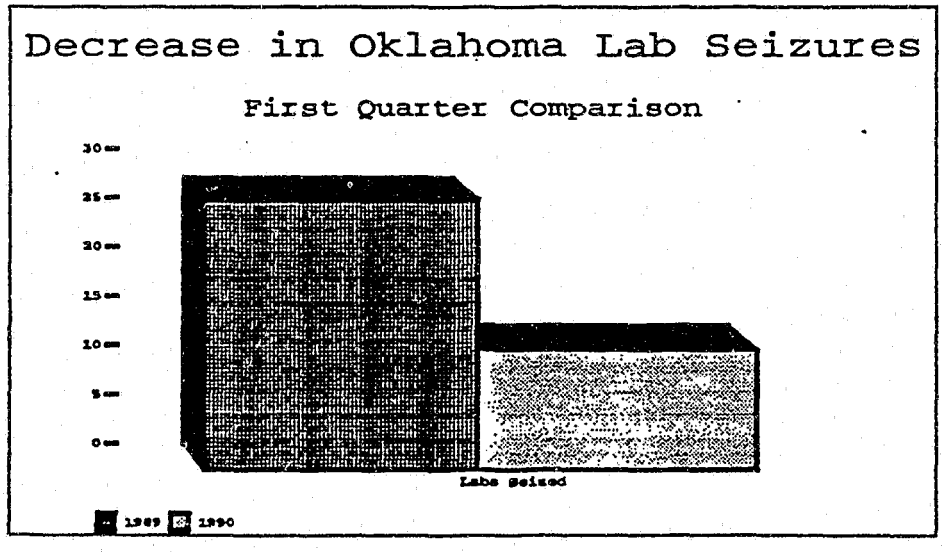
the United States on clandestine laboratory seizures.[1] What was a modest problem in the early 1980s turned into a major problem for Oklahoma law enforcement officers over the past five years. While in 1983 only 15 labs were seized in Oklahoma, 71 were seized in

[1]The Oklahoma Bureau of Narcotics and Dangerous Drugs (OBN), not DEA, is the state's lead agency on the investigation and seizure of clandestine laboratories. Virtually all of the laboratories seized in Oklahoma are results of OBN investigations. As a result, the statistics reported nationally by DEA for Oklahoma are highly misleading. This is because DEA statistics refer to only the labs that DEA seizes.

1989. This dramatic increase became a major concern for the Oklahoma Bureau of Narcotics and may provide the basis for an analysis of what may be done to combat the clandestine lab problem nationally. This is especially the case since Oklahoma is currently the only state in the nation that has seen a decrease in clandestine laboratories after such a sudden and overwhelming increase. This paper will attempt to reveal the correlation between chemical availability and the propagation of clandestine laboratories and show how Oklahoma exemplifies the National need for strict chemical controls.

What makes the study of laboratories in Oklahoma interesting is that during the past ten months, there has been a significant decrease in lab seizures. Although many reasons can be cited for this decrease, the predominant cause appears to be the closing of major chemical stores that dealt in precursor chemicals. What is significant is that one of these stores was a DEA storefront operation. Before examining this point in detail, it would be useful first to look at the history of the drug lab phenomenon in Oklahoma.

The Oklahoma Bureau of Narcotics has recorded drug lab seizures for the past ten years. In 1986, seizures increased almost 100%, from 16 labs in 1985 to 28 in 1986. Another increase of over 100% occurred in 1988, when OBN seized 62 laboratories. The increase continued into 1989, until the last part of the year, when the frequency of lab seizures decreased substantially. While during the first quarter of 1989, a total of 27 clandestine labs were seized, the same period in 1990 had only 12 clandestine laboratories seized.[2] Furthermore, the second quarter of 1990 shows no clandestine lab seizures so far.



OBN intelligence indicates that fewer laboratories are operating in the state, prices of methamphetamine (or "crank" as it is known on the street) have increased from $800.00 an ounce to $1200.00 an ounce, quality has decreased from nearly pure to poor, and the

[2]The source of information is the Oklahoma State Bureau of Investigation Forensic Laboratory.

availability of "crank" in Oklahoma has slackened.[3]

One possible reason for the increase in clandestine laboratory seizures in Oklahoma between 1986 and 1989 is the availability of chemicals and rural property. Both are necessary for an effective drug laboratory operation. The major chemical supply sources in 1986 were the following:

1. Mid-America Chemical Co.: Oklahoma City, Okla.
2. Burrito Brothers: Dallas, Texas
3. DFW Chemicals: Dallas, Texas
4. Tulsa Scientific: Tulsa, Oklahoma.

Of these, Burrito Brothers was closed after the owners were indicted on conspiracy charges. Mid-America worked with DEA Oklahoma City and provided information to agents about chemical purchases. Tulsa Scientific was a DEA "storefront" operation that was discontinued after it's ineffectiveness was brought to the attention of the Dallas DEA office by several Oklahoma law enforcement agencies. DFW continued to sell precursor chemicals.

In 1987, Mid-America was discouraged from selling precursor chemicals by the Oklahoma City office of the DEA. The Burrito Brothers Industrial Supply Company was closed by the DEA in Dallas because of involvement in a clandestine laboratory conspiracy, and DFW Chemicals continued to sell precursors to anyone with money enough to afford their prices.

In 1988, major sources for chemicals in Oklahoma were the following:

1. DFW Chemicals: Dallas, Texas.
2. Industrial Chemicals Plus: Durant, Oklahoma.
3. Mid-Town Scientific: Tulsa, Oklahoma.[4]

DFW Chemicals supported Industrial Chemicals Plus, which dealt exclusively in precursor chemicals and catered to lab operators by having a 24 hour, 7 day, service. Mid-Town Scientific in Tulsa was a second DEA "storefront" operation. Information was given to the Tulsa DEA office by the operator of the storefront when individuals purchased precursor chemicals. Frequently, however, this information was several days old, incomplete, and the chemicals and suspects were gone.[5]

In 1989, sources of precursor chemicals continued to be the same, but the Tulsa operation closed in August 1989 after a television station purchased precursors "undercover" and exposed

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[3] These figures are obtained by the OBN Intelligence Division from buy reports, informant and suspect debriefings, and intelligence reports of clandestine laboratories and drug availability.

[4] Mid-Town Scientific was formerly Tulsa Scientific. The same DEA informant operated the store, which dealt exclusively in chemicals and glassware used in illegal drug synthesis.

[5] See attachment 1 for a map of the chemical influences into the various areas of Oklahoma from Texas and Tulsa.

the store as a DEA operation. When DFW chemicals moved to Shreveport, Louisiana in 1989 because of strict precursor control laws in Texas, Industrial Chemicals Plus also closed. Currently, in 1990, there are no Oklahoma chemical companies that are dealing in precursor chemicals.[6]

At the beginning of 1989, the intelligence division of OBN began plotting the location of clandestine laboratory intelligence information and seizures. This study indicated that, geographically, Oklahoma has seen clandestine laboratories in every area, however, occurrences have been predominately in three areas. Counties surrounding Tulsa, surrounding and south of Oklahoma City, and those in the Southern part of the state, particularly southeast, have had the highest occurrence of seized clandestine laboratories.[7] This corresponds to the locations of chemical sources. It appears is that illegal laboratory operators establish a metropolitan source for chemicals and find a rural location at which to operate the laboratory. Consequently, when DFW Chemicals moved to Shreveport, Louisiana, there was an increase in clandestine laboratories in Northern Louisiana and East Texas.[8] Intelligence information indicates that illegal laboratory operators from Oklahoma are moving to Louisiana and Missouri. Previously, operators moved to Oklahoma from Texas.

Oklahoma State Drug Strategy includes chemical diversion as a primary concern. Consequently, a precursor control bill, sponsored by OBN and endorsed by the Association of Oklahoma Narcotics Enforcers has been put into law. Information to support the precursor control bill was obtained from two primary sources: legitimate users of precursor chemicals and other states that already had precursor control laws. The OBN Intelligence Division contacted representatives from industries and universities throughout the state and determined that a precursor control law would not have significant impact on Oklahoma's economy.[9] Agents then contacted authorities in Texas and California, modeling Oklahoma precursor laws on the best points of each. It is anticipated that this law will discourage chemical supply companies in Oklahoma from dealing precursor chemicals while enabling legitimate

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[6] At this time, the decrease in clandestine laboratories in Oklahoma began and continues to the present.

[7] See Attachment 2 for a map of the areas of most frequent clandestine laboratory seizures in 1989 in Oklahoma.

[8] This information was obtained by the OBN Intelligence Division from the Intelligence Divisions of Texas Department of Public Safety and Louisiana State Police.

[9] In assessing the needs of an Oklahoma precursor law, it was determined that many precursors have never been used in Oklahoma. To minimize the impact of such legislation, the list of chemicals to be controlled was limited to a realistic and perceived need.

users of precursor chemicals to continue with their business. Strong criminal penalties and fines are the backbone of Oklahoma Precursor Control legislation.[10]

Among other issues that have concerned OBN is officer safety during drug laboratory operations. In 1986, two agents from OBN and a state chemist were injured when they inhaled hydrochloric acid vapors during a drug lab raid. Subsequently, OBN developed a lab safety program and purchased protective equipment for agents. Safety policies were written and agents were sent to a State 40 hour OSHA certification school.[11] Medical surveillance was initiated on agents working drug labs.[12] Another chemical injury occurred in 1989 when an OBN agent was exposed to hydriodic acid vapors.

Because of the rapid and overwhelming increase of clandestine laboratories in Oklahoma, OBN applied for a United States Bureau of Justice Assistance "Clandestine Laboratory Model Enforcement Program" grant in 1987 but was denied. Although California, Texas, Oregon, Oklahoma, And Washington State had the greatest number of clandestine laboratory seizures, only California and Washington State were awarded grants. The other two available grants were awarded to Pennsylvania and New Jersey. According to DEA statistics, Pennsylvania seized 6 clandestine laboratories in 1988 and New Jersey seized only 5 labs.[13] Oklahoma Bureau of Narcotics received a State block grant to purchase protective equipment and medical surveillance for agents.

Although this study is based upon early information of a decrease in Oklahoma labs, National clandestine laboratory strategy coordinators can learn from indications in Oklahoma. First, it is clear that the methods of reporting clandestine laboratory seizures on a Federal level are inadequate. An accurate method of assessing the situation must be developed.[14] Second, it should be clear that

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[10] For further information, see copy of Oklahoma precursor control legislation.

[11] See Attachment 3 , which is the curriculum of the 1988 OBN clandestine lab certification school.

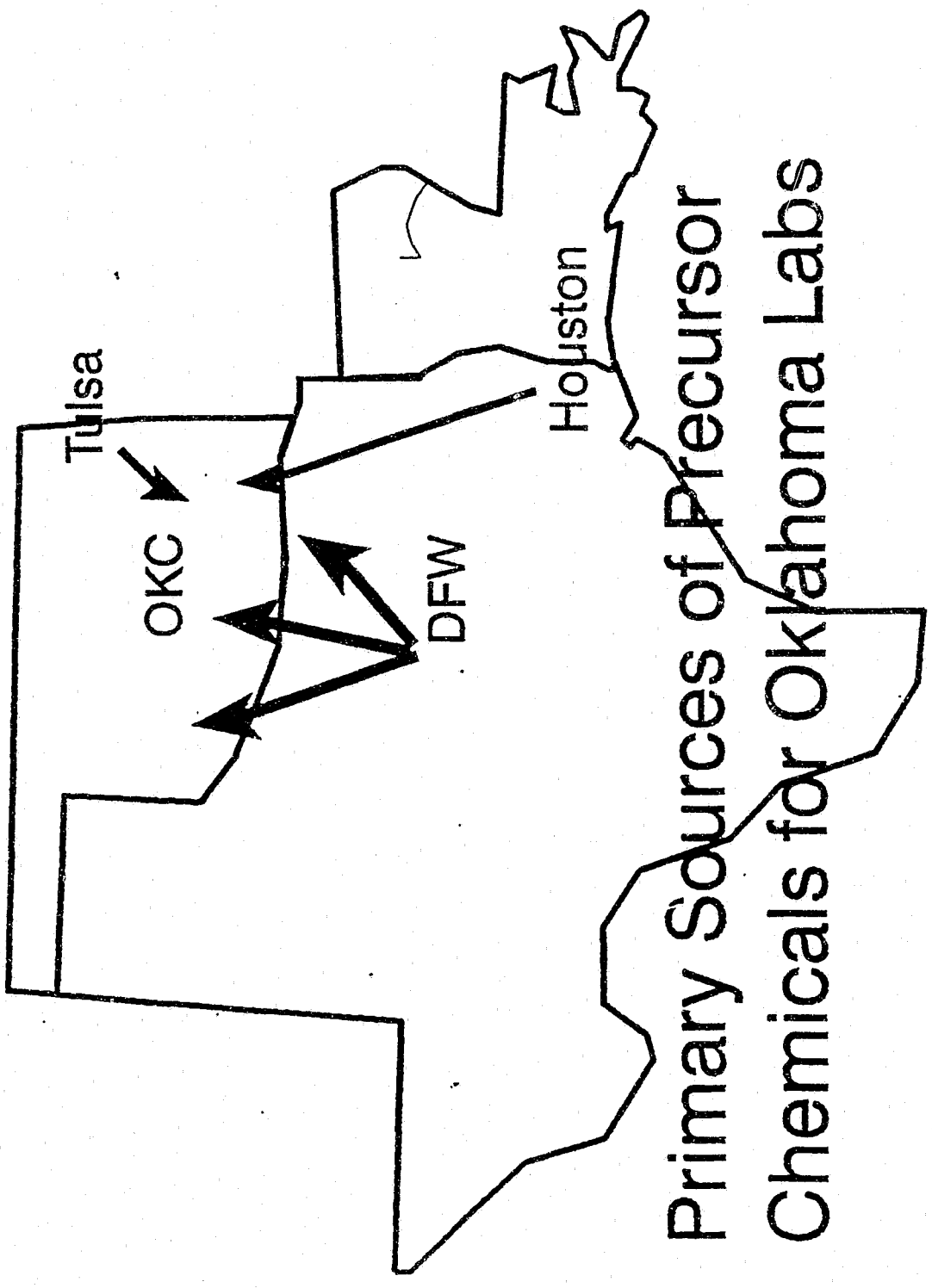
[12] OBN policy was based upon California DOJ policies. For more information see Attachment 4 , which is a copy of the OBN Clandestine Laboratory Policies and Procedures.

[13] The validity of DEA statistics for these states is presumed to be correct, since monitoring of the Federal Clandestine Laboratory Model Enforcement Program should produce accurate numbers.

[14] DEA statistics indicate that only 21 clandestine laboratories were seized in Oklahoma in 1988. In reality, 62 clandestine labs were seized. This error of 400% is not acceptable for National threat assessment.

sources of precursor chemicals, i.e., chemical supply companies, are the impetus for the geographical location of clandestine laboratories. Enforcement efforts, including grant money, should be provided for areas of high clandestine laboratory impact. "Storefront" operations are not effective unless chemicals are not allowed to leave the storefront without surveillance. Finally, strong precursor laws should be sponsored at the State and Federal level. When the average lab operator cannot find the chemicals he needs, he cannot produce illegal drugs. Most lab operators use a simple "recipe" and do not have chemistry backgrounds. Though trained chemists will always find a way around precursor control laws, most clandestine lab operators will be shut down.

Clearly there is a correlation between the availability of chemicals and the propagation of clandestine laboratories. This knowledge provides investigators, policy makers, and legislators with the means of controlling the lab problem by controlling precursor chemicals. Certainly any precursor control legislation cannot be effective unless there are strong criminal penalties for violation. Likewise, strong penalties must be levied against individuals engaged in clandestine laboratory operations.


Primary Sources of Precursor
Chemicals for Oklahoma Labs
Houston
DFW
OKC
Tulsa

Sources of Precursor Chemicals
for Oklahoma Labs
Houston
Tulsa
OKC

40 HOUR OBN CLANDESTINE LABORATORY CERTIFICATION SCHOOL

DAY 1

0830-0900	COURSE OVERVIEW
0900-1000	HISTORICAL PERSPECTIVE
1000-1100	"CHEMICAL ~~THREAT~~" video BASIC EQUIPMENT USED IN DRUG LABS
1100-1200	GENERAL FEATURES OF DRUG LABORATORIES (slide show)
1300-1400	BASIC TOXICOLOGY
1400-1700	RECOGNITION OF CHEMICAL HAZARDS ENCOUNTERED IN CLANDESTINE LABORATORIES

DAY 2

0830-0900	DEVELOPMENT OF A CERTIFIED SAFETY PROGRAM
0900-1030	OSHA RULES AND REGULATIONS
1030-1130	PERSONAL PROTECTIVE EQUIPMENT (levels A-D)
1230-1430	SELECTION, FITTING, USE, AND MAINTENENCE OF RESPIRATORS (lecture and exercise)
1430-1700	SELECTION, FITTING, USE, AND MAINTENENCE OF SCBA GEAR (lecture and exercise)

DAY 3

0830-1000	EYE PROTECTION, PROTECTIVE CLOTHING, EXPLOSIVE AND TOXIC VAPOR MONITORS (lecture and exercise)
1000-1200	RAID PLANNING (includes special planning necessary for clandestine lab raids)
1300-1400	SELECTING PERSONAL PROTECTIVE EQUIPMENT FOR RAIDS
1400-1700	SITE CONTROL, SAFETY OFFICER, DELEGATION OF RESPONSIBILITIES, DECONTAMINATION PROCEEDURES

DAY 4

0830-1200 BASIC FORMULAE USED IN CLANDESTINE DRUG LABS
1300-1400 SPECIAL DANGERS WITH SYNTHETIC "ANALOG" DRUGS
1400-1600 HARP PLAN (Hazard Appraisal and Recognition Plan)
1600-1700 LEGAL UPDATE (Current legal issues in clandestine laboratory investigations)
1700-1800 WRITTEN TEST

DAY 5

0800-1700 PRACTICAL EXERCISES (activities include a practical exercise in actually raiding a mock drug lab. Students are required to utilize the HARP plan and go through all phases of a raid through decontamination and use personal protective equipment; other exercises include malfunction clearance drills with SCBA and practical hazard recognition exercises with equipment)

NOTE: This course is designed to be accompanied by a three day field training on actual drug lab raids.

OKLAHOMA BUREAU OF NARCOTICS

AND

DANGEROUS DRUGS CONTROL

CLANDESTINE LABORATORY MANUAL

OF

INSTRUCTION AND PROCEDURE

HARP DOCUMENTATION PACKAGE

TABLE OF CONTENTS

INTRODUCTION

GOALS AND OBJECTIVES

The goal of the Oklahoma Bureau of Narcotics and Dangerous Drugs Control in printing this manual, is to insure the safest possible investigation of clandestine laboratories through the avoidance and reduction of chemical exposure to known acceptable levels of risk. Safe clandestine laboratory investigations are accomplished through phased investigatory procedures, information gathering and evaluation, proper selection and use of personal protective equipment, and medical monitoring of personnel.

The Oklahoma Bureau of Narcotics and Dangerous Drugs Control recognizes that successful prosecution of illicit drug manufacturers and the safety of its personnel require a coordinated relationship between the needs of the Bureau to identify and apprehend criminals and the Oklahoma State Bureau of Investigation Forensic Laboratory to evaluate and analyze evidence of chemical processes. The procedures set forth in this manual will standardize the investigations of clandestine laboratories participated in by the Oklahoma Bureau of Narcotics and Dangerous Drugs Control.

BACKGROUND

The recent and phenomenal growth of illicit drugs laboratories in Oklahoma caused a reevaluation of our enforcement practices with respect to toxic chemical exposures. During 1987, a clandestine laboratory safety program was established to develop procedures to minimize health risks associated with these investigations. The results of that program, along with consultations with other State and Federal agencies, have been used to arrive at this standardized safety program.

I. DEFINITIONS

A. Attorney General - A consititutional officer of the State whose duties include the investigation, detection, apprehension, prosecution and the suppression of crime.

B. Oklahoma State Bureau of Investigation (OSBI) - A bureau that identifies, collects, analyzes and interprets physical evidence of criminal activity. Bureau programs include criminalistics, latent prints, audio/visual, questioned documents and toxicology.

C. Oklahoma Bureau of Narcotics and Dangerous Drugs Control (OBNDDC) - A bureau assigned to enforce Oklahoma's Uniform Controlled Substances Act. Bureau programs include clandestine laboratories, regional task forces, narcotics enforcement units, drug diversion, and asset forfeiture/seizure.

D. Case Agent - A peace officer in charge of an investigation, and the person responsible for execution of the search warrant.

E. Clandestine Laboratory - An illicit operation consisting of a sufficient combination of apparatus and chemicals that either have been or could be used in the manufacture/synthesis of controlled substances.

F. Clandestine Laboratory Coordinator - An OBN Agent responsible for the Clandestine Laboratory Program who is also assigned to act as that Bureau's safety coordinator.

G. Criminalist - An OSBI Chemist, Drug Enforcement Administration Chemist, or a local criminalist trained in chemical and comparative analysis of physical evidence. Criminalists assigned to clandestine laboratory investigations have specialized experienced and/or training in illicit drug manufacture.

H. Hazard Appraisal Recognition Plan (HARP) - A preprinted package of forms to document information during the course of phased investigatory procedures.

I. Industrial Hygienist - An individual trained in the practice of industrial safety including hazard recognition, measurement, evaluation and methods of personal protection.

J. Lab Teams - (State, Federal Drug Enforcement Administration - DEA) and Local law enforcement personnel who have received the specialized training necessary to implement and follow the procedures and policies required in this manual.

K. On Call Industrial Hygienist - An individual contracted with the State of Oklahoma to provide industrial hygiene information to lab teams.

L. Phased Investigatory Procedures - Stages of an investigation with specific procedures that are completed in the following order: PLANNING, ENTRY, ASSESSMENT and PROCESSING.

M. Safety Officer - An OBNDDC employee assigned specific unit safety related tasks in addition to normal job duties.

N. Search Warrant - A search warrant is an order in writing in the names of the people, signed by a magistrate, directed to a peace officer, commanding him to search for personal property, and bring it before the magistrate.

O. Site Safety Officer (SSO) - A lab team member assigned by the Case Agent to act as the safety officer for a particular clandestine laboratory site investigation.

II. PERSONNEL DUTIES

A. Oklahoma Bureau of Narcotics (OBN)

1. Case Agent (At direction of Field Supervisor)

a. Assigns and directs a Site Safety Officer for the particular investigtion.

b. Initiates and develops the PLANNING phase of the clandestine laboratory investigation.

c. Directs the ENTRY phase.

d. Assists chemist during the ASSESSMENT phase and directs overall evidence gathering by local personnel and clandestine laboratory response teams.

e. Insures that the provisions of this manual are adhered to during the PLANNING, ENTRY, ASSESSMENT, and PROCESSING phases; and the disposal of contaminated wastes at the clandestine laboratory site.

f. Resolves conflicts between employees regarding issues of safety and scene processing. Insures that personnel not part of the lab team remain sufficiently off site to avoid chemical exposures.

g. Documents and reports to A.I.C. employee noncompliance to the instructions and procedures described in this manual as personally observed or reported by the Site Safety Officer. Attaches reports of employee noncompliance to the Hazard Appraisal Recognition Plan (HARP) that will be submitted to the Clandestine Laboratory Coordinator at OBN headquarters.

2. Safety Officer

Each OBN Regional Office shall designate a Safety Officer whose duties include, at least, these areas:

a. Performs minor maintenance of all personal protective equipment.

b. Insures that adequate supplies of disposable personal protective equipment are available.

c. Conducts and documents monthly checks of personal protective equipment for defects.

d. Makes recommendations to the OBN safety coordinator involving safety.

e. Acts as a "conduit" of safety information between unit employees and the bureau safety coordinators.

f. Reports and/or documents employee noncompliance of the instructions and procedures described in this manual. Noncompliance shall be reported to the Field Supervisor if it occurs in the "field." Noncompliance shall be documented and provided to the employee's supervisor if it occurs at the "office."

3. Site Safety Officer

The Case Agent shall appoint one lab team member to act as a Site Safety Officer (SSO) for each clandestine laboratory raid. The SSO should be the unit safety officer if available. The duties of the SSO shall include:

a. Transports the monitoring equipment to the site.

b. Compiles HARP PLANNING documentation including pre-raid intelligence information, the emergency evacuation and medical treatment plan. Briefs involved personnel on all known hazards associated with the particular clandestine laboratory, prior to the service of a search warrant.

c. Continues compilation of HARP documentation subsequent to the ENTRY phase and briefs the ASSESSMENT Team on observations made during entry.

d. Insures that two individuals with full protective clothing and Self Contained Breathing Apparatus (SCBA) are standing by and prepared to enter the scene in an emergency.

e. Insures that communications between the On-Call industrial hygienist and the field investigation team can be established if necessary.

f. Coordinates and implements the emergency evacuation plan for the particular site in accordance with the written PLANNING phase. The SSO may modify the emergency evacuation and medical treatment plan after consultation with the Case Agent and the Chemist. This in accord with circumstances which would impinge on civilian and agent safety - has particular reference to urban labs.

g. Insures that emergency first aid equipment and replacement personal safety equipment are available for immediate use e.g., first aid kit, eye wash, respirator cartridges, protective clothing and decontamination gear (Mainly access to water, hose, buckets, and brushes).

h. Continues compilation of HARP documentation subsequent to the ASSESSMENT phase. Records chemicals and processes indicated at the site. Reviews Material Safety Data Sheets (MSDS) for chemicals of concern at the site so that he/she can provide relevant safety information, as needed, during the course of the investigation. Briefs the PROCESSING team and waste hauler with available chemical information.

i. Insures that personnel using respirators (air supplied or air purified) have received training in the use of that equipment and that the equipment is being used in accordance with the investigatory phased procedures described in Section III. Reports employee (individual) refusal to follow prescribed protocol and/or use of personal protective equipment to the Case Agent. The Case Agent may document the noncompliance (see 1,f.) or direct the SSOto document the incident.

j. Insure that contaminated disposable equipment is provided to the waste hauler and that nondisposable equipment is decontaminated.

III. PERSONAL PROTECTIVE EQUIPMENT

Personal protective equipment shall be provided to OBN personnel. Equipment identified as the minimum level of protection for ENTRY and ASSESSMENT phases shall be provided and worn at all times during that phase. The PROCESSING phase may be "downgraded" from the requirements of the minimum level of protection as described in the paragraph below.

Respirators shall be worn by all personnel, during the ASSESSMENT and PROCESSING phases whenever "bulk" or otherwise unprocessed chemicals are on site other than the small volume samples collected and stored as evidence. If and when the ASSESSMENT team determines that air purifying respirators are not necessary for the PROCESSING team, the logical basis for that conclusion shall be documented as part of the HARP. Protective clothing shall be worn by all personnel handling, processing or physically in proximity to where chemicals are stored, being moved or processed.

All OBN Agents who may respond to clandestine laboratory investigations shall receive training on the use, limitations of use, maintenance and sanitation of respirators.

A. Minimum Personal Safety Equipment for the ENTRY team.*

1. Eye protection: a. non-vented, non-fogging goggle or b. plastic "flip-up-down" face shield.

2. Belt, holster, ammunition holders and handcuff cases.

3. Law enforcement identification clothing patches.

4. Nomex raid suit with gloves and hood.

5. Bullet resistant vest.

*NOTE: This list does not include weapon selection and tactical gear.

k. Continues compilation of HARP documentation during the evidence PROCESSING phase. The SSO should record unusual incidents, accidents or other relevant information called to his/her attention by the Case Agent, Chemist, or other lab team personnel.

l. Subsequent to field investigations, insures that all original documentation for the Hazardous Apraisal and Recognition Plan (HARP) is completed and submitted to the Clandestine Laboratory Coordinator (OBN Headquarters Office).

B. FORENSIC SERVICES

1. Chemists

a. An OSBI Chemist or DEA Chemist shall be called every time as early as possible to respond to a clandestine laboratory location. The Chemist shall be versed in chemical procedures, common formula routes for the region, and potential safety hazards associated with illicit drug manufacturing and the handling of chemical reagents.

b. The Chemist shall coordinate with the Case Agent and the SSO before dismantling or sampling controlled substances and hazardous materials.

c. The Chemist shall, in consultation with the Case Agent and/or the SSO and the On-Call industrial hygienist, make evaluation of the health and safety hazards of the clandestine laboratory site and recommend downgrading from the ASSESSMENT phase to the PROCESSING phase including the selection of proper personal protective equipment and the necessary and appropriate chemical safety procedures to be used at the clandestine laboratory site.

2. Body protection: (a) Sarnex coated tyvek material, full coverage coverall suits, (b) Tyvek coverall suits

3. Hand protection: Chemical resistant gloves.

4. Respiratory protection: (a) Half face air purifying respirators, or (b) Full face air purifying respirators.

D. Clothing Restriction.

No synthetic clothing, other than Nomex, will be worn under the exposure suit by any personnel involved in a clandestine laboratory crime scene investigation.

IV. SECURING OF CLANDESTINE LABORATORY CRIME SCENE

A. PLANNING Responsibilities

1. This is the initial phase of any clandestine laboratory enforcement action. This phase specifically involves documenting intelligence information relating to chemical safety issues, development of the emergency evacuation and medical treatment plan, and the commensurate resource management and coordination of personnel and material.

2. The Field Supervisor has overall enforcement and chemical safety responsibility for responding personnel. The Field Supervisor shall coordinate service of the search warrant, notification of allied agencies, initiate HARP documentation, and insure participants are briefed regarding issues of safety and procedures.

B. ENTRY Team and Responsibilities

1. The entry team will be comprised of OBN Agents and/or a combination of OBN and Federal/Local officers who are properly trained and equipped.

2. To secure the clandestine laboratory scene, arrest and remove suspects to an uncontaminated location.

3. To report any scene observations that were made during the ENTRY regarding chemicals, processing equipment, stages of process, odors etc. to the SSO for documentation, evaluation and to appraise the ASSESSMENT team of conditions.

4. Personal protective safety equipment should not hamper mobility, restrict or reduce breathing efficiency, speech, or reduce dexterity needed for effective firearm usage. The choice of personal safety equipment shall be made based on individualized case information. Protective eye and body equipment (goggles and Nomex suits with police identification patches and boot covers) shall be worn at a minimum.

5. If a local agency SWAT team is used for ENTRY, the Field Supervisor and SSO shall attempt to debrief SWAT team members for the information described in No. 3 above.

C. ASSESSMENT Team and Responsibilities

1. The ASSESSMENT team will be comprised of one qualified chemist and one OBN Agent (preferably the SSO).

2. To determine the explosivity limits, common toxic gases or vapors, and the oxygen levels by utilizing an explosivity/oxygen meter and Draeger detector tubes, if available. And, to report measured levels of gases monitored to the SSO.

3. To deactivate and ventilate the laboratory as needed.

4. To inform the Case Agent of all known chemicals and observed hazards associated with the clandestine laboratory scene.

5. To determine when the evidence PROCESSING team may begin. To select the appropriate air purifying cartridge for use by the PROCESSING team if chemicals are on site.

6. To determine when the minimum level of personal protective equipment for the PROCESSING phase may be further reduced and to document the logic for that further reduction.

V. LABORATORY DISMANTLING PROCEDURES

A. Dismantling is intended to be part of the PROCESSING phase. The ASSESSMENT team shall attempt to reduce chemical vapor levels by deactivating active chemical synthesis processes and ventilation if possible.

B. Photographs and/or video tapes of the inside of the clandestine laboratory site should be taken prior to dismantling. If the site cannot be "downgraded" in the use of personal safety equipment from SCBA to air purifying respirators, photographs shall be taken by the ASSESSMENT team.

C. Necessary items of evidence shall be removed to a well ventilated area for photography and latent print examination if the laboratory environment cannot be "downgraded" to the use of air purifying respirators.

D. Dismantling the chemical synthesis process shall be done at the direction of the chemist.

VI. EVIDENCE HANDLING AND STORAGE PROCEDURES

A. PROCESSING Team and Responsibilities

1. The PROCESSING team is comprised of lab team personnel who have been trained in the use of respirators. Because use of SCBA equipment increases metabolic stress, and the duration of this investigatory phase averages several hours, air purifying respirators are intended to be used after the ASSESSMENT phase whenever possible.

2. To identify, document and collect evidence of criminal activity.

B. Handling and Storage Procedures

1. The chemist(s) shall be responsible for sampling controlled substances and hazardous chemicals.

   a. All sampling shall be conducted under environmental conditions conducive to safety and with adequate personal protection against toxic exposure.

   b. Under no circumstances shall lab team personnel use their sense of smell to identify hazardous materials during ASSESSMENT and PROCESSING phases.

   c. Samples shall be placed in suitable sealed containers (such as glass bottles with teflon lined caps) and sealed in impervious containers (such as Kapak bags).

2. Photographs shall be taken of all samples with the original containers and numbered as such for evidence.

3. All chemically contaminated evidence shall be sealed in protective bags, or equivalent, at the scene and marked with **CAUTION/WARNING** labels, i.e., hazardous material, clandestine laboratory evidence.

4. Chemically contaminated evidence shall not be transported in the passenger compartment of a vehicle, stored in an "evidence vault" or submitted as evidence for analysis unless sealed in protective bags.

5. Photographs shall be taken of any evidence items to be removed from the laboratory scene.

6. Photographs should be taken of any item from which latent prints were lifted.

VII. AIR MONITORING EQUIPMENT

Air monitoring equipment shall consist of three separate instruments. First, a meter capable of detecting and warning of explosive levels of organic vapors. The second instrument is a hand held Draeger bellows pump with selected sample tubes for detection and quantitative measurement of specific vaporous chemicals. The third is a meter capable of detecting Toxic vapor, i.e., phosphine gas.

VIII. EXPOSURE RECORDS AND REPORTING

A. Site General Documentation is provided via the written Hazard Appraisal and Recognition Plan (HARP) which provides a chronological compilation of hazardous and chemical information as it is developed through the course of the investigation. The HARP lists the chemical process believed to be possible or operational, names of chemicals found, quantitative measurements from monitoring and the logical basis for any variations in the level of personal protective equipment defined by this manual of instruction and procedures. The HARP also includes written documentation of unusual incidents, and employee safety concerns and resolution.

A HARP documentation package shall be generated for each clandestine laboratory investigation. The original HARP documentation shall be maintained by the Clandestine Laboratory Coordinator in OBN headquarters. Because the HARP documentation contains on site chemical information and identifies employees involved in the particular investigatory phase, the completed packages shall be maintained

for the length of employment of the employees plus 30 years. The employee shall have full access to his/her site specific information (defined immediately below) and the generalized HARP information.

B. Site Specific Documentation is provided via the Clandestine Laboratory Exposure Report (CLER). The CLER is tailored to clandestine laboratories, should be filled out in the field, and provides more specific exposure information for the individual. The CLER shall be completed for any incidents of exposures to chemical vapors or physical body (tissue) contact which results in perceived or observed abnormal health reactions. Without perceived or observed abnormal health reactions, there is no specific need to complete the exposure report.

1. The CLER shall be completed by the SSO in the field. The case agent shall attempt to verify the factual basis of the conditions that resulted in the chemical exposure, or to report the conditions as he/she knew them to be and cosign the report. The role of the SSO and case agent is in fact finding and reporting information as accurately as possible.

   a. If significant abnormal health reactions occur, in the field, that require the attention of a physician, a CLER shall be completed and provided to the attending physician as information. The physician may retain a copy of the CLER as part of the patient's medical records. The original CLER shall be provided to the employee's supervisor.

2. The exposure reports shall be forwarded to the Clandestine Laboratory Coordinator, OBN headquarters. CLER's that have not been reviewed and cosigned by the Case Agent where the exposure is believed to have occurred may be referred to the Case Agent for verification of the reported factual basis . Exposure reports shall be reviewed by the OBN safety coordinators. The purpose of the review process is to evaluate reported exposures to determine if they were preventable and to recommend action, as necessary, to avoid future similar exposures. A copy of the CLER will be attached to and remian a part of the original HARP documentation package. All personal identifiers i.e., name, social security number, addresses etc. that identify the exposed employee shall be removed from the copy of the CLER before inclusion as part of the HARP documentation.

C. Sick Leave Reporting and Prompt Medical Treatment. The PLANNING phase of the investigation details specific procedures for prompt medical attention in the field. However, by the nature of some chemical exposures, delayed effects may be felt or observed several days after initial exposure. In the office, the employee's supervisor is responsible for assuring prompt medical treatment and the reporting of sick leave.

1. If abnormal health effects are reported or observed at the employee's unit subsequent to field operations, the employee's supervisor shall authorize sick leave in accordance with OBN Policy.

C. Medical Test Results. Detailed test results are confidential and privileged between the employee and the medical staff.

D. The Official Toxic Exposure Record is a separate and distinguishable record folder from the employee's official personnel record folder. The employee's official toxic exposure record is a folder containing restricted access information, for individual employees, that is managed and maintained by the OBN Personnel Officer. The folder shall include at least the following information:

1. The name and social security number of the employee.

2. Original documentation of site specific exposure information.

3. Original physicians' written opinions.

4. A copy of this Clandestine Laboratory Manual of Instruction and Procedure.

IX. HAZARDOUS WASTE DISPOSAL

A. All chemicals and other toxic waste shall be packaged, hauled, and stored by a licensed hazardous waste hauler or OSBI.

B. Decontamination of non-disposable equipment shall be performed by the user of the equipment as soon as possible at the direction of the SSO.

C. The Case Agent shall assign an agent to maintain scene security and the personal protection of non-employees until all items to be disposed of are packaged and ready to leave the crime scene.

X. ASSISTING OTHER AGENCIES

This manual of instructions and procedures provides the means to meet the needs of law enforcement agencies in the safe investigation and handling of clandestine laboratories. When assisting local and/or federal agencies, the policies and procedures set forth in this manual shall be strictly adhered to by all OBN personnel.

Law enforcement requests for OBN services only shall be addressed as follows:

A. Local law enforcement agencies requesting assistance from OBN shall be referred to the regional OBN Office.

B. OBN employees are specifically directed not to provide "field" instruction, personal safety equipment or advice that would reduce or substitute the requirements of this manual such that "field" operations could continue. It is the responsibility of the local and/or federal agency to be conversant with and to adhere to the requirements in this manual.

C. If assistance from the Oklahoma Highway Patrol (OHP) is needed, agents must contact the lieutenant in charge of the particular district at least two (2) hours prior to the raid. The lieutenant will then provide manpower for assistance to O.B.N. O.H.P. Troopers, by their policy, cannot enter ANY drug laboratory unless the environment is pronounced safe by a qualified chemist.

XI. NOTIFICATION OF TOXIC WASTE HAZARDS

A. The question of abatement (cleanup) responsibility is a complex problem that is currently the subject of litigation between State and local authorities. Notification of local or state authorities subsequent to an enforcement action involving the transfer, storage or disposal of hazardous waste shall be performed on clandestine laboratory investigations.

B. Written notification to responsible parties for potential nuisance abatement (cleanup) shall be provided by the Agent Supervisor who has regional jurisdiction over the clandestine laboratory investigation. The communication shall notice parties of (1.) the criminal investigation and subsequent enforcement action, (2.) observations made incident to the enforcement action "indicating the transfer, storage and/or disposal of hazardous chemicals" at the investigation site, (3.) Governmental seizure and removal of "bulk" chemicals and other hazardous materials has occurred, and (4.) because there may still be significant chemical contamination at the property, copies of this notification are being sent to local and/or state authorities concerned with environmental toxic contaminations.

1. If the investigation site is on privately owned land, the notification letter shall be addressed to the property owner of record and copies sent to the State Health Department.

2. If the investigation site is on public land owned by a city, county or State agency, the notification letter shall be addressed to the State Health Department.

3. If the investigation site is on privately owned land where there is reasonable cause to believe that chemical contamination has occurred onto adjoining privately owned property, through a public sewage system or onto public land, the notification letter shall be addressed to the property owner of record where the source of chemical contamination originated and copies sent to the State Health Department.

XII. PRISONER HANDLING

A. The following personal protective safety equipment shall be provided to a suspect in the event the clothing is deemed to have been contaminated:

1. Paper coverall suits (if available)

2. Paper booties (if available)

B. Correctional facility and transporting officers shall be notified of any prisoners who are contaminated.

C. Contaminated clothing shall be bagged and provided to the waste hauler.

XIII. MEDICAL SURVEILLANCE

Medical surveillance is a departmentally sponsored, voluntary, program in which employees are strongly urged to participate. Three services are provided:

A. The basic medical service or "base-line" includes a review of the patient's medical history and chemical testing of blood and urine to establish clinical parameters that can be monitored through time for abnormal variation. Blood and urine testing is performed yearly.

B. The determination of respiratory fitness is a medical evaluation that is performed yearly.

C. A personal examination by the departmentally contracted physician(s) may be requested by the employeer and/or employee upon failure of "base-line", respiratory fitness determination or subsequent to field chemical exposure.

XIV. TRAINING

Department and local agency personnel assigned to clandestine laboratory investigations shall be provided training in: (1.) Hazard recognition, (2.) Clandestine Laboratory Manual of Instruction and Procedure, (3.) HARP documentation and (4.) the Division's written respiratory program. Training shall be provided by OBN. Specialized training in the use of monitoring equipment shall be provided to employees assigned to the ASSESSMENT team.

XV. MANUAL REVIEW

The Clandestine Laboratory Safety Committee shall convene periodically to review employee feedback information, and recommend modifications to this manual of instruction and procedure.

GUIDELINES FOR EMERGENCY ROOM EVALUATION OF INDIVIDUALS INVOLVED IN DISMANTLING CLANDESTINE LABS

Introduction -

Individuals involved in dismantling clandestine drug manufacturing labs and arresting the operators may be exposed to a variety of hazardous materials. Although protective measures, including body suits and respiratory equipment are employed, occasions do arise when exposures occur which may be followed by symptoms. These may include nausea, vomiting, dizziness, headache, metallic taste in mouth, sore throat, shortness of breath, etc. Many symptoms are self-limited but all need to be carefully assessed. As a general principle, the best approach is to employ standard medical evaluation based on the individuals symptoms. Some specific points follow:

History -

Elicit the usual history describing the patient's specific symptoms. A history of the exposure conditions, substances and protective measures taken are also important. However, complete details will not always be available. In terms of priority, it will usually be most valuable to address and document the actual symptoms.

Physical Exam -

The usual initial examination should be performed, including vital signs (hypertension, hypotension, tachycardia, respiratory rate). Note the skin (rashes, burns, cyanosis), cardiac, respiratory (sneezing, coughing), abdominal (liver tenderness, size) and neurologic examination. The rest of the examination may be directed according to the patient's specific symptoms.

Lab -

Initial laboratory workup should include arterial blood gas, complete blood count, electrolytes, liver function tests and urinanalysis. A CXR should be performed in all cases of dyspnea and where respiratory injury is suspected. EKG may be performed it is seems indicated by the patient's condition and/or complaints.

Management -

Management is supportive and should be directed toward the individuals symptoms and condition as established by the evaluation. Obvious injuries, such as burns, are treated in the usual manner. For nonspecific symptoms, if all tests are negative, the patient may be discharged with advice to return for evaluation for worsening symptoms or the onset of new symptoms such as cough, dyspnea, chest tightness, etc.

Specific syndromes, e.g., cyanide poisoning, hypertension due to ephedrine absorption, brochospasm, or respiratory complaints should be treated in the usual manner. Patients with unresolved respiratory symptoms or abnormal exam findings, or laboratory studies may require observation for 24-48 hours after the exposure. The following is a brief list of some of the chemicals which may be encountered in the illicit drug manufacturing labs.

Irritants and Corrosives -

These compounds may damage surface skin by direct contact. If aerosolized, they may also cause respiratory tract irritation and nonspecific symptoms.

Acetic anhydride
Ethyl acetate
Acids
Mercuric chloride
Sodium acetate
Sodium hydroxide

Organic Solvents -

These compounds may also irritate the skin with direct contact. In addition, nonspecific symptoms include headache, nausea, dizziness, etc. Narcosis may result from severe exposures.

Acetone
Benzene
Methylamine
Methanol
Piperidine
Pyridine
Chloroform

Other Hazards -

Laboratory conditiions are usually not oriented toward safety. Physical hazards include fires and explosions. Some processes release cyanide gas (e.g., manufacture of PCP). This may be present as cyanosis, dyspnea, and unexplained metabolic acidosis on the blood gas or electrolytes. Exposure to the manufactured substances may also occur (e.g., LSD, PCP, ephedrine).

CLANDESTINE LABORATORY
HAZARDOUS APPRAISAL & RECOGNITION PLAN (HARP)

(To be Completed By Either Case Agent
or Designated Site Safety Officer)

Date:_____

Case Agent:_____ Site Safety Officer:_____

Prepared by:_____ Case No.:_____

I. PLANNING PHASE (INCLUDING ENTRY)

Type of Structure_____
(i.e., Residential, Commercial, Business)

Address:_____

Laboratory type:

( ) Methamphetamine

( ) P-2P/Methylalmine ( ) Ephedrine/Thionyl Chloride/Hydrogen
( ) P-2-P ( ) Ephedrine/Red Phosphorus/Hyd. Acid
( ) Other_____

( ) Phencyclidine (PCP)

( ) Piperidine/Cyclohexanone ( ) Pyrrolidine/Cyclohexanone
( ) Morpholine/Cyclohex ( ) PCC Only
( ) Grignard Reaction ( ) Other _____

( ) Other Lab

( ) Methaqualone ( ) Fentanyl
( ) LSD ( ) Cocaine Paste/Hcl
( ) Other_____

Intelligence gathered relating to potential hazards:

( ) Suspects are armed_____
_____

( ) There is a specific potential for explosion or fire at the lab
_____
_____

( ) The Lab has been bobby trapped _____

_____

( ) Estimated drug(s) production level _____

( ) Synthesis ("cooking") schedule, if known _____

_____

_____

( ) Known chemicals at site from chemical company purchases, etc (include type and amount) _____

_____

_____

_____

_____

_____

_____

( ) Other _____

_____

Other factors relating to potential hazards at the lab site:

( ) Weather

( ) Rain ( ) Snow ( ) Excessive heat (heat stress)

( ) Wind Wind direction _____

( ) Other _____

( ) Terrain

( ) Hilly ( ) Leval ( ) High elevation

( ) Other _____

( ) Structure

( ) Residence ( ) Small shed ( ) Mobile home

( ) Confined spaces _____

( ) Other _____

Ground level of structure ( ) above ( ) below

THE FOLLOWING NOTIFICATIONS MUST TAKE PLACE (IF POSSIBLE) PRIOR TO RAID BREIFING.

1. Forensic personnel

Chemist: OSBI ( ) DEA ( ) Other ( )

Name: _____

Name: _____

Latents:

Name: _____

Name: _____

Photographer:

Name: _____

Name: _____

2. Fire department:

Department name:

Telephone:_____ Date notified:_____

Number of units responding to stand by:_____

3. Nearest ambulance/hospital:

Hospital or Agency name:_____

Telephone:_____ Date notified:_____

Number of units responding to stand by:_____

4. Nearest MED-A-VAC Agency:

Agency notified:_____

Telephone:_____ Date notified:_____

5. Chemical Disposal Company:

Agency Name:_____

Time notified:_____ Time of arrival:_____

Emergency Evacuation and treatment plan:

Resources and necessary material:

( ) Material Safety Data Sheets (MSDS)
( ) Merck Index
( ) First Aid Kit
( ) Guidelines for Emergency Room evaluation

Who will be on site:

( ) Ambulance
( ) Fire Department
( ) Helicopter

If not on site, who by name and contact (telephone/dispatcher) met will be contacted for chemical injury:

Name_____
Title_____
Telephone_____

If not on site how long will it take to respond and what services will be provided when responding? _____

_____

If not on site where is the nearest emergency treatment facility or standby ambulance? _____

_____

If not on site who will provide transportation and how will it be provided? _____

_____

Equipment Readiness check:(complete prior to leaving office for raid)

( ) Air monitoring equipment

( ) Dreager bellows pump with tubes checked below

- ( ) Hydrogen Cyanide
- ( ) Hydrogen Chloride
- ( ) Phosphine
- ( ) Sulfur Dioxide
- ( ) Ammonia
- ( ) Diethyl Ether
- ( ) Acetone
- ( ) Benzene
- ( ) Chloroform
- ( ) Hydrogen Sulfide

( ) First Aid Kit
( ) Eye Wash
( ) Drinking Water or Gatorade
( ) Eye protection, non-vented, non-fogging goggle

( ) Body protection: a. Nomex coveralls, or b. "Sarnex" coated tyvek material, full coverage coverall suits.

( ) Foot protection: a. chemical resistant rubber boots, or b. disposable boot covers with a tread sole bottom.

( ) Hand protection: a. chemical resistnt gloves, b. fire resistant gloves.

( ) Respiratory protection: Air purifying respirators and Self contained breathing apparatus (SCBA)

( ) Emergency egress package with 5 minute escape air supply.
( ) Voice amplification communicator.
( ) Nylon belt, holster, ammunition holders and handcuff cases.
( ) Law enforcement identification clothing patches.

PERSONNEL AND RESPONSIBILITIES

ENTRY TEAM:

	NAME	RESPONSIBILITY
1.		
2.		
3.		
4.		
5.		
6.		
7.		
8.		
9.		
10.		
11.		
12.		
13.		
14.		
15.		
16.		
17.		
18.		
19.		
20.		
21.		
22.		

A COPY OF THE STRATEGIC BRIEFING PLAN SHALL BE ATTACHED TO THIS REPORT FOR FURTHER REFERENCE.

II. ASSESSMENT PHASE (To be completed following the entry and securing of the site)

Debrief by entry team:

( ) A reaction is ongoing
( ) The reaction is shutdown
( ) Lab not active (boxed-up)
( ) Minor quantities of chemicals in controlled condition
( ) No lab observed
( ) Odors detected:

( ) Hazards observed

ASSESSMENT TEAM (shall consist of one chemist/criminalist and one or more case agents)

Name	Responsibility
1.	(chemist)
2.	(case agent)
3.	(case agent)
4.	(Stand-by with SCBA outside of lab)

Debrief by assessment team:

( ) Type of reaction observed
( ) The reaction is: ( ) shutdown ( ) active
( ) Lab not active (boxed-up)
( ) Minor chemicals and or residues - situation apparently under control however sampling and disposal is needed.
( ) No lab is on site
( ) Hazards observed

( ) Advise SSO of known/observed chemicals present. Check off the known chemicals on the attached chemical list.

( ) Air monitoring equipment
( ) not used ( ) used (if used complete the following):

Oxygen level_____ Level of explosivity _____

( ) Draeger tubes
( ) not used ( ) used (if used check off tubes used):

The following tubes should be used in the order presented

Tube type	Reaction	
( ) hydrogen sulfide	positive ( )	negative ( )
( ) hydrogen cyanide	positive ( )	negative ( )
( ) chloroform	positive ( )	negative ( )
( ) benzene	positive ( )	negative ( )
( ) phosphine	positive ( )	negative ( )

The following tubes are optional tests

( ) hydrogen chloride	positive ( )	negative ( )
( ) sulfur dioxide	positive ( )	negative ( )
( ) ammonia	positive ( )	negative ( )
( ) diethyl ether	positive ( )	negative ( )
( ) acetone	positive ( )	negative ( )

Protective equipment recommended for the processing phase

( ) Eye protection, non-vented, non-fogging goggle.

( ) Body protection:
( ) Nomex coveralls
( ) "Sarnex" coated tyvek material, full coverage coverall suits

( ) Foot protection:
( ) Chemical resistant rubber boots
( ) Disposable boot covers with tread sole bottom

( ) Hand protection:
( ) chemical resistant gloves
( ) fire resistant gloves

( ) Respiratory protection:
( ) Air purifying respirators
( ) Self contained breathing apparatus (SCBA)
( ) Voice amplification communicator
( ) Emergency egress package with 5 minute escape air supply

III. PROCESSING PHASE

Processing Team:

	NAME	RESPONSIBILITY	Respiratory Trained:
1.	_____	_____	( )
2.	_____	_____	( )
3.	_____	_____	( )
4.	_____	_____	( )
5.	_____	_____	( )
6.	_____	_____	( )
7.	_____	_____	( )
8.	_____	_____	( )
9.	_____	_____	( )
10.	_____	_____	( )
11.	_____	_____	( )
12.	_____	_____	( )
13.	_____	_____	( )
14.	_____	_____	( )
15.	_____	_____	( )
16.	_____	_____	( )
17.	_____	_____	( )
18.	_____	_____	( )
19.	_____	_____	( )
20.	_____	_____	( )

NON-COMPLIANCE OF SAFETY PROCEDURES
(TO BE COMPLETED BY CASE AGENT OR SSO)

Incident No. 1

Action Taken:

Incident No. 2:

Action Taken:

Incident No. 3:

Action Taken:

NON-COMPLIANCE OF SAFETY PROCEDURES
(TO BE COMPLETED BY CASE AGENT OR SSO)

Incident No. 1

Action Taken:

Incident No. 2:

Action Taken:

Incident No. 3:

Action Taken:

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RICHARD M. WINTORY

Since receiving his J.D. degree from the University of Oklahoma College of Law in 1984, Mr. Wintory has been employed as an assistant district attorney with the Office of the Oklahoma County District Attorney, where he is assigned to the special narcotics prosecution unit. In that capacity he prosecuted Oklahoma's first state wiretap cases. As a special assistant United States attorney he participated in trying RICO and designer drug cases, including the successful prosecution of what the Department of Justice believed to be the third largest domestic heroin ring in the country.

As a member of the Oklahoma District Attorneys Association Legislation Committee, Mr. Wintory assisted in drafting Oklahoma drug trafficking, forfeiture and wiretap laws. His experience and expertise in criminal and forfeiture law has led him to serve on APRI's Task Force on the Uniform Controlled Substances Act (UCSA) and Task Force on Model Asset Forfeiture Legislation since 1988. On a leave of absence from his job as an assistant district attorney, Mr. Wintory served as Director of the American Prosecutors Research Institute's (APRI) National Drug Prosecution Center from January, 1990 until June, 1991.

As Director he supervised the Center's model legislation work; oversaw and assisted in development of Center training programs in trial advocacy, asset forfeiture, and multi-jurisdictional task forces; led Center efforts to assist district attorneys in developing community-based drug strategies; and served as a liaison with the Office of National Drug Control Policy and Office of the Attorney General.

Mr. Wintory lectures on search and seizure law, informants, and narcotics prosecution for the National College of District Attorneys which has designated him as a Lecturer of Merit. He also trains for law enforcement agencies, state district attorneys' associations, state bar associations and judicial conferences and organizations including the Louisiana District Attorneys Association, the Arkansas Prosecuting Attorneys Association, and the Oklahoma District Attorneys Council. Mr. Wintory speaks frequently on drug control issues at conferences held by the National Conference of State Legislatures and the Office of National Drug Control Policy. In addition, he has authored and co-authored several publications including a Narcotics Prosecution Handbook.

***

SANDRA L. JANZEN

After graduating from the Arizona State University College of Law with a J.D. degree in 1977, Ms. Janzen joined the Office of the Maricopa County (Phoenix) Attorney as a deputy county attorney. During the last five and one-half years of her twelve year tenure she was assigned to the Organized Crime and Racketeering Division where she focused on asset forfeiture actions and large scale criminal narcotics investigations. Ms. Janzen is currently an assistant attorney general with the Arizona Attorney General's office specializing in civil forfeiture and related actions designed to dismantle Northern Mexico's drug importation cartels.

Ms. Janzen co-authored Arizona's forfeiture statute which became effective in 1986 and trains on this legislation for the Arizona Prosecuting Attorneys Advisory Council. Additionally, she lectures nationally and writes extensively on asset forfeiture, money laundering, financial investigations, and conspiracy issues for the National College of District Attorneys which awarded her the Lecturer of Merit certificat. Other beneficiaries of her teaching skills include the National Association of Prosecutor Coordinators, the Louisiana District Attorneys Association, the Police Executive Research Forum and other law enforcement organizations.

For the past three years she has been a member of APRI's Task Force on the UCSA and Task Force on Model Asset Forfeiture Legislation. As a member, she co-wrote the Model Asset Seizure and Forfeiture Act (MASFA) (1991).

***

CAMERON H. HOLMES

Mr. Holmes received his J.D. degree from Georgetown University in 1977. He joined the Organized Crime and Racketeering Unit of the Maricopa County Attorney's Office in 1978, and handled criminal prosecutions through 1981. He then moved to the newly formed organized Crime Project of the Arizona Attorney General's Office, which was dedicated solely to civil racketeering cases.

Mr. Holmes has spoken nationally on RICO, and testified and consulted in the passage of various state RICO laws and amendments to the federal RICO act. He has also authored amendments to Arizona's RICO, money laundering and forfeiture statutes, and coordinated Arizona's amicus briefs in three U.S. Supreme Court cases involving RICO. As a member of APRI's Task Force on the UCSA and Task Force on Model Legislation he co-authored the Model Asset Seizure and Forfeiture Act (MASFA) (1991).

In 1988 he served as associate counsel to the Senate Iran-Contra Committee where he employed international money tracing techniques. He has returned to Arizona as Assistant Chief Counsel, Special Investigation's Division, Arizona Attorney General's Office, heading a forfeiture support project.

For this project, Mr. Holmes serves as a representative from the National Association of Attorneys General. Points of view or opinions in this document do not necessarily represent the official views of the National Association of Attorneys Generals.

***

HARRY S. HARBIN

Mr. Harbin received his J.D. degree in 1982 from Georgetown University Law Center. For the next four years, he was a litigation associate with Wald, Harkrader & Ross, a Washington D.C. law firm. From 1986–1988, he served as a trial lawyer with the Narcotics and Dangerous Drug Section, Criminal Division, United States Department of Justice, where he developed expertise in the area of designer drugs or controlled substances analogs. His duties included appellate and trial litigation and policy formulation in the areas of drug and money laundering law, and approval of federal money laundering prosecutions. From 1988 to 1990, Mr. Harbin was deputy director of the Asset Forfeiture Office, Criminal Division, United States Department of Justice. As Deputy Director, he was responsible for appellate practice and policy formulation in the areas of asset forfeiture and money laundering, and approval of federal money laundering prosecutions. Mr. Harbin is currently Deputy Director of the Money Laundering Section, Criminal Division, Department of Justice where he continues his work on national and international money laundering issues.

In addition to speaking nationally on asset forfeiture, money laundering, and drug law topics, he has co–authored a book entitled Handbook on the Anti–Drug Abuse Act of 1986 and "Money Laundering Amendments," a chapter in a forthcoming American Bar Association publication on the Anti–Drug Abuse Act of 1988.

Since 1988, he has been a member of APRI's Task Force on the UCSA and Task Force on Model Asset Forfeiture Legislation. In that role he served as the official Department of Justice advisor to the Uniform Law Commissioners' UCSA Drafting Committee.

***

SHERRY GREEN–DE LA GARZA

Graduating from George Washington University's National Law Center in 1984, Ms. Green–De La Garza worked as a research associate at the American Bar Association's National Center for Children and the Law. In addition to analyzing case law and child support statutes child support enforcement, she co–authored the publication Retroactive Modification of Child Support Arrears which provided background information for the development of the federal Child Support Enforcement Amendments of 1984. In 1986 and 1987, she clerked for a District of Columbia Superior Court judge. Her responsibilities included researching and drafting opinions on medical and legal malpractice, labor law, administrative law, and commercial law.

Ms. Green–De La Garza joined APRI's National Drug Prosecution Center as a staff attorney in 1988. As director and manager of the Center's model legislation activities, she serves on APRI's Task Force on the UCSA and Task Force on Model Asset Forfeiture Legislation. She researches and writes on state statutory developments in forfeiture and drug control; edits, co–writes, and oversees the production of model legislation handbooks and the Center's other state statutory material; coordinates the Center's model legislation assistance to states, the Office of National Drug Control Policy and other interested individuals; and tracks and analyzes federal drug legislation.

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