# STATUTORY ADDENDUM

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21 USCA S 801
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**UNITED STATES CODE ANNOTATED**
**TITLE 21. FOOD AND DRUGS**
**CHAPTER 13--DRUG ABUSE PREVENTION AND CONTROL**
**SUBCHAPTER I--CONTROL AND ENFORCEMENT**
**PART A--INTRODUCTORY PROVISIONS**



Current through P.L. 108-20, approved 04-30-03

§ 801. Congressional findings and declarations: controlled substances

The Congress makes the following findings and declarations:

(1) Many of the drugs included within this subchapter have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people.

(2) The illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.

(3) A major portion of the traffic in controlled substances flows through interstate and foreign commerce. Incidents of the traffic which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce because--

(A) after manufacture, many controlled substances are transported in interstate commerce,

(B) controlled substances distributed locally usually have been transported in interstate commerce immediately before their distribution, and

(C) controlled substances possessed commonly flow through interstate commerce immediately prior to such possession.

(4) Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances.

(5) Controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate. Thus, it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate.

(6) Federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic.

(7) The United States is a party to the Single Convention on Narcotic Drugs, 1961, and other international conventions designed to establish effective control over international and domestic traffic in controlled substances.

CREDIT(S)

1999 Main Volume

(Pub.L. 91-513, Title II, § 101, Oct. 27, 1970, 84 Stat. 1242.)

<General Materials (GM) - References, Annotations, or Tables>

21 USCA S 811
21 U.S.C.A. § 811

**UNITED STATES CODE ANNOTATED**
**TITLE 21. FOOD AND DRUGS**
**CHAPTER 13--DRUG ABUSE PREVENTION AND CONTROL**
**SUBCHAPTER I--CONTROL AND ENFORCEMENT**
**PART B--AUTHORITY TO CONTROL; STANDARDS AND SCHEDULES**



Current through P.L. 108-20, approved 04-30-03

§ 811. Authority and criteria for classification of substances

(a) Rules and regulations of Attorney General; hearing

The Attorney General shall apply the provisions of this subchapter to the controlled substances listed in the schedules established by section 812 of this title and to any other drug or other substance added to such schedules under this subchapter. Except as provided in subsections (d) and (e) of this section, the Attorney General may by rule--

(1) add to such a schedule or transfer between such schedules any drug or other substance if he--

(A) finds that such drug or other substance has a potential for abuse, and

(B) makes with respect to such drug or other substance the findings prescribed by subsection (b) of section 812 of this title for the schedule in which such drug is to be placed; or

(2) remove any drug or other substance from the schedules if he finds that the drug or other substance does not meet the requirements for inclusion in any schedule.

Rules of the Attorney General under this subsection shall be made on the record after opportunity for a hearing pursuant to the rulemaking procedures prescribed by subchapter II of chapter 5 of Title 5. Proceedings for the issuance, amendment, or repeal of such rules may be initiated by the Attorney General (1) on his own motion, (2) at the request of the Secretary, or (3) on the petition of any interested party.

(b) Evaluation of drugs and other substances

The Attorney General shall, before initiating proceedings under subsection (a) of this section to control a drug or other substance or to remove a drug or other substance entirely from the schedules, and after gathering the necessary data, request from the Secretary a scientific and medical evaluation, and his recommendations, as to whether such drug or other substance should be so controlled or removed as a controlled substance. In making such evaluation and recommendations, the Secretary shall consider the factors listed in paragraphs (2), (3), (6), (7), and (8) of subsection (c) of this section and any scientific or medical considerations involved in paragraphs (1), (4), and (5) of such subsection. The recommendations of the Secretary shall include recommendations with respect to the appropriate schedule, if any, under which such drug or other substance should be listed. The evaluation and the recommendations of the Secretary shall be made in writing and submitted to the Attorney General within a reasonable time. The recommendations of the Secretary to the Attorney General shall be binding on the Attorney General as to such scientific and medical matters, and if the Secretary recommends that a drug or other substance not be controlled, the Attorney General shall not control the drug or other substance. If the Attorney General determines that these facts and all other relevant data constitute substantial evidence of potential for abuse such as to warrant control or substantial evidence that the drug or other substance should be removed entirely from the schedules, he shall initiate proceedings for control or removal, as the case may be, under subsection (a) of this section.

(c) Factors determinative of control or removal from schedules

In making any finding under subsection (a) of this section or under subsection (b) of section 812 of this title, the Attorney General shall consider the following factors with respect to each drug or other substance proposed to be controlled or removed from the schedules:

(1) Its actual or relative potential for abuse.

(2) Scientific evidence of its pharmacological effect, if known.

(3) The state of current scientific knowledge regarding the drug or other substance.

(4) Its history and current pattern of abuse.

(5) The scope, duration, and significance of abuse.

(6) What, if any, risk there is to the public health.

(7) Its psychic or physiological dependence liability.

(8) Whether the substance is an immediate precursor of a substance already controlled under this subchapter.

(d) International treaties, conventions, and protocols requiring control; procedures respecting changes in drug schedules of Convention on Psychotropic Substances

(1) If control is required by United States obligations under international treaties, conventions, or protocols in effect on October 27, 1970, the Attorney General shall issue an order controlling such drug under the schedule he deems most appropriate to carry out such obligations, without regard to the findings required by subsection (a) of this section or section 812(b) of this title and without regard to the procedures prescribed by subsections (a) and (b) of this section.

(2)(A) Whenever the Secretary of State receives notification from the Secretary-General of the United Nations that information has been transmitted by or to the World Health Organization, pursuant to article 2 of the Convention on Psychotropic Substances, which may justify adding a drug or other substance to one of the schedules of the Convention, transferring a drug or substance from one schedule to another, or deleting it from the schedules, the Secretary of State shall immediately transmit the notice to the Secretary of Health and Human Services who shall publish it in the Federal Register and provide opportunity to interested persons to submit to him comments respecting the scientific and medical evaluations which he is to prepare respecting such drug or substance. The Secretary of Health and Human Services shall prepare for transmission through the Secretary of State to the World Health Organization such medical and scientific evaluations as may be appropriate regarding the possible action that could be proposed by the World Health Organization respecting the drug or substance with respect to which a notice was transmitted under this subparagraph.

(B) Whenever the Secretary of State receives information that the Commission on Narcotic Drugs of the United Nations proposes to decide whether to add a drug or other substance to one of the schedules of the Convention, transfer a drug or substance from one schedule to another, or delete it from the schedules, the Secretary of State shall transmit timely notice to the Secretary of Health and Human Services of such information who shall publish a summary of such information in the Federal Register and provide opportunity to interested persons to submit to him comments respecting the recommendation which he is to furnish, pursuant to this subparagraph, respecting such proposal. The Secretary of Health and Human Services shall evaluate the proposal and furnish a recommendation to the Secretary of State which shall be binding on the representative of the United States in discussions and negotiations relating to the proposal.

(3) When the United States receives notification of a scheduling decision pursuant to article 2 of the Convention on Psychotropic Substances that a drug or other substance has been added or transferred to a schedule specified in the

notification or receives notification (referred to in this subsection as a "schedule notice") that existing legal controls applicable under this subchapter to a drug or substance and the controls required by the Federal Food, Drug, and Cosmetic Act [21 U.S.C.A. § 301 et seq.] do not meet the requirements of the schedule of the Convention in which such drug or substance has been placed, the Secretary of Health and Human Services after consultation with the Attorney General, shall first determine whether existing legal controls under this subchapter applicable to the drug or substance and the controls required by the Federal Food, Drug, and Cosmetic Act, meet the requirements of the schedule specified in the notification or schedule notice and shall take the following action:

(A) If such requirements are met by such existing controls but the Secretary of Health and Human Services nonetheless believes that more stringent controls should be applied to the drug or substance, the Secretary shall recommend to the Attorney General that he initiate proceedings for scheduling the drug or substance, pursuant to subsections (a) and (b) of this section, to apply to such controls.

(B) If such requirements are not met by such existing controls and the Secretary of Health and Human Services concurs in the scheduling decision or schedule notice transmitted by the notification, the Secretary shall recommend to the Attorney General that he initiate proceedings for scheduling the drug or substance under the appropriate schedule pursuant to subsections (a) and (b) of this section.

(C) If such requirements are not met by such existing controls and the Secretary of Health and Human Services does not concur in the scheduling decision or schedule notice transmitted by the notification, the Secretary shall--

(i) if he deems that additional controls are necessary to protect the public health and safety, recommend to the Attorney General that he initiate proceedings for scheduling the drug or substance pursuant to subsections (a) and (b) of this section, to apply such additional controls;

(ii) request the Secretary of State to transmit a notice of qualified acceptance, within the period specified in the Convention, pursuant to paragraph 7 of article 2 of the Convention, to the Secretary-General of the United Nations;

(iii) request the Secretary of State to transmit a notice of qualified acceptance as prescribed in clause (ii) and request the Secretary of State to ask for a review by the Economic and Social Council of the United Nations, in accordance with paragraph 8 of article 2 of the Convention, of the scheduling decision; or

(iv) in the case of a schedule notice, request the Secretary of State to take appropriate action under the Convention to initiate proceedings to remove the drug or substance from the schedules under the Convention or to transfer the drug or substance to a schedule under the Convention different from the one specified in the schedule notice.

(4)(A) If the Attorney General determines, after consultation with the Secretary of Health and Human Services, that proceedings initiated under recommendations made under paragraph [FN1] (B) or (C)(i) of paragraph (3) will not be completed within the time period required by paragraph 7 of article 2 of the Convention, the Attorney General, after consultation with the Secretary and after providing interested persons opportunity to submit comments respecting the requirements of the temporary order to be issued under this sentence, shall issue a temporary order controlling the drug or substance under schedule IV or V, whichever is most appropriate to carry out the minimum United States obligations under paragraph 7 of article 2 of the Convention. As a part of such order, the Attorney General shall, after consultation with the Secretary, except such drug or substance from the application of any provision of part C of this subchapter which he finds is not required to carry out the United States obligations under paragraph 7 of article 2 of the Convention. In the case of proceedings initiated under subparagraph (B) of paragraph (3), the Attorney General, concurrently with the issuance of such order, shall request the Secretary of State to transmit a notice of qualified acceptance to the Secretary-General of the United Nations pursuant to paragraph 7 of article 2 of the Convention. A temporary order issued under this subparagraph controlling a drug or other substance subject to proceedings initiated under subsections (a) and (b) of this section shall expire upon the effective date of the application to the drug or substance of the controls resulting from such proceedings.

(B) After a notice of qualified acceptance of a scheduling decision with respect to a drug or other substance is transmitted to the Secretary-General of the United Nations in accordance with clause (ii) or (iii) of paragraph (3)(C) or after a request has been made under clause (iv) of such paragraph with respect to a drug or substance described in a

schedule notice, the Attorney General, after consultation with the Secretary of Health and Human Services and after providing interested persons opportunity to submit comments respecting the requirements of the order to be issued under this sentence, shall issue an order controlling the drug or substance under schedule IV or V, whichever is most appropriate to carry out the minimum United States obligations under paragraph 7 of article 2 of the Convention in the case of a drug or substance for which a notice of qualified acceptance was transmitted or whichever the Attorney General determines is appropriate in the case of a drug or substance described in a schedule notice. As a part of such order, the Attorney General shall, after consultation with the Secretary, except such drug or substance from the application of any provision of part C of this subchapter which he finds is not required to carry out the United States obligations under paragraph 7 of article 2 of the Convention. If, as a result of a review under paragraph 8 of article 2 of the Convention of the scheduling decision with respect to which a notice of qualified acceptance was transmitted in accordance with clause (ii) or (iii) of paragraph (3)(C)--

(i) the decision is reversed, and

(ii) the drug or substance subject to such decision is not required to be controlled under schedule IV or V to carry out the minimum United States obligations under paragraph 7 of article 2 of the Convention,

the order issued under this subparagraph with respect to such drug or substance shall expire upon receipt by the United States of the review decision. If, as a result of action taken pursuant to action initiated under a request transmitted under clause (iv) of paragraph (3)(C), the drug or substance with respect to which such action was taken is not required to be controlled under schedule IV or V, the order issued under this paragraph with respect to such drug or substance shall expire upon receipt by the United States of a notice of the action taken with respect to such drug or substance under the Convention.

(C) An order issued under subparagraph (A) or (B) may be issued without regard to the findings required by subsection (a) of this section or by section 812(b) of this title and without regard to the procedures prescribed by subsection (a) or (b) of this section.

(5) Nothing in the amendments made by the Psychotropic Substances Act of 1978 or the regulations or orders promulgated thereunder shall be construed to preclude requests by the Secretary of Health and Human Services or the Attorney General through the Secretary of State, pursuant to article 2 or other applicable provisions of the Convention, for review of scheduling decisions under such Convention, based on new or additional information.

(e) Immediate precursors

The Attorney General may, without regard to the findings required by subsection (a) of this section or section 812(b) of this title and without regard to the procedures prescribed by subsections (a) and (b) of this section, place an immediate precursor in the same schedule in which the controlled substance of which it is an immediate precursor is placed or in any other schedule with a higher numerical designation. If the Attorney General designates a substance as an immediate precursor and places it in a schedule, other substances shall not be placed in a schedule solely because they are its precursors.

(f) Abuse potential

If, at the time a new-drug application is submitted to the Secretary for any drug having a stimulant, depressant, or hallucinogenic effect on the central nervous system, it appears that such drug has an abuse potential, such information shall be forwarded by the Secretary to the Attorney General.

(g) Exclusion of non-narcotic substances sold over the counter without a prescription; dextromethorphan; exemption of substances lacking abuse potential

(1) The Attorney General shall by regulation exclude any non-narcotic substance from a schedule if such substance may, under the Federal Food, Drug, and Cosmetic Act [21 U.S.C.A. § 301 et seq.], be lawfully sold over the counter without a prescription.

(2) Dextromethorphan shall not be deemed to be included in any schedule by reason of enactment of this subchapter unless controlled after October 27, 1970 pursuant to the foregoing provisions of this section.

(3) The Attorney General may, by regulation, exempt any compound, mixture, or preparation containing a controlled substance from the application of all or any part of this subchapter if he finds such compound, mixture, or preparation meets the requirements of one of the following categories:

(A) A mixture, or preparation containing a nonnarcotic controlled substance, which mixture or preparation is approved for prescription use, and which contains one or more other active ingredients which are not listed in any schedule and which are included therein in such combinations, quantity, proportion, or concentration as to vitiate the potential for abuse.

(B) A compound, mixture, or preparation which contains any controlled substance, which is not for administration to a human being or animal, and which is packaged in such form or concentration, or with adulterants or denaturants, so that as packaged it does not present any significant potential for abuse.

(h) Temporary scheduling to avoid imminent hazards to public safety

(1) If the Attorney General finds that the scheduling of a substance in schedule I on a temporary basis is necessary to avoid an imminent hazard to the public safety, he may, by order and without regard to the requirements of subsection (b) of this section relating to the Secretary of Health and Human Services, schedule such substance in schedule I if the substance is not listed in any other schedule in section 812 of this title or if 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.A. § 355]. Such an order may not be issued before the expiration of thirty days from--

(A) the date of the publication by the Attorney General of a notice in the Federal Register of the intention to issue such order and the grounds upon which such order is to be issued, and

(B) the date the Attorney General has transmitted the notice required by paragraph (4).

(2) The scheduling of a substance under this subsection shall expire at the end of one year from the date of the issuance of the order scheduling such substance, except that the Attorney General may, during the pendency of proceedings under subsection (a)(1) of this section with respect to the substance, extend the temporary scheduling for up to six months.

(3) When issuing an order under paragraph (1), the Attorney General shall be required to consider, with respect to the finding of an imminent hazard to the public safety, only those factors set forth in paragraphs (4), (5), and (6) of subsection (c) of this section, including actual abuse, diversion from legitimate channels, and clandestine importation, manufacture, or distribution.

(4) The Attorney General shall transmit notice of an order proposed to be issued under paragraph (1) to the Secretary of Health and Human Services. In issuing an order under paragraph (1), the Attorney General shall take into consideration any comments submitted by the Secretary in response to a notice transmitted pursuant to this paragraph.

(5) An order issued under paragraph (1) with respect to a substance shall be vacated upon the conclusion of a subsequent rulemaking proceeding initiated under subsection (a) of this section with respect to such substance.

(6) An order issued under paragraph (1) is not subject to judicial review.

CREDIT(S)

1999 Main Volume

(Pub.L. 91-513, Title II, § 201, Oct. 27, 1970, 84 Stat. 1245; Pub.L. 95-633, Title I, § 102(a), Nov. 10, 1978, 92 Stat. 3769;

Pub.L. 96-88, Title V, § 509(b), Oct. 17, 1979, 93 Stat. 695; Pub.L. 98-473, Title II, §§ 508, 509(a), Oct. 12, 1984, 98 Stat. 2071, 2072.)

[FN1] So in original. Probably should be "subparagraph".

<General Materials (GM) - References, Annotations, or Tables>

21 USCA S 812
21 U.S.C.A. § 812

**UNITED STATES CODE ANNOTATED**
**TITLE 21. FOOD AND DRUGS**
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Current through P.L. 108-20, approved 04-30-03

§ 812. Schedules of controlled substances

(a) Establishment

There are established five schedules of controlled substances, to be known as schedules I, II, III, IV, and V. Such schedules shall initially consist of the substances listed in this section. The schedules established by this section shall be updated and republished on a semiannual basis during the two-year period beginning one year after October 27, 1970, and shall be updated and republished on an annual basis thereafter.

(b) Placement on schedules; findings required

Except where control is required by United States obligations under an international treaty, convention, or protocol, in effect on October 27, 1970, and except in the case of an immediate precursor, a drug or other substance may not be placed in any schedule unless the findings required for such schedule are made with respect to such drug or other substance. The findings required for each of the schedules are as follows:

(1) Schedule I.--

**(A)** The drug or other substance has a high potential for abuse.

**(B)** The drug or other substance has no currently accepted medical use in treatment in the United States.

**(C)** There is a lack of accepted safety for use of the drug or other substance under medical supervision.

(2) Schedule II.--

**(A)** The drug or other substance has a high potential for abuse.

**(B)** The drug or other substance has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions.

**(C)** Abuse of the drug or other substances may lead to severe psychological or physical dependence.

(3) Schedule III.--

**(A)** The drug or other substance has a potential for abuse less than the drugs or other substances in schedules I and II.

**(B)** The drug or other substance has a currently accepted medical use in treatment in the United States.

**(C)** Abuse of the drug or other substance may lead to moderate or low physical dependence or high psychological dependence.

(4) Schedule IV.--

**(A)** The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule III.

**(B)** The drug or other substance has a currently accepted medical use in treatment in the United States.

**(C)** Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule III.

(5) Schedule V.--

**(A)** The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule IV.

**(B)** The drug or other substance has a currently accepted medical use in treatment in the United States.

**(C)** Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule IV.

(c) Initial schedules of controlled substances

Schedules I, II, III, IV, and V shall, unless and until amended [FN1] pursuant to section 811 of this title, consist of the following drugs or other substances, by whatever official name, common or usual name, chemical name, or brand name designated:

**Schedule I**

**(a)** Unless specifically excepted or unless listed in another schedule, any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation:

**(1)** Acetylmethadol.

**(2)** Allylprodine.

**(3)** Alphacetylmathadol. [FN2]

**(4)** Alphameprodine.

**(5)** Alphamethadol.

**(6)** Benzethidine.

**(7)** Betacetylmethadol.

**(8)** Betameprodine.

**(9)** Betamethadol.

**(10)** Betaprodine.

**(11)** Clonitazene.

**(12)** Dextromoramide.

(13) Dextrorphan.

(14) Diampromide.

(15) Diethylthiambutene.

(16) Dimenoxadol.

(17) Dimepheptanol.

(18) Dimethylthiambutene.

(19) Dioxaphetyl butyrate.

(20) Dipipanone.

(21) Ethylmethylthiambutene.

(22) Etonitazene.

(23) Etoxeridine.

(24) Furethidine.

(25) Hydroxypethidine.

(26) Ketobemidone.

(27) Levomoramide.

(28) Levophenacylmorphan.

(29) Morpheridine.

(30) Noracymethadol.

(31) Norlevorphanol.

(32) Normethadone.

(33) Norpipanone.

(34) Phenadoxone.

(35) Phenampromide.

(36) Phenomorphan.

(37) Phenoperidine.

(38) Piritramide.

(39) Proheptazine.

(40) Properidine.

(41) Racemoramide.

(42) Trimeperidine.

(b) Unless specifically excepted or unless listed in another schedule, any of the following opium derivatives, their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Acetorphine.

(2) Acetyldihydrocodeine.

(3) Benzylmorphine.

(4) Codeine methylbromide.

(5) Codeine-N-Oxide.

(6) Cyprenorphine.

(7) Desomorphine.

(8) Dihydromorphine.

(9) Etorphine.

(10) Heroin.

(11) Hydromorphinol.

(12) Methyldesorphine.

(13) Methylhydromorphine.

(14) Morphine methylbromide.

(15) Morphine methylsulfonate.

(16) Morphine-N-Oxide.

(17) Myrophine.

(18) Nicocodeine.

(19) Nicomorphine.

(20) Normorphine.

(21) Pholcodine.

(22) Thebacon.

(c) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation, which contains any quantity of the following hallucinogenic substances, or which contains any of their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the

specific chemical designation:

**(1)** 3,4-methylenedioxy amphetamine.

**(2)** 5-methoxy-3,4-methylenedioxy amphetamine.

**(3)** 3,4,5-trimethoxy amphetamine.

**(4)** Bufotenine.

**(5)** Diethyltryptamine.

**(6)** Dimethyltryptamine.

**(7)** 4-methyl-2,5-dimethoxyamphetamine.

**(8)** Ibogaine.

**(9)** Lysergic acid diethylamide.

**(10)** Marihuana.

**(11)** Mescaline.

**(12)** Peyote.

**(13)** N-ethyl-3-piperidyl benzilate.

**(14)** N-methyl-3-piperidyl benzilate.

**(15)** Psilocybin.

**(16)** Psilocyn.

**(17)** Tetrahydrocannabinols.

**Schedule II**

**(a)** Unless specifically excepted or unless listed in another schedule, any of the following substances whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

**(1)** Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate.

**(2)** Any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in clause (1), except that these substances shall not include the isoquinoline alkaloids of opium.

**(3)** Opium poppy and poppy straw.

**(4)** coca [FN3] leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed; cocaine, its salts, optical and geometric isomers, and salts of isomers; ecgonine, its derivatives, their salts, isomers, and salts of isomers; or any compound, mixture, or preparation which contains any quantity of any of the substances referred to in this paragraph.

(b) Unless specifically excepted or unless listed in another schedule, any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters and ethers, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation:

(1) Alphaprodine.

(2) Anileridine.

(3) Bezitramide.

(4) Dihydrocodeine.

(5) Diphenoxylate.

(6) Fentanyl.

(7) Isomethadone.

(8) Levomethorphan.

(9) Levorphanol.

(10) Metazocine.

(11) Methadone.

(12) Methadone-Intermediate, 4-cyano-2-dimethylamino-4, 4-diphenyl butane.

(13) Moramide-Intermediate, 2-methyl-3-morpholino-1, 1-diphenylpropane- carboxylic acid.

(14) Pethidine.

(15) Pethidine-Intermediate-A, 4-cyano-1-methyl-4-phenylpiperidine.

(16) Pethidine-Intermediate-B, ethyl-4-phenylpiperidine-4-carboxylate.

(17) Pethidine-Intermediate-C, 1-methyl-4-phenylpiperidine-4-carboxylic acid.

(18) Phenazocine.

(19) Piminodine.

(20) Racemethorphan.

(21) Racemorphan.

(c) Unless specifically excepted or unless listed in another schedule, any injectable liquid which contains any quantity of methamphetamine, including its salts, isomers, and salts of isomers.

**Schedule III**

(a) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system:

(1) Amphetamine, its salts, optical isomers, and salts of its optical isomers.

(2) Phenmetrazine and its salts.

(3) Any substance (except an injectable liquid) which contains any quantity of methamphetamine, including its salts, isomers, and salts of isomers.

(4) Methylphenidate.

(b) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system:

(1) Any substance which contains any quantity of a derivative of barbituric acid, or any salt of a derivative of barbituric acid.

(2) Chorhexadol.

(3) Glutethimide.

(4) Lysergic acid.

(5) Lysergic acid amide.

(6) Methyprylon.

(7) Phencyclidine.

(8) Sulfondiethylmethane.

(9) Sulfonethylmethane.

(10) Sulfonmethane.

(c) Nalorphine.

(d) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation containing limited quantities of any of the following narcotic drugs, or any salts thereof:

(1) 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.

(2) 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, non-narcotic ingredients in recognized therapeutic amounts.

(3) 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.

(4) 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.

(5) 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.

(6) 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.

(7) 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.

(8) 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.

(e) Anabolic steroids.

**Schedule IV**

(1) Barbital.

(2) Chloral betaine.

(3) Chloral hydrate.

(4) Ethchlorvynol.

(5) Ethinamate.

(6) Methohexital.

(7) Meprobamate.

(8) Methylphenobarbital.

(9) Paraldehyde.

(10) Petrichloral.

(11) Phenobarbital.

**Schedule V**

Any compound, mixture, or preparation containing any of the following limited quantities of narcotic drugs, which shall include 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:

(1) Not more than 200 milligrams of codeine per 100 milliliters or per 100 grams.

(2) Not more than 100 milligrams of dihydrocodeine per 100 milliliters or per 100 grams.

(3) Not more than 100 milligrams of ethylmorphine per 100 milliliters or per 100 grams.

(4) Not more than 2.5 milligrams of diphenoxylate and not less than 25 micrograms of atropine sulfate per dosage unit.

(5) Not more than 100 milligrams of opium per 100 milliliters or per 100 grams.

CREDIT(S)

1999 Main Volume

(Pub.L. 91-513, Title II, § 202, Oct. 27, 1970, 84 Stat. 1247; Pub.L. 95-633, Title I, § 103, Nov. 10, 1978, 92 Stat. 3772; Pub.L. 98-473, Title II, §§ 507(c), 509(b), Oct. 12, 1984, 98 Stat. 2071, 2072; Pub.L. 99-570, Title I, § 1867, Oct. 27, 1986, 100 Stat. 3207-55; Pub.L. 99-646, § 84, Nov. 10, 1986, 100 Stat. 3619; Pub.L. 101-647, Title XIX, § 1902(a), Nov. 29,

1990, 104 Stat. 4851.)

[FN1] Revised schedules are published in the Code of Federal Regulations, Part 1308 of Title 21, Food and Drugs.

[FN2] So in original. Probably should be "Alphacetylmethadol".

[FN3] So in original. Probably should be capitalized.

<General Materials (GM) - References, Annotations, or Tables>

21 USCA S 841
21 U.S.C.A. § 841

**UNITED STATES CODE ANNOTATED**
**TITLE 21. FOOD AND DRUGS**
**CHAPTER 13--DRUG ABUSE PREVENTION AND CONTROL**
**SUBCHAPTER I--CONTROL AND ENFORCEMENT**
**PART D--OFFENSES AND PENALTIES**



Current through P.L. 108-20, approved 04-30-03

§ 841. Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

**(1)** to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

**(2)** to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

**(1)(A)** In the case of a violation of subsection (a) of this section involving--

**(i)** 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

**(ii)** 5 kilograms or more of a mixture or substance containing a detectable amount of--

(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, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

**(iii)** 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

**(iv)** 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

**(v)** 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

**(vi)** 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 1,000 or more marijuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of Title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving--

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of--

(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, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N- phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 100 or more marijuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date- Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III (other than gamma hydroxybutyric acid), or 30 milligrams of flunitrazepam, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18,

or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such persons shall be sentenced to a term of imprisonment of not more than 2 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of Title 18.

(5) Any person who violates subsection (a) of this section by cultivating a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed--

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of Title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual;

or both.

(6) Any person who violates subsection (a), or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use--

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water,

shall be fined in accordance with title 18, United States Code, or imprisoned not more than five years, or both.

(7) **Penalties for distribution. (A) In general.** Whoever, with intent to commit a crime of violence, as defined in section 16 of Title 18 (including rape), against an individual, violates subsection (a) of this section by distributing a controlled substance or controlled substance analogue to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with Title 18.

**(B) Definitions.** For purposes of this paragraph, the term "without that individual's knowledge" means that the

individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is administered to the individual.

(c) Offenses involving listed chemicals

Any person who knowingly or intentionally--

(1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this subchapter;

(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this subchapter; or

(3) with the intent of causing the evasion of the recordkeeping or reporting requirements of section 830 of this title, or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required;

shall be fined in accordance with Title 18 or imprisoned not more than 20 years in the case of a violation of paragraph (1) or (2) involving a list I chemical or not more than 10 years in the case of a violation of this subsection other than a violation of paragraph (1) or (2) involving a list I chemical, or both.

(d) Boobytraps on Federal property; penalties; "boobytrap" defined

(1) Any person who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term of imprisonment for not more than 10 years or fined under Title 18, or both.

(2) If any person commits such a violation after 1 or more prior convictions for an offense punishable under this subsection, such person shall be sentenced to a term of imprisonment of not more than 20 years or fined under Title 18, or both.

(3) For the purposes of this subsection, the term "boobytrap" means any concealed or camouflaged device designed to cause bodily injury when triggered by any action of any unsuspecting person making contact with the device. Such term includes guns, ammunition, or explosive devices attached to trip wires or other triggering mechanisms, sharpened stakes, and lines or wires with hooks attached.

(e) Ten-year injunction as additional penalty

In addition to any other applicable penalty, any person convicted of a felony violation of this section relating to the receipt, distribution, manufacture, exportation, or importation of a listed chemical may be enjoined from engaging in any transaction involving a listed chemical for not more than ten years.

(f) Wrongful distribution or possession of listed chemicals

(1) Whoever knowingly distributes a listed chemical in violation of this subchapter (other than in violation of a recordkeeping or reporting requirement of section 830 of this title) shall be fined under Title 18 or imprisoned not more than 5 years, or both.

(2) Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements of section 830 of this title have not been adhered to, if, after such knowledge is acquired, such person does not take immediate steps to remedy the violation shall be fined under Title 18 or imprisoned not more than one year, or both.

(g) Redesignated (f)

CREDIT(S)

1999 Main Volume

(Pub.L. 91-513, Title II, § 401, Oct. 27, 1970, 84 Stat. 1260; Pub.L. 95-633, Title II, § 201, Nov. 10, 1978, 92 Stat. 3774; Pub.L. 96-359, § 8(c), Sept. 26, 1980, 94 Stat. 1194; Pub.L. 98-473, Title II, §§ 224(a), 502, 503(b)(1), (2), Oct. 12, 1984, 98 Stat. 2030, 2068, 2070; Pub.L. 99-570, Title I, §§ 1002, 1003(a), 1004(a), 1005(a), 1103, Title XV, § 15005, Oct. 27, 1986, 100 Stat. 3207-2, 3207-5, 3207-6, 3207-11, 3207-192; Pub.L. 100-690, Title VI, §§ 6055, 6254(h), 6452(a), 6470(g), (h), 6479, Nov. 18, 1988, 102 Stat. 4318, 4367, 4371, 4378, 4381; Pub.L. 101-647, Title X, § 1002(e), Title XII, § 1202, Title XXXV, § 3599K, Nov. 29, 1990, 104 Stat. 4828, 4830, 4932; Pub.L. 103-322, Title IX, § 90105(a), (c), Title XVIII, § 180201(b)(2)(A), Sept. 13, 1994, 108 Stat. 1987, 1988, 2047; Pub.L. 104-237, Title II, § 206(a), Title III, § 302(a), Oct. 3, 1996, 110 Stat. 3103, 3105; Pub.L. 104-305, § 2(a), (b)(1), Oct. 13, 1996, 110 Stat. 3807; Pub.L. 105-277, Div. E, § 2(a), Oct. 21, 1998, 112 Stat. 2681-759.)

2003 Electronic Update

(As amended Pub.L. 106-172, §§ 3(b)(1), 5(b), 9, Feb. 18, 2000, 114 Stat. 9, 10, 13; Pub.L. 107-273, Div. B, Title III, § 3005(a), Title IV, § 4002(d)(2)(A), Nov. 2, 2002, 116 Stat. 1805, 1809.)

<General Materials (GM) - References, Annotations, or Tables>

21 USCA S 844
21 U.S.C.A. § 844

**UNITED STATES CODE ANNOTATED**
**TITLE 21. FOOD AND DRUGS**
**CHAPTER 13--DRUG ABUSE PREVENTION AND CONTROL**
**SUBCHAPTER I--CONTROL AND ENFORCEMENT**
**PART D--OFFENSES AND PENALTIES**



Current through P.L. 108-23, approved 05-19-03

§ 844. Penalties for simple possession

(a) Unlawful acts; penalties

It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II of this chapter. It shall be unlawful for any person knowingly or intentionally to possess any list I chemical obtained pursuant to or under authority of a registration issued to that person under section 823 of this title or section 958 of this title if that registration has been revoked or suspended, if that registration has expired, or if the registrant has ceased to do business in the manner contemplated by his registration. Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of $1,000, or both, except that if he commits such offense after a prior conviction under this subchapter or subchapter II of this chapter, or a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years, and shall be fined a minimum of $2,500, except, further, that if he commits such offense after two or more prior convictions under this subchapter or subchapter II of this chapter, or two or more prior convictions for any drug, narcotic, or chemical offense chargeable under the law of any State, or a combination of two or more such offenses have become final, he shall be sentenced to a term of imprisonment for not less than 90 days but not more than 3 years, and shall be fined a minimum of $5,000. Notwithstanding the preceding sentence, a person convicted under this subsection for the possession of a mixture or substance which contains cocaine base shall be imprisoned not less than 5 years and not more than 20 years, and fined a minimum of $1,000, if the conviction is a first conviction under this subsection and the amount of the mixture or substance exceeds 5 grams, if the conviction is after a prior conviction for the possession of such a mixture or substance under this subsection becomes final and the amount of the mixture or substance exceeds 3 grams, or if the conviction is after 2 or more prior convictions for the possession of such a mixture or substance under this subsection become final and the amount of the mixture or substance exceeds 1 gram. Notwithstanding any penalty provided in this subsection, any person convicted under this subsection for the possession of flunitrazepam shall be imprisoned for not more than 3 years, shall be fined as otherwise provided in this section, or both. The imposition or execution of a minimum sentence required to be imposed under this subsection shall not be suspended or deferred. Further, upon conviction, a person who violates this subsection shall be fined the reasonable costs of the investigation and prosecution of the offense, including the costs of prosecution of an offense as defined in sections 1918 and 1920 of Title 28, except that this sentence shall not apply and a fine under this section need not be imposed if the court determines under the provision of Title 18 that the defendant lacks the ability to pay.

(b) Repealed. Pub.L. 98-473, Title II, § 219(a), Oct. 12, 1984, 98 Stat. 2027

(c) "Drug, narcotic, or chemical offense" defined

As used in this section, the term "drug, narcotic, or chemical offense" means any offense which proscribes the possession, distribution, manufacture, cultivation, sale, transfer, or the attempt or conspiracy to possess, distribute, manufacture, cultivate, sell or transfer any substance the possession of which is prohibited under this subchapter.

CREDIT(S)

1999 Main Volume

(Pub.L. 91-513, Title II, § 404, Oct. 27, 1970, 84 Stat. 1264; Pub.L. 98-473, Title II, § 219, Oct. 12, 1984, 98 Stat. 2027; Pub.L. 99-570, Title I, § 1052, Oct. 27, 1986, 100 Stat. 3207-8; Pub.L. 100-690, Title VI, §§ 6371, 6480, Nov. 18, 1988, 102 Stat. 4370, 4382; Pub.L. 101-647, Title XII, § 1201, Title XIX, § 1907, Nov. 29, 1990, 104 Stat. 4829, 4854; Pub.L. 104-237, Title II, § 201(a), Oct. 3, 1996, 110 Stat. 3101; Pub.L. 104-305, § 2(c), Oct. 13, 1996, 110 Stat. 3808.)

<General Materials (GM) - References, Annotations, or Tables>

21 USCA S 903
21 U.S.C.A. § 903

**UNITED STATES CODE ANNOTATED**
**TITLE 21. FOOD AND DRUGS**
**CHAPTER 13–DRUG ABUSE PREVENTION AND CONTROL**
**SUBCHAPTER I–CONTROL AND ENFORCEMENT**
**PART F–GENERAL PROVISIONS**



Current through P.L. 108-20, approved 04-30-03

§ 903. Application of State law

No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.

CREDIT(S)

1999 Main Volume

(Pub.L. 91-513, Title II, § 708, Oct. 27, 1970, 84 Stat. 1284.)

<General Materials (GM) - References, Annotations, or Tables>

# ADDENDUM OF CASES

## INDEX TO ADDENDUM OF CASES

1. United States v. Johnson, 14 Fed. Appx. 157 (4th Cir. 2001), *cert. denied*, 534 U.S. 1085 (2002)

2. Wo/Men's Alliance for Medical Marijuana v. United States, No. 02-MC-7012 JF (N.D. Cal. Dec. 3, 2002), *on appeal*, No. 03-15062 (9th Cir.)

3. United States v. Cannabis Cultivators Club, 1999 WL 111893 (N.D. Cal. Feb. 25, 1999), *vacated on other grounds,* 221 F.3d 1349 (9th Cir. 2000) (Mem.)

14 Fed.Appx. 157
(Cite as: 14 Fed.Appx. 157, 2001 WL 725360 (4th Cir.(Va.)))

H

This case was not selected for publication in the Federal Reporter.

UNPUBLISHED

Please use FIND to look at the applicable circuit court rule before citing this opinion. Fourth Circuit Rule 36(c). (FIND CTA4 Rule 36(c).)

United States Court of Appeals,
Fourth Circuit.

**UNITED STATES of America, Plaintiff-Appellee,**
**v.**
**Brian Antwanine JOHNSON, a/k/a Fudd, Defendant-Appellant.**

**No. 00-4430.**

Argued April 6, 2001.
Decided June 28, 2001.

Defendant was convicted in the United States District Court for the Eastern District of Virginia, Leonie M. Brinkema, J., of money laundering , conspiracy to commit money laundering, and conspiracy to distribute 50 grams or more of cocaine base, and he appealed. The Court of Appeals held that: (1) court did not violate defendant's rights under the Confrontation Clause by admitting the grand jury testimony of witness pursuant to the "residual" hearsay exception; (2) venue on the drug trafficking charge was proper in the Eastern District of Virginia; and (3) life sentence imposed for the drug conspiracy conviction was not improper under *Apprendi*.

Affirmed.

West Headnotes

**[1] Criminal Law ⚿662.60**
110k662.60

District court did not violate defendant's rights under the Confrontation Clause by admitting the grand jury testimony of witness, who testified regarding defendant's drug-dealing activities, pursuant to the "residual" hearsay exception; efforts of Government, which notified local law enforcement authorities to be on the lookout for witness and which issued a material witness warrant, to locate witness were inadequate, and therefore witness was unavailable, and witness' grand jury testimony bore sufficient indicia of reliability since witness appeared voluntarily and testified from personal knowledge. Fed.R.Evid. 807; U.S.C.A. Const.Amend. 6.

**[2] Criminal Law ⚿829(16)**
110k829(16)

An "addict instruction" was not required when district court provided lengthy instructions regarding the assessment of a witness' credibility.

**[3] Commerce ⚿82.6**
83k82.6

**[3] Controlled Substances ⚿6**
96Hk6
(Formerly 138k43.1 Drugs and Narcotics)

Congress did not exceed its authority under the Commerce Clause in enacting the drug trafficking statute. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401, 21 U.S.C.A. § 841.

**[4] Criminal Law ⚿113**
110k113

Because retrieval of narcotics was an act in furtherance of the conspiracy, venue on the drug trafficking charge was proper in the Eastern District of Virginia; evidence indicated that on one occasion defendant and a cohort traveled to the Eastern District of Virginia to retrieve narcotics from a vehicle of defendant's that had been impounded.

**[5] Sentencing and Punishment ⚿322**
350Hk322

Life sentence imposed for drug conspiracy conviction was not improper under *Apprendi* because the jury was not required to find drug quantity beyond a reasonable doubt in order to convict; finding by the jury that defendant agreed to distribute more than 50 grams of cocaine base is sufficient to authorize the imposition of a life sentence under *Apprendi*.

***158** Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Leonie M. Brinkema, District Judge. (CR-98-283-A).

Joseph John McCarthy, Delaney, McCarthy, Colton & Botzin, P.C., Alexandria, VA, for appellant. Gordon Dean Kromberg, Assistant United States

Attorney, Office of the United States Attorney, Alexandria, VA, for appellee. ON BRIEF: Helen F. Fahey, United States Attorney, Office of the United States Attorney, Alexandria, VA, for appellee.

Before WIDENER and WILKINS, Circuit Judges, and DUFFY, United States District Judge, for the District of South Carolina, sitting by designation.

OPINION

PER CURIAM.

**1 Brian Antwanine Johnson appeals his convictions for money laundering and conspiracy to commit money laundering, *see* 18 U.S .C.A. § 1956(a)(1)(B)(i), 1956(h) (West 2000), and his conviction and sentence for conspiracy to distribute 50 grams or more of cocaine base, *see* 21 U.S.C.A. § 846 (West 1999). We affirm.

I.

Since Johnson's appeal presents only legal questions, the facts may be summarized briefly. The evidence presented at trial established that between 1992 and 1997 Johnson engaged in the sale of cocaine base in Baltimore, Maryland. Johnson laundered the proceeds of this activity through successive purchases of vehicles of increasing value; the vehicles were titled in the names of various friends and family members who acted as straw purchasers. Based upon this evidence, the jury convicted Johnson of one count each of conspiracy to launder money and conspiracy to distribute cocaine base and of five substantive counts of money laundering.

II.

[1] We first consider Johnson's assertion that the district court violated his rights under the Confrontation Clause by admitting the grand jury testimony of Robert Riddick, Jr., who testified regarding Johnson's drug-dealing activities. The district court admitted the grand jury testimony pursuant to the "residual" hearsay exception. *See* Fed.R.Evid. 807. Johnson maintains that the admission of the testimony was improper because the Government failed to exert good faith efforts to secure Riddick's presence at trial and because Riddick's grand jury testimony did not bear sufficient indicia of reliability. We reject both contentions.

The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. This protection is not absolute, however; "the Clause permits, where necessary, the admission ***159** of certain hearsay statements against a defendant despite the defendant's inability to confront the declarant at trial." *Maryland v. Craig*, 497 U.S. 836, 847-48, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990). For example, hearsay is admissible "if the prosecution establishes that the declarant is unavailable and that the evidence bears indicia of reliability sufficient to afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement." *United States v. Shaw*, 69 F.3d 1249, 1253 (4th Cir.1995) (internal quotation marks omitted).

Johnson first challenges the conclusion of the district court that Riddick was unavailable. Following Riddick's testimony before the grand jury in 1998, the Government maintained contact with Riddick through an agent of the Drug Enforcement Administration. Johnson was a fugitive for approximately one year following his indictment, and during that time Riddick's controlling agent was reassigned and the Government lost contact with Riddick. After efforts to locate Riddick at various former addresses failed, the Government notified local law enforcement authorities to be on the lookout for Riddick. One week before trial, the Government issued a material witness warrant so that Riddick could be taken into custody if he were located. Based on this sequence of events, the district court determined that Riddick was unavailable.

**2 Johnson does not contest the factual accuracy of the Government's account, but rather maintains that the Government's efforts to locate Riddick were inadequate as a matter of law. *See United States v. Thomas*, 705 F.2d 709, 711-12 (4th Cir.1983) (explaining that a witness is not unavailable if the Government has failed to employ reasonable means to obtain the witness' presence (citing Fed.R.Evid. 804(a)(5))). Under similar circumstances, however, we have concluded that the Government made a good faith effort to obtain the presence of a witness. *See id.* at 712 (holding that witnesses were unavailable when Government maintained contact with one witness directly and with the other through his attorney, but both witnesses absconded following their grand jury testimony and could not be located by service of process). We therefore conclude that the district court correctly determined that Riddick was unavailable.

Johnson next contends that the district court erred in concluding that Riddick's grand jury testimony bore sufficient indicia of reliability. In *United States v. McHan,* 101 F.3d 1027 (4th Cir.1996), we identified several factors relevant to a determination of whether grand jury testimony bears sufficient indicia of reliability to be admitted under Rule 807. *See id.* at 1038. [FN1] In particular, we noted that such testimony is, to some degree, inherently reliable because it "is given in the solemn setting of the grand jury, under oath and the danger of perjury, and in the presence of jurors who are free to question witnesses and assess their credibility and a court reporter who prepares an official transcript of the testimony." *Id.* We cautioned, however, that grand jury testimony is not per se reliable. Rather, other factors should be considered, including whether the witness appeared voluntarily, whether the witness testified from personal knowledge, and whether the testimony was accurate. *See id.*

FN1. *McHan* discusses Federal Rule of Evidence 804(b)(5). Subsequent to the decision in *McHan,* Rule 804(b)(5) was recodified as Rule 807 with no change in meaning. *See United States v. Bros. Constr. Co. of Ohio,* 219 F.3d 300, 309 n. 2 (4th Cir.2000), *cert. denied,* 531 U.S. 1037, 121 S.Ct. 628, 148 L.Ed.2d 537 (2000).

Applying the factors identified in *McHan,* we conclude that the district court did not commit clear error in determining **160 that Riddick's grand jury testimony bore sufficient indicia of reliability to be admitted under Rule 807. In addition to the indicia of reliability applicable to all grand jury testimony, Riddick appeared voluntarily and testified from personal knowledge. And, as the district court noted, the majority of Riddick's testimony was elicited through non-leading questions. [FN2] *Cf. United States v. Flores,* 985 F.2d 770, 776 n. 14 (5th Cir.1993) (observing that grand jury testimony elicited through leading questions is less reliable).

FN2. Moreover, any possibility of prejudice was obviated by repeated cautionary instructions of the district court regarding Riddick's testimony. *See United States v. Powers,* 59 F.3d 1460, 1468 (4th Cir.1995).

III.

During the trial, Ivan Burrell, a Government informant, testified regarding an aborted drug transaction involving Johnson. On cross-examination, Burrell denied that he was under the influence of drugs at the time of his interaction with Johnson but acknowledged that he had used drugs "around the time" of the events in question. J.A. 457. Based upon this admission, Johnson maintains that he was entitled to a jury instruction that "[t]he testimony of a witness who was using drugs at the time of the events he is testifying about ... may be less believable because of the effect the drugs may have[had] on his ability to perceive ... the events in question." *Id.* at 52. We review the refusal of a requested jury instruction for abuse of discretion. *See United States v. Abbas,* 74 F.3d 506, 513 (4th Cir.1996).

**3 [2] An "addict instruction" such as the one requested by Johnson is not required when, *inter alia,* the district court provides other cautionary instructions. *See United States v. Vgeri,* 51 F.3d 876, 881 (9th Cir.1995). Here, the district court provided lengthy instructions regarding the assessment of a witness' credibility. In particular, the district court instructed the jury that an "informant's testimony must be examined with greater scrutiny than the testimony of an ordinary witness." J.A. 811. The court further warned the jury to be cautious of the testimony of an informant who had received benefits from the Government--as Burrell had, in the form of living expenses and rewards for helpful information--because "the witness may believe that he will only continue to receive these benefits if he produces evidence of criminal conduct." *Id.* at 812. In light of Burrell's explicit denial that he was intoxicated at the time of the events in question and the other cautionary instructions given by the district court, the refusal to give the requested instruction was not an abuse of discretion. *See Vgeri,* 51 F.3d at 881

.

IV.

Johnson raises several challenges to his drug trafficking conviction. We address these challenges seriatim, concluding that all of them are without merit.

A.

[3] Johnson first contends that Congress exceeded its authority under the Commerce Clause in enacting the drug trafficking statute, 21 U.S.C.A. § 841 (West 1999 & Supp.2001). [FN3] Specifically, Johnson maintains that drug trafficking is not an activity affecting interstate commerce that Congress may regulate pursuant to the Commerce Clause. We

rejected *161 this claim in *United States v. Leshuk,* 65 F.3d 1105, 1111-12 (4th Cir.1995), concluding that under *United States v. Lopez,* 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), intrastate drug trafficking activity had a substantial effect on interstate commerce. The decision cited by Johnson, *United States v. Morrison,* 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000), does not undermine our prior holding because it "did not modify the *Lopez* framework in any manner relevant to this case." *United States v. Gallimore,* 247 F.3d 134, 138 (4th Cir.2001).

> FN3. Johnson was not charged with a substantive drug offense, but with conspiracy. However, 21 U.S.C.A. § 846 specifies that "[a]ny person who ... conspires to commit any offense" under, *inter alia,* 21 U.S.C.A. § 841 "shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the ... conspiracy."

B.

[4] Johnson next argues that venue in the Eastern District of Virginia was improper on the drug trafficking charge. Because Johnson failed to raise this issue before the trial court, our review is for plain error. *See United States v. Olano,* 507 U.S. 725, 731-32, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). In order to establish our authority to notice an error not preserved by timely objection, Johnson must demonstrate that an error occurred, that the error was plain, and that the error affected his substantial rights. *See id.* at 732. Even if Johnson can satisfy these requirements, correction of the error remains within our discretion, which we "should not exercise ... unless the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.' " *Id.* (second alteration in original) (quoting *United States v. Young,* 470 U.S. 1, 15, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985)). Because we conclude that venue was proper in the Eastern District of Virginia, there was no error.

**4 Article III of the Constitution provides, as is relevant here, that "[t]he Trial of all Crimes ... shall be held in the State where the said Crimes shall have been committed." U.S. Const. art. III, § 2, cl. 3. The Sixth Amendment reinforces this command, stating that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. amend. VI; *see* Fed.R.Crim.P. 18 ("Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed."). When multiple counts are alleged in an indictment, venue must be proper on each count. *See United States v. Bowens,* 224 F.3d 302, 308 (4th Cir.2000), *cert. denied,* 532 U.S. 944, 121 S.Ct. 1408, 149 L.Ed.2d 349 (2001). In a conspiracy case, venue is proper in any district in which an act in furtherance of the conspiracy was committed. *See United States v. Al Talib,* 55 F.3d 923, 928 (4th Cir.1995). The burden is on the Government to prove venue by a preponderance of the evidence. *See id.*

Johnson maintains that the Government failed to provide any evidence that any drug trafficking activity took place in the Eastern District of Virginia. Johnson overlooks the fact that the evidence indicated that on one occasion Johnson and a cohort traveled to the Eastern District of Virginia to retrieve narcotics from a vehicle of Johnson's that had been impounded. Because the retrieval of the narcotics was an act in furtherance of the conspiracy, venue was proper in the Eastern District of Virginia.

C.

[5] Finally, Johnson contends, based upon *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), that the life sentence imposed for the drug conspiracy conviction was improper because the jury was not required to find drug quantity beyond a reasonable doubt in order to convict. Johnson failed to raise this issue before the district court; accordingly, we review for plain error. *See Olano,* 507 U.S. at 731-32.

*162 We conclude that there was no *Apprendi* error here. Johnson's indictment specifically charged him with conspiring to "distribute 50 grams or more of a mixture and substance containing a detectable amount of cocaine base." J.A. 24. And, the district court explicitly instructed the jury that in order to convict Johnson, it had to find beyond a reasonable doubt that he was a member of the conspiracy alleged in the indictment:

> [C]ount two is the drug conspiracy count, and that count alleges that ... the defendant unlawfully, knowingly, and intentionally ... conspired ... to unlawfully, knowingly, and intentionally distribute 50 grams or more of "crack" cocaine....
> ....

> The first element for the drug conspiracy is ... that the Government must prove beyond a reasonable doubt ... that the agreement as described in the indictment, did in fact exist.... So that, in other words, they have alleged a conspiracy between the defendant and at least one other person to distribute 50 grams or more of "crack" cocaine....
> **5 ....
> So to establish the drug conspiracy, they must prove beyond a reasonable doubt three facts: That the specific conspiracy they have described in count two of the indictment did, in fact, exist and that the defendant knowingly became a member of that conspiracy. That is the second element. The third element is that he voluntarily became a member of that conspiracy.

*Id.* at 823-24. The finding by the jury that Johnson agreed to distribute more than 50 grams of cocaine base is sufficient to authorize the imposition of a life sentence under *Apprendi*. *See United States v. Hoover*, 246 F.3d 1054, 1058 (7th Cir.2001); *United States v. Irvin*, 2 F.3d 72, 75 (4th Cir.1993) (explaining that a conspirator is criminally liable for all acts within the scope of the conspiratorial agreement); *see also United States v. Richardson*, 233 F.3d 223, 230-31 (4th Cir.2000) (holding that no *Apprendi* error occurred when indictment charged drug quantity and district court instructed jury that Government was required to prove offense as charged in indictment), *petition for cert. filed*, No. 00-9234 (U.S. Mar. 19, 2001).

V.

For the reasons set forth above, we conclude that there was no error in Johnson's convictions or sentence. [FN4] Accordingly, we affirm.

> FN4. In addition to the issues discussed above, Johnson challenges the admission of certain testimony by two witnesses. We have carefully considered Johnson's arguments with respect to this testimony, and we conclude that his challenges are without merit.

*AFFIRMED.*

14 Fed.Appx. 157, 2001 WL 725360 (4th Cir.(Va.))

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NOT FOR PUBLICATION



IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

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|---|---|
| WO/MEN'S ALLIANCE FOR MEDICAL MARIJUANA; MICHAEL CORRAL; and VALERIE CORRAL<br><br>Movants,<br><br>vs.<br><br>UNITED STATES OF AMERICA,<br><br>Defendant. | No. 02-MC-7012 JF<br><br>ORDER DENYING MOTION FOR RETURN OF PROPERTY (Fed. R. Crim. Proc. 41(e))<br><br>[Doc. No's: 1, 2, 3] |

Movants Valerie Corral and Michael Corral ("Corrals") and Wo/men's Alliance for Medical Marijuana ("WAMM") seek return of seized property pursuant to Federal Rule of Criminal Procedure 41(e). The Court has considered the evidence and legal authorities submitted by the parties and the arguments of counsel presented at the hearing on November 4, 2002. Although movants raise important issues of both public policy and constitutional law, the Court concludes that the disposition of the motion in the district court is controlled by Ninth Circuit precedent that precludes the relief sought. Accordingly, the motion will be denied.

## I. BACKGROUND

WAMM is a collective hospice organization located in Davenport, California. It assists seriously ill and dying patients by providing patients with the opportunity to cultivate marijuana for their personal and collective medical use. Both the cultivation and the use of marijuana are carried out only upon the recommendation of the patients' respective physicians. WAMM is supported by voluntary contributions, but patients are not charged for the marijuana they use and assist in cultivating the plants to the extent of their physical abilities. Valerie Corral is the executive director of WAMM, and Michael Corral is the agricultural director. The Corrals reside on a farm in Davenport, California, where they permit participants in WAMM to cultivate marijuana plants for medicinal use. Valerie Corral herself uses medicinal marijuana on recommendation of her physician to control seizures.[1]

On the morning of September 5, 2002, between twenty and thirty armed agents of the United States Drug Enforcement Administration ("DEA") arrived at the Corrals' property to execute a search warrant. The agents forcibly entered the premises, pointed loaded rifles at movants, and forced movants to the ground and handcuffed them. Movants did not resist the agents at any time. After four hours, movants were transported to the federal courthouse in San Jose, where they were released without being charged. No arrest warrant was issued. The DEA agents remained on the premises for eight hours, seizing 167 marijuana plants, numerous plastic bags containing marijuana, hash oil, a laptop computer, photo albums, an instructional video tape, firearms, and various documents and records.

## II. LEGAL STANDARD

Rule 41(e) of the Federal Rules of Criminal Procedure provides that: "[A] person aggrieved by an unlawful search and seizure or by the deprivation of property may move the

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[1] It is undisputed for purposes of the instant motion that movants' activities are legal under California's medical marijuana statute. *See* Cal. Health & Safety Code § 11362.5. The government, however, contends that the California statute is superseded by the federal Controlled Substances Act, 21 U.S.C. §§ 841, 846. *See United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001). (No medical necessity exception to prohibitions with respect to marijuana contained in Controlled Substances Act.)

district court for the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property." The Court of Appeals for the Ninth Circuit has held that district courts have the power to entertain motions for return of property even when there are no criminal proceedings pending against the movants. *Ramsden v. United States*, 2 F.3d 322, 324 (9th Cir. 1993), *cert. denied*, 511 U.S. 1058 (1994). Such motions "are treated as equitable proceedings and, therefore, a district court must exercise 'caution and restraint' before assuming jurisdiction." *Id.* Certain factors must be considered by the district court before entertaining a pre-indictment motion for return of property, including (1) whether the government has displayed a callous disregard for the constitutional rights of the movants; (2) whether the movants have an individual interest in and need for the property requested to be returned; (3) whether the movants would be irreparably injured if return of the property were denied; and (4) whether the movants have an adequate remedy at law for the redress of their grievances. *Id.* at 325. These factors are balanced by the court. In *Ramsden*, the court found that even though the movant did not show irreparable injury, the balance of equities tilted in favor of reaching the merits of his claim. *Id.* Similarly, in *In re Singh*, 892 F. Supp. 1, 4 (D.D.C. 1995), the court found that movant had satisfied two of the four factors, and that the balance of the factors weighed in favor of the court exercising jurisdiction over the merits of the motion. It is not necessary that all four factors exist in order for the district court to exercise its jurisdiction.

Once the district court decides to reach the merits of a Rule 41(e) claim, the motion "is properly denied if the defendant is not entitled to lawful possession of the seized property, the property is contraband or subject to forfeiture or the government's need for the property as evidence continues." *United States v. Mills*, 991 F.2d 609, 612 (9th Cir. 1993). The burden at this point is on the government to show it has a legitimate reason to retain the property. *Id.* Reasonableness under all of the circumstances is the appropriate test when a person seeks a return of property. *In re Singh*, 892 F. Supp. at 4 (citing to Advisory Committee Notes to the 1989 Amendment of Rule 41(e)). The government's retention of the property generally is reasonable if it has a need for the property in an investigation or prosecution. *Ramsden*, 2 F.3d. at 326. If the government's interests can be satisfied even if the property is returned, then retention

of the property becomes unreasonable. *Id.* (citing to Advisory Committee Notes to the 1989 Amendment of Rule 41(e)).

## III. DISCUSSION

A. The *Ramsden* Factors are Satisfied

Applying the test established in *Ramsden*, this Court concludes that it has jurisdiction to address the merits of the instant motion. Movants have made a sufficient showing that they have an individual interest and need for the property to be returned, that they will suffer irreparable injury if the property is not returned and that they do not have an adequate remedy at law. While it is true that movants have alternative remedies, the Court concludes that these alternative remedies are insufficient. Because movants have not been charged with a crime, it is unclear if and when they will be able to request the return of their property. While a civil suit could result in an award of monetary damages, it would not result in the return of their property. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics,* 403 U.S. 388 (1971).

B. Movants are Not Entitled to Lawful Possession of the Seized Property Under Settled Ninth Circuit Authority

As noted above, a Rule 41(e) motion "is properly denied if the defendant is not entitled to lawful possession of the seized property, the property is contraband or subject to forfeiture or the government's need for the property as evidence continues." *Mills*, 991 F.2d at 612. The government contends that because the Controlled Substances Act ("CSA") prohibits the cultivation and possession of marijuana, even in the absence of sale or distribution,[2] movants cannot be entitled to lawful possession of the seized marijuana.

Movants claim that their particular conduct, which is limited to cultivation and use of medical marijuana pursuant to the recommendations of physicians, does not affect interstate commerce, and thus the application of the CSA to such conduct constitutes an unlawful exercise

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[2] The record reflects that some members of WAMM are too ill or disabled to cultivate their own marijuana and therefore obtain their marijuana through the assistance of others. The parties dispute whether this practice constitutes distribution for purposes of the statute. The Court concludes that this dispute is immaterial in light of the relevant case law and thus will assume without deciding that movants are not engaged in distribution.

of Congressional powers under the Commerce Clause. The Supreme Court expressly reserved this issue in *United States v. Oakland Cannibis Buyers' Coop*, 532 U.S. 483 (2001), *see id.* at fn. 7, and at least one Ninth Circuit judge has advanced a thoughtful argument in support of this position.[3]

This Court, however, is bound by the express holding of the Ninth Circuit in *United States v. Visman*, 919 F.2d 1390 (9th Cir. 1990); *see also United States v. Bramble*, 103 F.3d 1475 (9th Cir. 1996); *United States v. Rodriquez-Camacho*, 462 F.2d 1220 (9th Cir. 1972). Although movants appropriately note that many of the appellate cases relied upon by the government involve distribution and trafficking as well as non-commercial possession and cultivation, *Visman* addresses cultivation of marijuana explicitly. It holds unambiguously that "Congress may constitutionally regulate intrastate criminal cultivation of marijuana plants found rooted in the soil... " and that "local criminal cultivation of marijuana is within a class of activities that adversely affects interstate commerce." 919 F.2d at 1393. While it was decided before *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000), in which the Supreme Court sustained challenges to federal statutes passed pursuant to the Commerce Clause, *Visman* is still the law in the Ninth Circuit, and it was cited with express approval in *United States v. Kim*, 94 F.3d 1247, 1250 (9th Cir. 1996), which was decided after *Lopez*. This Court would not hesitate to reach the merits of movants' broader arguments were it considering the present motion as a matter of first impression, but it is not at liberty to ignore directly applicable appellate authority.[4]

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[3] *See Conant v. Walters*, 2002 WL 31415494 (concurring opinion of Kozinski, J., at *8). The government correctly notes that the actual holding in *Conant* - that the powers of Congress under the Commerce Clause do not permit it to interfere with physicians' ability to counsel patients with respect to medical marijuana - is tangential to the precise issues presented here.

[4] Nothing in this order should be construed as indicating how this Court would rule with respect to movants' arguments were it free to do so. One reasonably may assume that at least part of movants' motivation in the instant proceeding is to encourage the Ninth Circuit to reexamine *Visman* and to invite the Supreme Court to consider the constitutional question it left open in the *Oakland Cannibis Buyers' Coop* case.

## IV. ORDER

Good cause therefore appearing, IT IS HEREBY ORDERED that the motion for return of property is DENIED.[5]

DATED: 12-2-02

JEREMY FOGEL
United States District Judge

[5] With respect to seized items other than marijuana, the government indicated at oral argument that it would return those items shortly, perhaps within a week after the hearing. Assuming that the government has in fact returned the items, the remainder of the instant motion appears to be moot.

Copies of Order mailed on 12-3-02 to:

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Only the Westlaw citation is currently available.

United States District Court, N.D. California.

**UNITED STATES of America, Plaintiff,**
**v.**
**CANNABIS CULTIVATOR'S CLUB, et al., Defendants. and Related Actions**

**No. C 98-00085 CRB, C 98-00086 CRB, C 98-00087 CRB, C 98-00088 CRB, C 98-00245 CRB.**

Feb. 25, 1999.

MEMORANDUM AND ORDER

BREYER, District J.

*1 Now before the Court is plaintiff's motion to dismiss the complaint-in- intervention in its entirety. After carefully considering the papers submitted by the parties, and having had the benefit of oral argument on February 5, 1999, the motion to dismiss is GRANTED.

BACKGROUND

In early 1998, plaintiff filed separate lawsuits against six medical cannabis cooperatives and several individuals associated with those cooperatives, alleging that the defendants' distribution of marijuana violated the Controlled Substances Act, 21 U.S.C. § 841(a)(1), and that their illegal conduct should be enjoined pursuant to 21 U.S.C. § 882(a). In May 1998, the Court granted a preliminary injunction enjoining all defendants from engaging in the distribution of marijuana in violation of 21 U.S.C. § 841(a)(1).

Several months later, the Court granted the motion of four individuals, Edward Neil Brundridge, Ima Carter, Rebecca Nikkel, and Lucia Y. Vier ("Intervenors"), to intervene as defendants in the government's action pursuant to Federal Rule of Civil Procedure 24(b). The Intervenors are members of the defendant Oakland, Marin or Ukiah medical cannabis cooperatives. They seek a judicial declaration that they have a fundamental right "to be free from governmental interdiction of their personal, self-funded medical choice, in consultation with their personal physician, to alleviate suffering through the only effective treatment available for them." They also seek an order enjoining the United States from interfering with the Intervenors' exercise of this fundamental right, and in particular, they seek to enjoin the United States from prohibiting the cooperatives from distributing marijuana to the Intervenors.

Plaintiff subsequently moved to dismiss the Intervenors' complaint in its entirety.

DISCUSSION

Plaintiff contends that under the Ninth Circuit's decision in *Carnohan v. United States*, 616 F.2d 1120 (9th Cir.1980), the Intervenors' complaint fails as a matter of law. In *Carnohan*, the plaintiff brought a declaratory proceeding to secure the right to obtain and use laetrile in a nutritional program for the prevention of cancer. The court held that since the Food and Drug Administration ("FDA") had determined that laetrile was a new drug, and laetrile did not meet the standards for distribution of a new drug, the plaintiff had to bring an Administrative Procedure Act ("APA") action to challenge the FDA's decision. The plaintiff argued further that the FDA's regulatory scheme is so burdensome as applied to individuals that it infringes upon constitutional rights. The Ninth Circuit responded:

> We need not decide whether Carnohan has a constitutional right to treat himself with home remedies of his own confection. *Constitutional rights of privacy and personal liberty do not give individuals the right to obtain laetrile free of the lawful exercise of government police power.*

*Id.* at 1121 (emphasis added).

*Carnohan* disposes of the Intervenors' claims. Regardless of whether the Intervenors have a right to treat themselves with marijuana which they themselves grow (a remedy of their own confection), the Ninth Circuit has held that they do not have a constitutional right to *obtain* marijuana from the medical cannabis cooperatives free of government police power. To hold otherwise would directly contradict the *Carnohan* holding.

*2 The Intervenors attempt to distinguish *Carnohan* and the other cases cited by plaintiff on the grounds that the Intervenors (1) do not seek to compel government action and are not asserting that they have a fundamental constitutional right to obtain a particular medication, and (2) seek to use cannabis upon the recommendation of their personal physicians

to alleviate their suffering through the only effective treatment available for them. Neither of these alleged distinctions persuades the Court than *Carnohan* is not controlling here.

First, the Intervenors' characterization of their complaint as not seeking a declaration of a right to obtain a particular medication is belied by the plain language of their complaint and their arguments in support of their motion to intervene. If the issue before the Court were whether the Intervenors have a right to use marijuana which they have grown themselves, the Court would not have granted them leave to intervene since such a claim is not related to the claims raised by the United States' lawsuits. By their complaint, however, the Intervenors seek an order enjoining the United States from enforcing the Controlled Substances Act against the medical cannabis cooperatives in which they are members. Complaint in Intervention at ¶ ¶ 19-21. Indeed, in their motion to intervene, they emphasized that their complaint alleges that they have a "protectable interest in *obtaining* cannabis." Motion to Intervene at 11 (emphasis added); *see also id.* at 5 ("If the cooperatives are prevented from distributing cannabis, the [Intervenors] will not be able to legally obtain cannabis that is safe and effective."). Thus, the Intervenors' complaint seeks an order that they have a fundamental right to obtain to a particular medication, marijuana, from a particular source, the medical cannabis cooperatives. *Carnohan,* however, holds that there is no constitutional right to obtain medication free from the lawful exercise of the government's police powers.

The fact that California law does not prohibit the distribution of medical marijuana under certain circumstances is not relevant as to whether the Intervenors have a fundamental right. If that were the case, whether one had a fundamental right to treat oneself with marijuana would depend on whether the state in which one lived prohibited such conduct.

Second, that the Intervenors' personal physicians recommended marijuana is not a material distinction. If one does not have a right to obtain medication free from government regulation, there is no reason one would have that right upon a physician's recommendation. In *Kulsar v. Ambach,* 598 F.Supp. 1124 (W.D.N.Y.1984), for example, medical patients alleged that New York laws that prohibited *their personal physician* from administering a particular treatment for their hypoglycemic disorders were unconstitutional. The court dismissed their constitutional claim on the ground that the "constitutional right of privacy does not give individuals the right to obtain a particular medical treatment 'free of the lawful exercise of government police power." ' *Id.* at 1126 (citing *Carnohan,* 616 F.2d 1120).

***3** The Intervenors' argument that marijuana is the only effective treatment for their symptoms is also not persuasive. In *Rutherford v. United States,* 616 F.2d 455 (10th Cir.1980), a case relied upon by the *Carnohan* court, terminally ill cancer patients brought suit to enjoin the United States from interfering with interstate shipments of the sale of laetrile. The trial court had held that the cancer patients had a right "to be let alone," or "a constitutional right of privacy to permit them, as terminally ill cancer patients, to take whatever treatment they wished regardless of whether the FDA regarded the medication as 'effective' or 'safe." ' *Id.* at 456. The Tenth Circuit reversed:

> It is apparent in the context with which we are here concerned that the decision by the patient whether to have a treatment or not is a protected right, but his selection of a particular treatment, or at least a medication, is within the area of governmental interest in protecting public health. The premarketing requirement of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 355, is an exercise of Congressional authority to limit the patient's choice of medication.

*Id.* at 457. The *Rutherford* plaintiffs had no other treatment alternative. They believed that without the laetrile they would die. The Tenth Circuit nonetheless held that the *Rutherford* plaintiffs did not have a constitutional right to obtain laetrile. *See also Smith v. Shalala,* 954 F.Supp. 1, 3 (D.D.C.1996) ("While there are decisions recognizing that competent adults have a fundamental right to refuse medical treatment, *Cruzan v. Director, Missouri Dept. of Health,* 497 U.S. 261 (1990), and to determine the time and manner of their death, free from governmental interference, ... nothing in those decisions suggests that the government has an affirmative obligation to set aside its regulations in order to provide dying patients access to experimental medical treatments").

Here, the plaintiffs similarly believe, and on a motion to dismiss the Court must assume they could prove, that marijuana is the only effective treatment for their symptoms. Congress and the FDA disagree. If the Intervenors believe the FDA and Congress are wrong, they should challenge the legal prohibition on the distribution of marijuana through an APA or similar action. *Carnohan* and *Rutherford* hold, however, that

there is no fundamental right to obtain the medication of choice. Accordingly, the Intervenors' claim that they do have such a right, and that the United States should be enjoined from interfering with that right, will be dismissed without leave to amend.

As is set forth above, the Court does not interpret the Intervenors' complaint as alleging a fundamental right to treat themselves with cannabis which they themselves have grown. The Intervenors' motion to intervene was based on their assertion that if the cooperatives are closed, they will not be able to treat their symptoms with cannabis. Nonetheless, to the extent the complaint does make such claim, such claim does not raise a question of fact or law in common with the claims or defenses in these related lawsuits. *See* Fed.R.Civ.P. 24(b)(2). Accordingly, to the extent the complaint-in-intervention makes such a claim, it shall be dismissed without prejudice.

CONCLUSION

*4 For the foregoing reasons, plaintiff's motion to dismiss is GRANTED. Intervenors' claims for a declaration that they have a fundamental right to obtain marijuana for their personal, medical use without interference from the United States, and their claims seeking to enjoin the United States' efforts to close the cooperatives, are DISMISSED without leave to amend. Intervenors' claims seeking an order that they have a fundamental right to treat themselves with marijuana which they themselves have grown, to the extent the Intervenors' complaint makes such claims, are DISMISSED without prejudice.

IT IS SO ORDERED.

1999 WL 111893, 1999 WL 111893 (N.D.Cal.)

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