American Prosecutors Research Institute

HANDBOOK

The Uniform Controlled Substances Act

Overview and Analysis of Proposed Amendments

1990

Prepared for

National Conference of Commissioners on Uniform State Laws

APRI

The non-profit research and technical assistance affiliate of the National District Attorneys Association

The National District Attorneys Association (NDAA), founded in 1950, is the only national organization representing America's local prosecutors. Today membership exceeds 7,000 elected and appointed district attorneys and assistant district attorneys. Headquartered in the nation's capital, NDAA serves its members through extensive liaison and issue advocacy with the federal and legislative branches of government.

American Prosecutors Research Institute

The American Prosecutors Research Institute (APRI), was established in 1984 as the non-profit research and technical assistance affiliate of the National District Attorneys Association. APRI provides training and practical assistance to prosecutors on critical issues in the criminal justice system. The Institute's major programs, National Center for Prosecution of Child Abuse and National Drug Prosecution Center, have gained a national reputation for in-depth research, training analysis, and policy reform.

The National Drug Prosecution Center has as its goal the improved prosecution of drug-related cases nationwide through the shared expertise of district attorneys, the identification of successful local programs, interagency cooperation, legislative reform, and intense prosecutor training.

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by

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This document prepared under Cooperative Agreement Number 87-DD-CX-K106 from the Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice. Points of view or opinions in this document are those of the authors and do not necessarily represent the official position of the U.S. Department of Justice.

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About this Handbook...

"The UCSA" refers to the existing Uniform Controlled Substances Act, approved by the National Conference of Commissioners on Uniform State Laws in 1970 (Uniform Law Commissioners).

"Proposed amendments" or "proposed UCSA amendments" or "proposed amendments to the UCSA" refers to the draft amendments prepared by the Drafting Committee to Revise Uniform Controlled Substances Act (Drafting Committee).

The tab entitled "Overview" includes a synopsis of the major issues concerning the drug problem which the proposed amendments to the UCSA address.

The tab entitled "Articles I, II and III" is an exact photocopy of the draft language in Articles I, II and III of the proposed UCSA amendments along with the analysis provided by APRI's Task Force on the UCSA.

The tab entitled "Article IV" includes an exact photocopy of the proposed Article IV amendments along with the APRI Task Force analysis.

The tab entitled "Article V" includes an exact photocopy of the proposed Article V amendments along with the APRI Task Force analysis.

The tab entitled "Articles VI and VII" includes an exact photocopy of the proposed Articles VI and VII amendments along with the APRI Task Force analysis.

Readers may refer to the Table of Contents for the specific pages on which the analysis of a particular section is found.

The Appendix includes the biographical sketches of the members of the APRI Task Force on the UCSA. Also found here are the names of the members of the board of directors of the American Prosecutors Research Institute (APRI), the board of directors of the National District Attorneys Association (NDAA), and the names of the NDAA Drug Control Committee members.

Introduction

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

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

This analysis of the proposed amendments to the Uniform Controlled Substances Act (APRI's Handbook) has been prepared for the 1990 Annual Meeting of the National Conference of Commissioners on Uniform State Laws.

Since 1988, the National District Attorneys Association, National Association of Attorneys General, and the U.S. Department of Justice, through the Task Force on the UCSA established by the American Prosecutors Research Institute, have worked with the National Conference of Commissioners on Uniform State Laws to develop amendments which effectively address the current drug epidemic. Extraordinary hard work and a spirit of cooperation between the UCSA Drafting Committee and the Task Force have characterized the effort to present to the Conference a comprehensive package of model legislation desperately needed by the states.

Recognizing the states' critical need for strong drug legislation, the President's National Drug Control Strategy encourages states to adopt many provisions recommended by the task force and included in the proposed UCSA amendments. The Strategy urges states to enact laws which (1) impose forfeiture sanctions on both users and traffickers; permit substitution of non-drug related assets where drug assets are beyond the reach of the judicial process; and direct forfeiture proceeds to law enforcement purposes; (2) impose minimum mandatory sentences for serious drug crimes; and (3) criminalize attempts and solicitations to sell or buy drugs. *[National Drug Control Strategy, September 1989, pp. 125-129.]*

Similarly, the Office of National Drug Control Policy and Attorney General Thornburgh strongly urge passage of Task Force recommendations on asset forfeiture and other drug control legislation. In brief, these new amendments provide the basic tools to fight the war on drugs fairly and effectively while protecting the legitimate interests of innocent parties.

At the core, the amendments are designed to target drug traffickers; to facilitate the seizure of illegally-gotten drug assets and to channel them into the war on drugs; to protect children; promote user accountability; provide alternatives to incarceration for first time offenders; and to provide adequate funding for education and treatment services.

The Conference has a clear choice. It has the opportunity to help codify the American people's desire to provide fair and effective tools with which to wage this war. While many state legislatures have forged ahead to adopt powerful new provisions based on federal law, the need is still great for strong **uniform** provisions. The Conference should rise to meet the challenge and give state legislatures across America the uniform act needed to defend our hopes for today and our dreams for tomorrow.

Preface

The American Prosecutors Research Institute (APRI) is pleased to be able to provide this Handbook to the National Conference of Commissioners on Uniform State Laws as an aid to the deliberations of the Commissioners this summer.

We sincerely appreciate the opportunity afforded members of APRI's Task Force on the UCSA by Chairman David Gibson to participate in the free exchange of ideas with members of the Drafting Committee over the past several years. We are confident that the final outcome will be the kind of quality legislation that serves all interests.

We owe a profound debt of gratitude to the following members of APRI's Task Force on the UCSA who wrote this Handbook and who have worked so diligently with the Drafting Committee over the last year: Sherry Green-De La Garza, Harry S. Harbin, Cameron H. Holmes, Sandra L. Janzen, and the indefatigable Richard M. Wintory. The efforts of the authors was transformed into the attractive and readable work that you have in front of you by APRI's Jean Holt, Lynn Hoffman, Tina Klockow, and Anne Haskell.

The work of the Task Force was only possible because of the support of the following individuals: Edward Dennis, assistant attorney General, United States Department of Justice; Robert K. Corbin, attorney general of Arizona; and Robert H. Macy, district attorney, Oklahoma City, Oklahoma.

The American Prosecutors Research Institute is grateful to the Bureau of Justice Assistance, United States Department of Justice, for the financial support that made this effort possible. Finally, the support of the Bureau of Justice Assistance has been personified on an almost daily basis by Charles Hollis, our project monitor, who has been a wise counsel and, when needed, a constructive critic.

James C. Shine
Director

Overview

An Overview of Major Drug Issues in the Proposed Amendments to the Uniform Controlled Substances Act (UCSA) -1990-

"Designer Drugs" or Controlled Substance Analogs

SECTION 101. DEFINITIONS PARAGRAPH (3)

SECTION 201. AUTHORITY TO CONTROL. SUBSECTION (e)

SECTION 214. CONTROLLED SUBSTANCE ANALOG TREATED AS SCHEDULE I

The drug abuse problem in the United States has been marked by the growing popularity of new and very potentially dangerous substances called "designer drugs" or controlled substance analogs. For example, an analog of the controlled substance fentanyl, sold on the streets as "China White," proved to be more than 3,000 times more potent than heroin and resulted in hundreds of drug overdoses in Southern California and other areas. Similarly, an analog of the controlled substance meperedine (Demerol) was marketed with processing impurities believed to be linked to Parkinson's disease which resulted in the near total paralysis of dozens of users and the identification of over 400 users who are believed to be at serious risk of developing Parkinson's disease. Between 1972 and 1985, DEA laboratories identified 41 seizures of the then-uncontrolled stimulant/hallucinogen MDMA or "Ecstasy"—an analog of the controlled substance MDA—consisting of over 60,000 dosage units and, in 1984, DEA discovered that this substance was being distributed in Dallas in 100-tablet bottles. Users of MDMA report that it has the same addictive potential as cocaine.

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

Currently, there is no provision in the UCSA to deal effectively with the "designer drug" problem. However, Section 201(e) of the proposed amendments would go part of the way toward resolving this problem by authorizing state scheduling agencies to do "emergency scheduling" of substances on an expedited and temporary basis based upon a need to avoid an imminent hazard to the public safety. Sections 101(3)(i) and 214 of the proposed amendments would allow for the criminal prosecution of "designer drug" cases, in very limited circumstances, without impeding legitimate scientific research or use of analogs for purposes other than human consumption. Moreover, these provisions insure that the final determination of whether an analog should be treated as a controlled substance will be made by the state scheduling agency.

Targeting Major Traffickers and Others Who Deal in Large Quantities of the Most Commonly Abused Controlled Substances

SECTION 401. PROHIBITED ACTS A-; PENALTIES. SUBSECTION (b)

The U.S. State Department estimates that, in 1987, the worldwide production of opium was between 1,902 and 3,107 metric tons, production of cocaine hydrochloride (the powder form of cocaine) was between 324 and 422 metric tons, and the production of marijuana was between 10,930 and 17,645 metric tons. (A metric ton is equal to 2,200 lbs.) Most of this production was destined for U.S. markets. Seizures of cocaine are up from 1.7 tons in 1981 to 70 tons in 1987 and seizures of heroin are up from 460 pounds in 1981 to 1,400 pounds in 1987—yet these amounts represent but a tiny fraction (perhaps 10 percent) of the drugs that are destined for U.S. markets. Indeed, the estimated value of the illegal drug trade worldwide is as high as $500 billion; the American illegal drug market alone—comprised primarily of cocaine, heroin and marijuana—accounts for between $50 billion and $100 billion at the retail level each year. Moreover, the total cost of drug use to the American economy each year is estimated to be over $100 billion in medical costs, lost productivity, highway fatalities, etc. *[Source: Congressional Findings, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Sections 4102 and 5251, 102 Stat. 4264 and 4309 (1988)].*

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

In 1986 and 1988, Congress enacted legislation which required the imposition of specified mandatory minimum prison terms on all persons convicted of trafficking in major amounts of the most commonly abused controlled substances. These traffickers are not eligible for probation, parole or suspension of sentence during the entire prison term imposed. These mandatory minimum prison terms have been consistently upheld by the federal courts. Section 401(b) of the proposed amendments to the UCSA would impose a similar "mandatory minimum" sentencing scheme on those convicted of trafficking in major amounts of controlled substances. The "quantity" and "prison term" provisions are left bracketed to allow the states to set levels which reflect the realities of their respective drug markets and the capabilities of their respective prison systems.

Holding Users Accountable

SECTION 402. PROHIBITED ACTS B-; PENALTIES

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

Statutory Approaches for Demand Reduction

A comprehensive strategy to reduce America's demand for drugs will include many components, some of which cannot be legislated. Nevertheless, when Congress mandated America's "Drug Czar" to develop such a plan, legislative strategies supporting demand reduction were prominently prioritized. The proposed amendments to the UCSA contain a number of provisions which warrant examination by all persons interested in demand reduction.

The key concept of demand reduction strategies is to hold users accountable for the harms they are inflicting on our society. Given the historically tolerant view many Americans have harbored towards drug users, it is important to briefly exam just what those harms are. While our most severe statutory responses are directed to those who illegally distribute drugs, we must not forget those who create the demand for illegal drugs are ultimately those responsible for feeding the beast devouring our children, our schools, our neighborhoods and our way of life.

Drug Addicts Commit Crime

According to the studies collected by the National Institute of Justice's report, *Characteristics of Different Types of Drug Involved Offenders*, users/addicts commit many of the robberies and burglaries that threaten and sometimes take our lives and those of our families. Users/addicts commit the car thefts, shoplifting, and frauds which boost the costs of insurance, goods, and services by billions of dollars each year. Surveys of state prisoners conducted by the Bureau of Justice Statistics reveal that:

- Of the state prisoners who were sentenced for robbery, burglary, larceny or a drug offense, half were daily drug users, and about 40 percent were under the influence of an illegal drug at the time they committed the crime. These proportions were higher than those reported by inmates convicted of other crimes.
- Users of major drugs were substantially more likely than non-users to report that they received income from illegal activities during the time they were last free (48 percent versus 10 percent).
- The greater an offender's use of major drugs, the more prior convictions the inmate reported; less than 13 percent of those who had never used a major drug had six or more prior convictions compared to nearly 30 percent of daily users of major drugs.

Substantial numbers of prisoners convicted of profit motivated crimes acknowledge being daily drug users during the time prior to their arrest: robbery 50.3 percent, burglary 52.3 percent, larceny 40.2 percent, auto theft 46 percent, drug trafficking 52.4 percent.

Not surprisingly, successful arrests result a in reduction of drug connected criminal activity. In mid-June of 1989, Washington D.C. police officers reported a 25 percent drop in the murder rate after the arrests of members of a drug organization supplying more than 20 percent of the cocaine consumed in our nation's capitol. Lynn, Massachusetts, reported a reduction in the armed robbery rate of 46 percent following street level enforcement strategies.

Often the attention focused on crimes committed by drug users to support a habit or life style ignores another class of crimes even more inextricably connected to drug use. Because one of the chief effects of drug use is a reduction of inhibitions, persons under the influence of drugs commit acts of violence against family members, friends and often total strangers. The number of abused children reported in New York rose dramatically, from 2600 in 1986 to 8500 in 1988, at the same time as drug use by parents escalated. Over 73% of cases involving children killed as a result of child neglect in New York in 1988 were tied to parental drug abuse.

Another survey by the Bureau of Justice Statistics revealed that 46 percent of all rape victims believed their attacker was under the influence of drugs. This statistic receives chilling corroboration from the state prison inmates survey where a third of the rapists admitted they were under the influence of a drug at the time they raped their victim. Over 28 percent of all murderers also acknowledge being under the influence of drugs when they killed.

Users/Addicts Are Flooding Our Emergency Rooms

Users/addicts are flooding our emergency rooms. A study released by the National Institute for Drug Abuse (NIDA) in May of 1989 shows that 15 of 19 surveyed cities had record numbers of cocaine emergencies. New Orleans was up 210 percent.

DEA reports that the marijuana now being sold is 235 percent more potent than that sold 10 years ago. This accounts for the fact that 16 of 19 cities reported increases in marijuana related emergencies. Seattle reported a 123 percent increase.

Ten of 19 cities reported increases in heroin-related emergencies. In Philadelphia, heroin killed 124 in the first half of last year, more than triple from the year before.

Intravenous (IV) drug users account for the dramatic upswing of AIDS cases among heterosexuals. NIDA reports that 70 percent of heterosexually transmitted AIDS cases are traceable to an IV using partner.

According to a recent study done by Blue Cross and Blue Shield of Pennsylvania, when substance abuse occurs in families both the substance abusers and members of their families have increased rates of hospital utilization. Substance abusers and their immediate families also have a disproportionately higher number of non-substance abuse hospital admissions compared to other Blue Cross subscribers.

Drug-Affected Infants

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

For those who don't see the human tragedy involved in what they term a "victimless crime," consider the costs of drug addicted infants: In 1984, Miami, Florida, hospitals recorded the birth of ten children addicted to cocaine. By the end of 1989, Florida officials had seen 11,000 children born addicted to drugs with an annual cost of care of over $10 million a year. According to Dr. Beryl J. Rosenstein of John Hopkins Hospital, infants born addicted to cocaine are typically premature, suffer from low brain weight, suppressed immune systems and are 5-10 times more susceptible to Sudden Infant Death Syndrome (SIDS) commonly known as crib death.

The average stay for such a child in the intensive care unit of a hospital is a minimum 30 days at a minimum cost of $1,000 a day. Hospital bills frequently run as high as $150,000 according to *USA Today*. It is impossible to calculate the long-term

suffering these children will endure or the long-term costs society will bear for their care, but health officials in Maryland, for example, estimate that 60 percent of these infants will require attention from child protective services and 40 percent will require foster care. Conservative estimates for care, therapy, and special education for the 7,400 drug affected babies born in Maryland, just in 1989, through age 18, are almost $387,000,000.

Children are neglected, abused and too often killed as a result of drug use by their parents and caretakers.

Last year's jump in reports of child abuse and neglect—reaching an all-time high of 2.4 million—was directly related to parental and caretaker drug use, according to the National Committee for the Prevention of Child Abuse. In Pennsylvania, Louisiana, and the District of Columbia, for instance, as many as 90 percent of caretakers abusing children are also substance abusers—numbers 10 times higher than that reported in NIDA surveys of the general population.

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

Drug Abuse in the Work Force

Non-addicted, so called "recreational" users can often be found to be gainfully employed in the early stages of abuse. NIDA's latest studies show that among 20 to 40 year old full-time employed Americans, 22 percent used an illicit drug in the past year, and 12 percent used an illicit drug in the past month. These persons sap the strength of the American economy with decreased productivity, increased use of sick leave, increased on-the-job accidents and as a consequence increased demands on the worker compensation system. Drug using employees continue to occupy scarce jobs leaving other Americans, willing to work drug free, unemployed. According to Health and Human Services Secretary, Otis R. Bowen, M.D., drug abuse cost the U.S. economy 60 billion dollars in 1983, over 30 percent more than the $47 billion estimated for 1980. Lost productivity, absenteeism and turnover costs, increased health benefit utilization, accidents, and losses stemming from impaired judgment and creativity are among the drug related expenses included in the estimate.

Roger Smith, Chairman of the Board of General Motors, says drug abuse costs General Motors alone more than $1 billion a year.

The United States Chamber of Commerce reports that workers who use drugs illegally greatly compromise their performance compared to average employees. A typical "recreational" drug user in today's work force is:

- 2.2 times more likely to request early dismissal or time off,
- 2.5 times more likely to have absences of eight days or more,
- 3 times more likely to be late for work,
- 3.6 times more likely to injure themselves or another person in a work-place accident,
- 5 times more likely to be involved in an accident off the job (which, in turn, affects attendance or performance on the job),
- 5 times more likely to file a worker's compensation claim,
- 7 times more likely to have wage garnishments, and one-third less productive.

Furthermore, drug abusing employees incur 300 percent higher medical costs and benefits.

Drug Users Fund the Narco-Terrorists

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

Thus, users provide the cash for the guns and the bullets, turning American cities into war zones;

the cash for the bribes and the hush money corrupting police officers and other public officials. Drug users provide the cash which supports the kinds of lifestyles led by drug dealers that tell young people they don't need the work ethic or their family to succeed—easy money is a drug deal away.

Users are funding a new kind of American Imperialism, narco-terrorists, like those in the Colombian cartels, are crippling the government of Latin America's oldest democracy in order to freely feed America's monstrous cocaine and marijuana habit. The rule of law is being replaced with the offer of "plomo o plata," lead or silver, a bullet or bribe.

Columbia has paid in blood for resisting this coerced corruption. Since 1980 traffickers have murdered over 350 judicial employees, a justice minister, an attorney general, 2 presidential candidates, dozens of police officers, journalists, and their families. These murders were financed in large part by the billions of dollars provided each year by American drug users. These murders were committed to protect that market.

Eduardo Moya Tovar, the first Colombian federal judge assassinated by the cartel, was presiding over a drug lab case. His daughter told *Barrister,* "Everybody reacted to his death, a judge being killed was unheard of. Now it is everyday. We barely react when a judge is killed. The cartels have numbed us."

Reducing Drug Use Would Deal a Blow to Narcotic Trafficking

Indeed, because approximately 60-65 percent of all cocaine users are non-addicted "recreational" users the cash they provide constitutes a continuing source of fuel to the fire. These are the persons who could inflict a serious blow to the drug lords by cutting off that which they themselves are addicted to - money. The members of the Drug Cartel, like OPEC's Oil Cartel, have become dependent on a heavy flow of American dollars. Just as a small but significant reduction of America's demand for oil wreaked havoc with OPEC, reducing America's demand for cocaine by those recreational users, who could quit tomorrow, might well turn these thugs loose on one another.

To Reduce Demand We Must Make More Arrests for Possession Possible

Because our objective is to reduce demand the concept of User Accountability cannot simply be punitive. We must, however, begin with the premise that the illegal use of drugs is a criminal wrong subject to severe punishment absent a demonstrated willingness by the defendant to make a better choice in his or her life. Law enforcement strategies such as "reverse stings" targeting the drug customers flowing into drug houses and open air markets are provided for in Section 408 of the proposed UCSA amendments. This provision punishes those persons who offer or solicit or attempt to purchase what they believe to be drugs. Section 402 of the proposed amendments contains powerful new provisions designed to create disincentives for persons who provide the apartments and rental houses where drugs are so often dealt. And finally, early attempts to water down the sanctions for persons possessing illegal drugs have been removed.

Disincentives in Addition to Incarceration Must Be Created

Next we must recognize that scarce prison space should be reserved for those committing the most serious offenses and those who commit less serious offenses but have failed to demonstrate a willingness to alter their criminal conduct. As a result of this reality disincentives, other than incarceration, and programs encouraging rehabilitation must be made available to courts sentencing drug users. Disincentives should include fines and assessments but should also include forfeiture of assets used or intended to be

used to buy drugs. Vehicles used to transport or purchase drugs should also be forfeited, subject to the interests of protected persons. These are the vehicles which permit suburbanites to contribute to inner city decay by driving into open air drug markets. Contrasted with imprisonment, fines and forfeitures provide a realistic and meaningful deterrent to the purchasing, transportation and use of illegal drugs.

The proposed amendments have both a deterrent and a remedial effect. There is a consensus in America that drug education and treatment are essential to demand reduction. Nevertheless, these programs remain seriously underfunded. States like New Jersey have decided that those convicted of drug offenses are the most appropriate persons to fund drug education and treatment programs. The demand reduction fee program has been collecting $9-10 million per year.

With a realistic and reliable funding base, the proposed UCSA amendments provide for treatment programs and a conditional discharge provision for first offenders which gives those ready to take responsibility for their lives a true second chance. The proposed amendments strike an appropriate balance of maintaining substantial disincentives for drug use while leaving the door open for treatment and rehabilitation.

Targeting Leaders of Drug Enterprises and Drug Monies

SECTION 411. CONTINUING CRIMINAL ENTERPRISE; PENALTY

SECTION 412. MONEY LAUNDERING AND ILLEGAL INVESTMENT; PENALTY

A Drug Dealer and His Enterprise

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

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

Carlos Lehder Rivas is a 38-year-old leader of the Columbian Medellin Cartel. According to law enforcement, the Medellin Cartel supplies 80 percent of the cocaine imported into the United States. Rivas, a billionaire, was convicted of various drug counts based on importing three tons of cocaine into the United States. The jury also voted to strip Rivas of his drug empire which consisted of a Bahamian Island and millions of dollars worth of property.

Columbia holds no monopoly on cartels. The Mexican cartels are also providing delivery systems for vast amounts of cocaine, heroin and marijuana. According to 1989 newspaper accounts, Miguel Felix Gallardo, 43, smuggled four tons of cocaine a month into the United States and laundered $30 million a month. His net worth is estimated to be $500 million.

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

Awash in Drug Monies and Drug Assets

While the numbers associated with Rivas, Gallardo, and Gomez are striking, they are not unusual in today's lucrative drug business. "Operation Pisces," a local, state, and federal task force conducting a financial investigation of a drug enterprise, laundered $52 million for Columbian traffickers. An additional $19 million in currency was forfeited. The cocaine exports for Columbia are three to six billion dollars; whereas, their legal exports are five billion dollars.

Between 1979 and 1982, $268 million in drug assets were seized by the Drug Enforcement Administration (DEA). In 1985, $244 million in drug assets were seized. In 1987, $500 million in drug assets were seized. On January 5, 1989, the New York office of the DEA seized $20 million in cash. The Federal Reserve Bank in Los Angeles had a cash surplus of $3.8 billion in 1988, a jump from $165 million in 1985. This staggering increase is believed by the U.S. Customs Service to come largely from laundered drug monies.

Millions of drug dollars are paid in bribes. Sadly, even members of America's law enforcement agencies have been seduced by drug monies. Three special agents were charged with laundering hundreds of thousands of dollars to Switzerland while they were employed by the DEA.

Targeting Drug Kingpins and Drug Wealth

The drug war is not just about fighting individuals, it is about fighting systems. Only by reaching the power brokers can we hope to dismantle and cripple these drug systems. Simultaneously, we must attack the financial base of the drug industry. Money is the Achille's heel of these power brokers. One does not buy drugs with a check or credit card. The illegal drug business deals with cold, hard cash. This presents a tremendous problem for the drug dealer. How can he convert his drug money to make it look legitimate? This is no small feat because his industry is billions upon billions of dollars rich. Statutes must provide tools which address this financial aspect of the drug industry.

The proposed UCSA amendments do just that. They provide new criminal sanctions and civil remedies which target drug kingpins and drug wealth. There is a Continuing Criminal Enterprise provision modeled after federal statutes. It reaches the leader of the drug operation, who, in concert with at least five other persons, obtains substantial income from a continuing series of drug violations. This provision is designed to help destroy the drug system itself.

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

Forfeiting Property Used in or Acquired Through Drug Dealing

The Upper Echelon — Targeting Drug Kingpins

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

The government brought charges against Benevento under the Racketeer Influenced and Corrupt Organizations (RICO) Act, seeking to forfeit the seed money for the second cycle. Benevento argued that because the seed money had made it to Switzerland unseized, it was beyond the reach of RICO forfeiture. To his dismay, the Second Circuit disagreed. Because RICO forfeiture operates against the person rather than being limited to *in rem* application, the court ordered Benevento to pay the amount of the seed money from any available assets, as a personal judgment.[1]

Personal jurisdiction allows judicial remedies to be brought to bear on a person, even for assets out of the state or country. It is especially useful at the state level because county or district attorneys are frequently confronted with drug enterprises spanning several counties, districts, states, or even countries. The proposed amendments incorporate *in personam* jurisdiction with its concomitant benefits.

An adjunct to *in personam* remedies is the substitute asset provision. To avoid losing their drug wealth, drug dealers hide their money, use offshore banking, make tracing difficult through commingling, heavily encumber the asset, and use leased or rented properties. The substitute asset provision allows the court to order the forfeiture of any other property up to the value of the original property subject to forfeiture which is no longer available.

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

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

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

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

Reducing Waste — Proper Management of Seized Assets

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

The GAO found that vehicles resold for 58 percent of their seizure value, boats for 43 percent and aircraft for only 35 percent. The experience of the states has been comparable. Long delays in the completion of forfeitures often causes this waste. As forfeiture proceedings extend over time, seized assets which have been put in storage continue to depreciate. Congress amended federal statutes in 1984,[2] 1986,[3] and 1988[4] to provide for proper management of seized assets.

The UCSA fails to address these concerns. However, the proposed amendments provide three state of the art techniques to speed the forfeiture process, eliminate non-meritorious cases, and reduce waste.

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

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

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

Freedom from Forfeiture —Exemptions

In 1974 the U.S. Supreme Court reaffirmed its long support of forfeiture, holding that the U.S. Constitution's protection against the taking of property without due process does not require exemption of wholly innocent interests.[5] The Supreme Court's decision, however, has been tempered by legislative restraint. Legislatures have perceived the role of civil remedies as freeing legitimate commerce from the effects of criminal influences. The remedies are effective in inverse proportion to the economic disruption they cause; a truly effective civil remedy fosters an alliance between business and law enforcement. These perceptions have been shared by law enforcement and reflected in federal and state legislation since the Supreme Court's decision.

Statutes generally provide limited, piecemeal exemptions from forfeiture to protect commercial interests. The proposed amendments provide a unified, comprehensive approach that clearly establishes a priority for commercial continuity while preventing manipulation by drug network participants and their agents. The exemptions function as a series of tests, each designed to eliminate non-qualifying claimants, leaving those

2. Pub. L. 98-473.
3. Pub. L. 99-570.
4. Pub. L. 100-690.
5. *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 563 (1974).

who are, for example, good faith purchasers for value.

Speedy Probable Cause Determination — Right to a Hearing

The proposed amendments create a new right to a speedy judicial determination of probable cause, a right now found in only a few states. Even federal law provides no right to a speedy hearing. The U.S. Supreme Court has held that delays of months or even years between seizure and a judicial determination of probable cause at a forfeiture hearing do not violate due process.[6] While delays due to ongoing criminal trials are often desirable to people accused of crime, they are economically damaging to lienholders and other commercial interest holders.

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

Protecting Property Interests — Procedural Safeguards

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

The proposed amendments provide specific authority and a procedure that encourages the government to stipulate to the exempt status of particular interests in seized property, such as the bank's interest. The commercial interest holder is protected, and the prosecutor is not forced to make tactical decisions under the pressure of knowing that some courses of action may harm commercial interests.

The proposed amendments place time limits on the state in which to initiate and pursue forfeiture, in addition to the quick probable cause hearing. They mandate filing in far less time than federal procedure. The proposed amendments further protect property interests by requiring an immediate inventory, and require that the state give notice of its pending forfeiture, protecting potential purchasers from becoming involved in possible fraudulent or voidable conveyances.

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6. *United States* v. *Eight Thousand Eight Hundred Fifty Dollars ($8,850) in United States Currency*, 461 U.S. 555 (1983); *United States* v. *$18,505.10*, 739 F.2d 354 (8th Cir. 1984) (25-month delay reasonable).

Article I — Definitions

and

Article II — Standards and Schedules

and

Article III — Regulation of Manufacture, Distribution and Dispensing of Controlled Substances

of the

Proposed Amendments

to the

Uniform Controlled Substances Act

(UCSA)

D R A F T

FOR APPROVAL

UNIFORM CONTROLLED SUBSTANCES ACT (1990)

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

MEETING IN ITS NINETY-NINTH YEAR
MILWAUKEE, WISCONSIN

JULY 13-20, 1990

UNIFORM CONTROLLED SUBSTANCES ACT (1990)

With Prefatory Note and Comments

DRAFTING COMMITTEE TO REVISE UNIFORM CONTROLLED SUBSTANCES ACT

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Copies of this Act and copies of all Uniform and Model Acts and other printed matter issued by the Conference may be obtained from:

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ON UNIFORM STATE LAWS
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UNIFORM CONTROLLED SUBSTANCES ACT (1990)

PREFATORY NOTE

The Drafting Committee concentrated its efforts this past year on the provisions relating to forfeiture. As can be readily seen from the text of the most recent draft, the Committee decided to have the forfeiture provisions covered in a separate article. The Committee considered comments and recommendations received from several interested groups and individuals, particularly relating to the relationship between interests protected under the Uniform Commercial Code and other holders of interests in property vis-a-vis, the State's power to forfeit interests in property as a result of violations of controlled substances laws.

Among the many issues relating to this subject the Committee wishes to highlight the following ones for members of the Conference:

1. Throughout Article 5 various provisions relating to procedure are set forth in detail. An alternate approach would be simply to reference the appropriate jurisdiction's rules and statutes relating to civil procedure. The reason that the Committee did not choose to use such a general reference is that the very nature of forfeiture of property involves the doing of some acts and invoking some remedies that are not generally available in a civil proceeding. Thus, the Committee decided it was best to try to spell out in sufficient detail the procedures that should be followed.

2. The standard of proof required to be shown by the State in order to prevail in an in rem forfeiture proceeding is to show probable cause that the underlying facts exist. The alternative would be to require the State to prove the elements of its case by a preponderance of the evidence or by clear and convincing evidence.

3. For a person to avoid having an interest in property forfeited, the person has the burden of proving that his, her or its property interest is exempt from forfeiture.

4. An individual loses exempt status with respect to vehicles used to transport illegal drugs solely on the basis of the type of ownership (i.e., joint tenants, tenants in

common, or tenants by the entirety), such as usually is found among individuals related by blood or marriage.

5. Awarding of costs of investigating a matter, litigation expenses, and attorneys fees may be imposed against a person claiming an interest in property. However, no such award may be made against the State if the court has determined that reasonable cause existed in connection with the seizure of the property or for the filing of forfeiture proceedings.

6. Other property may be forfeited if property otherwise forfeitable is lost or substantially diminished in value or otherwise unavailable, even though such loss, diminution in value or unavailability was the result of no fault of the person.

7. Attorneys fees may be exempt, at least in part. Two alternative provisions are set forth in Sec. 505(c). The first alternative does not require absence of knowledge that the property received as the fee may be subject to forfeiture. The second alternative allows the attorney to retain property to the extent payment was reasonable and was earned before the attorney obtained actual knowledge that the property was subject to forfeiture.

8. The forfeiture mechanisms have been prepared with the intent of having prompt resolution of forfeiture proceedings and to minimize opportunities for persons who violate controlled substances laws to be able to secrete assets. At the same time, the Committee has attempted to accommodate the needs of owners and secured parties who have legitimate interests in property subject to forfeiture.

The Drafting Committee has refrained from making substantial changes to the other articles of the Uniform Controlled Substances Act. Actions taken by the Conference as a whole at the 1989 annual meeting have been incorporated. A clarification has been added to Section 308(f), which is intended to insure that the medical profession is not constrained from prescribing narcotic drugs for treatment of pain, including intractable pain.

Also, language has been added to Sec. 705, Uniformity of Interpretation. This additional language points out that this Act is intended to be consistent with the purposes of the Federal act and conventions relating to narcotic and psychotropic drugs. Thus, use of controlled substances is recognized to be essential for public health and safety, and the availability of these substances must be assured; at the

same time, we must try to curtail and eliminate the illegitimate manufacture, distribution and possession of controlled substances.

Again, the Committee wishes to extend its appreciation to the many persons, too numerous to name, who have assisted in its work.

Dated: April 25, 1990

FOR THE COMMITTEE

By: David A. Gibson
David A. Gibson,
Chairman

AMENDMENTS TO UNIFORM CONTROLLED SUBSTANCES ACT
1990 ANNUAL MEETING

POLICY ISSUES

Principal policy issues presented in the Drafting Committee's proposals are as follows:

1. Marijuana

Repeal of present section 409 of the UCSA, which section authorizes possession of marijuana for personal use in private and also authorizes distribution of small amounts of marijuana in private so long as there is no remuneration or only insignificant remuneration not involving a profit.

The recommendations of the Drafting Committee authorize each State to set its own penalty structure for violations involving marijuana, which may be less severe than those for other Schedule I controlled substances. See Sec. 401 (a) (1) (vii) and (a) (5). In addition, simple possession of marijuana, as well as other controlled substances, may be prosecuted as a misdemeanor. See Sec. 406. Also, there is provision for deferral of entry of a judgment of guilt and for dismissal of proceedings on a one-time basis with respect to violations of the Act involving marijuana as well as other controlled substances. See Sec. 414.

2. Forfeiture

Forfeiture provisions are found in Article V of the Act. Property that is subject to forfeiture is described in broad terms, as is conduct that triggers forfeiture. See

Sec. 503 and 504. Limited exemptions for certain property interests are set forth in section 505. Standards relating to the process of initiating seizure for forfeiture and legal proceedings relating thereto are found in sections 506 through 509. Possible resolution of forfeiture proceedings outside the court process is permitted by sections 510 and 511.

Judicial forfeiture proceedings are governed by sections 514 through 518, and may be in rem or in personam or both. Probable cause hearings may be sought under section 512. Disposition of forfeited property is governed by section 519. Sections 520 and 521 relate to limitations on bringing of civil actions and on summary forfeiture of contraband.

3. Controlled Substance Analogs

Controlled substance analogs are defined in section 101 (3) and are illegal. See Sec. 214. State authorities may add controlled substance analogs to Schedule I or II by administrative rule on an emergency basis upon finding that such action is necessary to avoid an imminent hazard to the public safety. See Sec. 201 (e).

4. Delegation

A. Incorporation of federal actions

Several sections provide for State authority to schedule substances without making independent findings where a federal agency has acted to control or not to control a substance. See Secs. 201 (d), 203 (b), 204 (a), 205 (b), 206 (a), 207 (b), 208 (a), 209 (b), 210 (a), 211 (b) and 212 (a). Similar provisions exist with respect to registration for research with Schedule I substances and with respect to Schedule I or II order forms. See Secs. 303 (c), 307.

Those states whose constitutions, laws or court decisions frown on incorporation of such federal actions will have to follow the lengthier procedural requirements for scheduling substances. See Sec. 201 (a) and (b).

B. Legislative delegation to administrative agencies

The UCSA lists the various substances that have been scheduled by the federal government in order to avoid possible problems with courts finding unconstitutional delegation of authority. Inasmuch as the UCSA provides for criminal penalties for violations of the Act, the Committee chose to be as specific as possible. See Secs. 204, 206, 208, 210, and 212.

5. The Committee has included bracketed language relating to mandatory imprisonment for certain crimes. Those crimes are set forth in sections 401 (b) (trafficking), 409 (distribution near schools, colleges or public playgrounds),

410 (use of minors in drug operations), and 411 (continuing criminal enterprises).

6. With respect to attorneys' fees, the Committee has included language similar to amendments to the federal money laundering statute. See Sec. 412 (a)(1). The Committee also has included language to exempt attorneys' fees from forfeiture in limited circumstances. See Secs. 505 (c), 511.

7. A "user fee" is established by section 416, dedicated to education and treatment programs.

8. The Committee rejected a proposal to include a preamble to the Act that would be similar to the language in the federal act. See 21 U.S.C. Sec. 801. The Drafting Rules of the Conference discourage inclusion of purpose clauses (Rule 22). There was some sentiment to make an exception to the rule for this Act in order to highlight the facts that many of the drugs that are controlled do "have a useful and legitimate medical purpose" and that they "are necessary to maintain the health and general welfare of the American people." Thus, language to that effect has been added to section 705 (uniformity of interpretation).

9. The Committee also added a proposal to include language relating to treatment of intractable pain. Unfortunately, segments of physicians, pharmacists and patients for varying reasons are reluctant to prescribe, dispense, and use

narcotic drugs designed to combat and control pain where there is no apparent relief or cure otherwise available. The added language tries to make it clear that the revised uniform act is not designed to inhibit appropriate medical treatment for persons suffering intractable pain. See Sec. 308 (a).

Respectfully submitted,

David A. Gibson, Chairman
Drafting Committee to Revise
Uniform Controlled Substance Act

John W. Thomas, Chairman
Review Committee

ARTICLE I

~~DEFINITIONS~~

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

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

~~(1)~~ (i) a practitioner (or, in ~~his~~ the practitioner's presence, by ~~his~~ the practitioner's authorized agent)~~,~~; or

~~(2)~~ (ii) the patient or research subject at the direction and in the presence of the practitioner.

~~(b) "Agent" means an authorized person who acts on behalf of or at the direction of a manufacturer, distributor, or dispenser. It does not include a common or contract carrier, public warehouseman, or employee of the carrier or warehouseman.~~

~~(c) "Bureau" means the Bureau of Narcotics and Dangerous Drugs, United States Department of Justice, or its successor agency.~~

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

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

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

(A) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance included in Schedule I or II; or

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

(ii) The term does not include:

(A) a controlled substance;

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

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

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

~~(f)~~ (4) "Deliver" or "delivery," unless the context otherwise requires, means the actual, or constructive~~, or attempted~~ transfer from one person to another of a ~~controlled~~ substance, whether or not there is an agency relationship.

~~(g)~~ (5) "Dispense" means to deliver a controlled substance to an ultimate user or research subject by or pursuant to the lawful order of a

practitioner, including the prescribing, administering, packaging, labeling, or compounding necessary to prepare the substance for that delivery.

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

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

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

~~(k)~~ (9) "Drug" means ~~(1)~~ (i) substances recognized as drugs in the official United States Pharmacopoeia, National Formulary, or the official Homeopathic Pharmacopoeia of the United States, ~~or official National Formulary,~~ or any supplement to any of them; ~~(2)~~ (ii) substances intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in ~~man~~ individuals or animals; ~~(3)~~ (iii) substances (other than food) intended to affect the structure or any function of the body of ~~man~~ individuals or animals; and ~~(4)~~ (iv) substances intended for use as a component of any article specified in clause ~~(1), (2), or (3)~~ (i), (ii), or (iii) of this ~~subsection~~ sentence. ~~It~~ The term does not include devices or their components, parts, or accessories.

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

(11) "Immediate precursor" means a substance ~~which~~ :

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

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

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

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

~~(m)~~ (13) "Manufacture" means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly or by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container~~, except that this~~. The term does not include ~~the preparation or compounding of a controlled substance by an individual for his own use or~~ the preparation, compounding, packaging, ~~or~~ repackaging, labeling, or relabeling of a controlled substance:

~~(1)~~ (i) by a practitioner as an incident to ~~his~~ the practitioner's administering or dispensing of a controlled substance in the course of ~~his~~ the practitioner's professional practice~~,~~; or

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

~~(n)~~ (14) ~~"Marihuana"~~ "Marijuana" means all parts of the plant Cannabis ~~sativa L.~~, whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin. ~~It~~ The term does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound,

manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of the plant which is incapable of germination.

~~(c)~~ (15) "Narcotic drug" means any of the following, 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)~~ (i) Opium ~~and opiate~~, opium derivative, and any ~~salt, compound,~~ derivative~~, or preparation~~ of opium or ~~opiate~~ opium derivative, including their salts, isomers, and salts of isomers, whenever the existence of the salts, isomers, and salts of isomers is possible within the specific chemical designation.

~~(2) Any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in clause 1, but~~ The term does not ~~including~~ include the isoquinoline alkaloids of opium.

(ii) Synthetic opiate and any derivative of synthetic opiate, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, whenever the existence of the isomers, esters, ethers, and salts is possible within the specific chemical designation.

~~(3)~~ (iii) ~~Opium poppy and poppy~~ Poppy straw and concentrate of poppy straw.

~~(4)~~ (iv) Coca leaves ~~and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, but not including decocainized~~, except coca leaves ~~or extractions~~ and extracts of coca leaves from which ~~do not~~

~~contain~~ cocaine ~~or~~, ecgonine, and derivatives of ecgonine or their salts have been removed.

(v) Cocaine, or any salt, isomer, or salt of isomer thereof.

(vi) Cocaine base.

(vii) Ecgonine, or any derivative, salt, isomer, or salt of isomer thereof.

(viii) Any compound, mixture, or preparation containing any quantity of any substance referred to in subparagraphs (i) through (vii).

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

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

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

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

~~(t)~~ (20) "Practitioner" means:

~~(1)~~ A a physician, dentist, veterinarian, scientific investigator, ~~or other person licensed, registered or otherwise permitted to~~

~~distribute, dispense, conduct research with respect to or to administer a controlled substance in the course of professional practice or research in this State.~~

~~(2)~~ ~~A~~ pharmacy, hospital, or other ~~institution~~ person licensed, registered, or otherwise permitted, by this State, to distribute, dispense, conduct research with respect to ~~or to~~, administer, or to use in teaching or chemical analysis, a controlled substance in the course of professional practice or research ~~in this State~~.

~~(u)~~ (21) "Production," unless the context otherwise requires, includes the ~~manufacture~~ manufacturing, planting, ~~cultivation~~ cultivating, growing, or harvesting of a controlled substance.

~~(v)~~ (22) "State," ~~when applied to a part of the United States~~ unless the context otherwise requires, ~~includes any~~ means a state~~, district, commonwealth, territory, insular possession thereof, and any area subject to the legal authority~~ of the United States ~~of America~~, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or insular possession subject to the jurisdiction of the United States.

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

COMMENT ON AMENDMENT

Several revisions to the Act are made to conform to the wording of the federal Controlled Substances Act. In most instances, deviations from the wording of the federal Act are intended to improve readability, with no change in substance. This Act does not include a definition for such terms as "addict", "drug dependent person", or "habitual user". If a state chooses to use such a definition, the state should assure that the definition cannot be construed to include a patient using a controlled substance pursuant to the lawful order of a practitioner. The definitions of "immediate precursor" and "practitioner" are revised to conform to the definitions of "immediate precursor" and "practitioner" in the federal Controlled Substances Act,

21 U.S.C. 802(21) and (23), as enacted in 1970. The definition of "bureau" is deleted because federal administration is by the Drug Enforcement Administration. In paragraph (2) "included" is used to refer to substances controlled on adoption of the Act (those substances "listed" in Sections 204, 206, 208, 210, and 212) and to substances controlled under Section 601 and administrative action. The definition of "controlled substance analog" is derived from the definition contained in the federal Act, as added by the Anti-Drug Abuse Act of 1986, §§1201-1204 (the "Controlled Substance Analogue Enforcement Act of 1986"). The definition of "counterfeit substance" is transferred to Section 404. The definition of "deliver" and "delivery" is amended to apply to any substance so as to include imitation controlled substances. The definition of "drug" is derived from the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 321(g)(1). The definition of "isomer" is taken from the federal Controlled Substances Act, 21 U.S.C. 802(14). "Isomer" was added to the federal Act in 1984, and amended in 1986 and is further revised to reflect the use of the term in Sections 101(15)(v), 204(a)(1)(xxxiv), 208(a)(1), 210(a)(3), and 401(a)(1)(ii)(B). The definition of marijuana is revised to apply to all subtypes or species of Cannabis, regardless of the gross botanical characteristics of individual species, e.g., Cannabis sativa L., Cannabis americanus, Cannabis indica, and Cannabis ruderalis. There may be a question on whether adding "or" in the definition of "manufacture" to parallel the language in the federal Act causes confusion. See the introductory paragraph of paragraph (15) and the introductory paragraph of Section 206(a)(1) where "or" is not used. The definition of "narcotic drug" is revised to reflect the definition of "narcotic drug" as contained in the federal Controlled Substances Act, 21 U.S.C. 802(17).

ARTICLE II

~~STANDARDS AND SCHEDULES~~

SECTION 201. ~~AUTHORITY TO CONTROL.~~

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

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

~~(1)~~ (i) the actual or relative potential for abuse;

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

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

~~(4)~~ (iv) the history and current pattern of abuse;

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

~~(6)~~ (vi) the risk to the public health;

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

~~(8)~~ (viii) whether the substance is an immediate precursor of a controlled substance ~~already controlled under this Article~~.

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

(b) After considering the factors enumerated in subsection (a), the [appropriate person or agency] shall make findings with respect thereto and ~~issue~~ adopt and cause to be published a rule controlling the substance ~~if he (it) finds~~ upon finding the substance has a potential for abuse.

(c) The [appropriate person or agency], without regard to the findings required by subsection (a) or Sections 203, 205, 207, 209, and 211 or the procedures prescribed by subsections (a) and (b) of this section, may 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. If the [appropriate person or agency] designates a substance as an immediate precursor, substances ~~which~~ that are precursors of the controlled precursor ~~shall~~ are not ~~be~~ subject to control solely because they are precursors of the controlled precursor.

(d) If ~~any~~ a substance is designated, rescheduled, or deleted as a controlled substance under ~~Federal~~ federal law ~~and notice thereof is given to the [appropriate person or agency]~~, the [appropriate person or agency] shall

similarly control the substance under this [Act] after the expiration of 30 days from the date of publication in the Federal Register of a final order designating ~~a~~ the substance as a controlled substance or rescheduling or deleting ~~a~~ the substance or from the date of issuance of an order of temporary scheduling under Section 508 of the federal Dangerous Drug Diversion Control Act of 1984 [21 U.S.C. 811(h)], unless within that 30-day period, the [appropriate person or agency] or an interested party objects to inclusion, rescheduling, temporary scheduling, or deletion. ~~In that case~~ If no objection is made, the [appropriate person or agency] shall adopt and cause to be published, without the necessity of making determinations or findings as required by subsection (a) or Section 203, 205, 207, 209, or 211, a final rule, for which notice of proposed rulemaking is omitted, designating, rescheduling, temporarily scheduling, or deleting the substance. If an objection is made, the [appropriate person or agency] shall ~~publish the reasons for objection and afford all interested parties an opportunity to be heard. At the conclusion of the hearing, the [appropriate person or agency] shall publish his [its] decision, which shall be final unless altered by statute~~ make a determination with respect to the designation, rescheduling, or deletion of the substance as provided by subsection (a). Upon ~~publication~~ receipt of an objection to inclusion, rescheduling, or deletion under this [Act] by the [appropriate person or agency], the [appropriate person or agency] shall publish notice of the receipt of the objection, and control under this [Act] is stayed until the [appropriate person or agency] ~~publishes his [its] decision~~ adopts a rule as provided by subsection (a).

(e) The [appropriate person or agency], by rule and without regard to the requirements of subsection (a), may schedule a substance in Schedule I regardless of whether the substance is substantially similar to a controlled substance in Schedule I or II if the [appropriate person or agency] finds that scheduling of the substance on an emergency basis is necessary to avoid

an imminent hazard to the public safety and the substance is not included in any other schedule or no exemption or approval is in effect for the substance under Section 505 of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 355]. Upon receipt of notice under Section 214, the [appropriate person or agency] shall initiate scheduling of the controlled substance analog on an emergency basis pursuant to this subsection. The scheduling of a substance under this subsection expires one year after the adoption of the scheduling rule. With respect to the finding of an imminent hazard to the public safety, the [appropriate person or agency] shall consider whether the substance has been scheduled on a temporary basis under federal law or factors set forth in subsections (a)(1)(iv), (v), and (vi), and may also consider clandestine importation, manufacture, or distribution, and, if available, information concerning the other factors set forth in subsection (a)(1). A rule may not be adopted under this subsection until the [appropriate person or agency] initiates a rulemaking proceeding under subsection (a) with respect to the substance. A rule adopted under this subsection must be vacated upon the conclusion of the rulemaking proceeding initiated under subsection (a) with respect to the substance.

(f) Authority to control under this section does not extend to distilled spirits, wine, malt beverages, or tobacco ~~as those terms are defined or used in [insert relevant sections if applicable]~~.

COMMENT ON AMENDMENT

The Act vests the authority to administer its provisions in the appropriate person or agency within the state. In addition to the suggestions in the comment to Section 201 in the 1970 Act, the "appropriate" person or agency should have expertise in law enforcement, pharmacology, and chemistry. In subsection (a) "enumerated" is replaced with "listed" to make consistent the use of terminology throughout the Act. "Listed" is used to refer to the controlled substances listed in this Act, while "included" is used to refer to substances controlled under authority of this Act but not necessarily "listed" in this Act. Subsection (a) is revised to allow federal findings with respect to the substance to be the evidence of consideration of the relevant factors enumerated in subsection (a). Subsection (d) maintains the current process of action without

resorting to normal administrative procedure. The subsection is revised to provide that a rule is required to be adopted and published to similarly control a substance without objection and to clarify that the decision of the administering agency is final with respect to administrative action but is subject to judicial review as provided by Section 507. The procedure also applies to federal, temporary scheduling of a controlled substance. States that would have a delegation of legislative authority problem may want to replace subsection (d) with a sentence to this effect: "If a substance is designated, rescheduled, or deleted as a controlled substance under federal law and notice thereof is given to the [appropriate person or agency], the [appropriate person or agency] shall initiate proceedings to control the substance under this [Act] pursuant to the procedures of [insert appropriate state administrative procedures code section]." Changes to the schedules should be published so as to afford notice, and this is encouraged by the added requirement in subsections (b) and (d) that the agency is to cause the rules to be published. The new subsection (e) is intended to allow emergency scheduling and is based on similar temporary scheduling authority in the federal Act, added in 1984 and contained in 21 U.S.C. 811(h). The reference to the scheduling on a temporary basis under federal law is intended to allow use of scheduling under the equivalent federal provision, 21 U.S.C. 811(h), as a factor in lieu of the three referenced factors in subsection (a). Although the emergency rulemaking procedure may be initiated without regard to a regular rulemaking proceeding, the initiation of a regular rulemaking proceeding is a condition precedent to the adoption of an emergency rule. States may want to consider whether to allow a hearing under subsection (e) upon the request of an interested party, similar to that provided by subsection (d).

SECTION 202. ~~[~~NOMENCLATURE.~~]~~ The controlled substances listed or to be ~~listed~~ included in the schedules in ~~sections~~ Sections 204, 206, 208, 210, and 212 are included by whatever official, common, usual, chemical, or trade name designated.

COMMENT ON AMENDMENT

"Included" is used to refer to substances controlled under authority of this Act but not necessarily "listed" in this Act.

SECTION 203. ~~[~~SCHEDULE I TESTS.~~]~~

(a) The [appropriate person or agency] shall place a substance in Schedule I ~~if he [it] finds~~ upon finding that the substance:

(1) has high potential for abuse; ~~and~~

(2) has no currently accepted medical use in treatment in the United States ~~or~~; and

(3) lacks accepted safety for use ~~in treatment~~ under medical supervision.

(b) The [appropriate person or agency] may place a substance in Schedule I without making the findings required by subsection (a) if the substance is controlled under Schedule I of the federal Controlled Substances Act by a federal agency as the result of an international treaty, convention, or protocol.

COMMENT ON AMENDMENT

The requirements of subsection (a) are retained, with subsection (a)(2) revised to provide that the substance has no currently accepted medical use, which is the requirement found in 21 U.S.C. 812(b)(1)(B). The two requirements are divided into three separate requirements in the conjunctive rather than disjunctive sense to conform to the three requirements required under 21 U.S.C. 812(b)(1). With extreme reluctance the requirements for placing substances in the various schedules are being retained in substantially the form contained in the original Uniform Act and the federal Controlled Substances Act. The primary reason for the retention is that requirements for scheduling particular substances should parallel one another at the state and federal levels. The primary reason for the reluctance to retain the requirements is the fact that substances have been placed on schedules without complying fully with the criteria ordinarily governing scheduling decisions. See Grinspoon v. Drug Enforcement Administration, 828 F.2d 881 (1st Cir. 1987); and National Organization for the Reform of Marijuana Laws (NORML) v. Drug Enforcement Administration, 559 F.2d 735 (D.C. Cir. 1977). Subsection (b) is added to allow placement of a substance on the schedule without the necessity of the findings required by subsection (a), if it is placed by a federal agency on the corresponding federal schedule pursuant to an international agreement. See 21 U.S.C. 811(d). As enacted in 1970 the federal Act contained such a provision, 21 U.S.C. 811(d)(1), which was expanded in 1978 with respect to application of the Convention on Psychotropic Substances, 21 U.S.C. 811(d)(2).

SECTION 204. ~~[~~SCHEDULE I.~~]~~

(a) ~~The~~ Unless specifically excepted by state or federal law or regulation or more specifically included in another schedule, the following controlled substances are listed ~~in this section are included~~ in Schedule I~~.~~:

~~(b)~~ (1) Any of the following synthetic opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers~~,~~ ~~unless specifically excepted,~~ whenever the existence of ~~these~~ those isomers,

esters, ethers, and salts is possible within the specific chemical designation:

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

(ii) Acetylmethadol;

~~(2)~~ (iii) Allylprodine;

~~(3)~~ (iv) Alphacetylmethadol;

~~(4)~~ (v) Alphameprodine;

~~(5)~~ (vi) Alphamethadol;

~~(6)~~ (vii) Alpha-methylfentanyl (N-[1-(alpha-methyl-beta-phenyl)ethyl-4-piperidyl] propionanilide; 1-(1-methyl-2-phenylethyl)-4-(N-propanilido) piperidine);

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

(ix) Benzethidine;

~~(7)~~ (x) Betacetylmethadol;

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

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

~~(8)~~ (xiii) Betameprodine;

~~(9)~~ (xiv) Betamethadol;

~~(10)~~ (xv) Betaprodine;

~~(11)~~ (xvi) Clonitazene;

~~(12)~~ (xvii) Dextromoramide;

~~(13)~~ ~~Dextrorphan;~~

~~(14)~~ (xviii) Diampromide;

~~(15)~~ (xix) Diethylthiambutene;

(xx) Difenoxin;

~~(16)~~ (xxi) Dimenoxadol;

~~(17)~~ (xxii) Dimepheptanol;

~~(18)~~ (xxiii) Dimethylthiambutene;

~~(19)~~ (xxiv) Dioxaphetyl butyrate;

~~(20)~~ (xxv) Dipipanone;

~~(21)~~ (xxvi) Ethylmethylthiambutene;

~~(22)~~ (xxvii) Etonitazene;

~~(23)~~ (xxviii) Etoxeridine;

~~(24)~~ (xxix) Furethidine;

~~(25)~~ (xxx) Hydroxypethidine;

~~(26)~~ (xxxi) Ketobemidone;

~~(27)~~ (xxxii) Levomoramide;

~~(28)~~ (xxxiii) Levophenacylmorphan;

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

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

~~(29)~~ (xxxvi) Morpheridine;

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

~~(30)~~ (xxxviii) Noracymethadol;

~~(31)~~ (xxxix) Norlevorphanol;

~~(32)~~ (xL) Normethadone;

~~(33)~~ (xLi) Norpipanone;

(xLii) Para-fluorofentanyl (N-(4-fluorophenyl)-N-[1-(2-phenethyl)-4-piperidinyl]-propanamide);

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

~~(34)~~ (xLiv) Phenadoxone;

~~(35)~~ (xLv) Phenampromide;

~~(36)~~ (xLvi) Phenomorphan;

~~(37)~~ (xLvii) Phenoperidine;

~~(38)~~ (xLviii) Piritramide;

~~(39)~~ (xLix) Proheptazine;

~~(40)~~ (L) Properidine;

(Li) Propiram;

~~(41)~~ (Lii) Racemoramide;

(Liii) Thiofentanyl (N-phenyl-N-[1-(2-thienyl)ethyl-4-piperidinyl]-propanamide);

(Liv) Tilidine;

~~(42)~~ (Lv) Trimeperidine.

~~(c)~~ (2) Any of the following opium derivatives, including their salts, isomers, and salts of isomers~~, unless specifically excepted,~~ whenever the existence of ~~these~~ those salts, isomers, and salts of isomers is possible within the specific chemical designation:

~~(1)~~ (i) Acetorphine;

~~(2)~~ (ii) Acetyldihydrocodeine;

~~(3)~~ (iii) Benzylmorphine;

~~(4)~~ (iv) Codeine methylbromide;

~~(5)~~ (v) Codeine-N-Oxide;

~~(6)~~ (vi) Cyprenorphine;

~~(7)~~ (vii) Desomorphine;

~~(8)~~ (viii) Dihydromorphine;

~~(9)~~ (ix) Drotebanol;

(x) Etorphine, except hydrochloride salt;

~~(10)~~ (xi) Heroin;

~~(11)~~ (xii) Hydromorphinol;

~~(12)~~ (xiii) Methyldesorphine;

~~(13)~~ (xiv) Methyldihydromorphine;

~~(14)~~ (xv) Morphine methylbromide;

~~(15)~~ (xvi) Morphine methylsulfonate;

~~(16)~~ (xvii) Morphine-N-Oxide;

~~(17)~~ (xviii) Myrophine;

~~(18)~~ (xix) Nicocodeine;

~~(19)~~ (xx) Nicomorphine;

~~(20)~~ (xxi) Normorphine;

~~(21)~~ (xxii) ~~Phoclodine~~ Pholcodine;

~~(22)~~ (xxiii) Thebacon.

~~(d)~~ (3) Any material, compound, mixture, or preparation ~~which contains~~ containing any quantity of the following hallucinogenic substances, including their salts, isomers, and salts of isomers~~, unless specifically excepted,~~ whenever the existence of ~~these~~ those salts, isomers, and salts of isomers is possible within the specific chemical designation:

~~(1)~~ (i) ~~3,4 methylenedioxy amphetamine~~ 4-bromo-2,5-dimethoxy-amphetamine (Some trade or other names: 4-bromo-2,5-dimethoxy-alpha-methylphenethylamine; 4-bromo-2,5-DMA.);

~~(2)~~ (ii) 2,5-dimethoxyamphetamine (Some trade or other names: 2,5-dimethoxy-alpha-methylphenethylamine; 2,5-DMA.);

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

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

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

(vi) 3,4-methylenedioxy amphetamine;

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

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

~~(4)~~ (ix) Bufotenine (Some trade and other names: 3-(beta-Dimethylaminoethyl)-5-hydroxyindole; 3-(2-dimethylaminoethyl)-5-indolol; N, N-dimethylserotonin; 5-hydroxy-N,N-dimethyltryptamine; mappine.);

~~(5)~~ (x) Diethyltryptamine (Some trade or other names: N,N-Diethyltryptamine; DET.);

~~(6)~~ (xi) Dimethyltryptamine (Some trade or other names: DMT.);

~~(7) 4 methyl 2,5 dimethoxylamphetamine;~~

~~(8)~~ (xii) Ibogaine (Some trade and other names: (7-Ethyl-6,6B,7,8,9,10,12,13-octahydro-2-methoxy-6,9-methano-5H-pyrido [1', 2':1,2] azepine [5,4-b] indole; Tabernanthe iboga.);

~~(9)~~ (xiii) Lysergic acid diethylamide;

~~(10)~~ (xiv) ~~Marihuana~~ Marijuana;

~~(11)~~ (xv) Mescaline;

(xvi) Parahexyl (Some trade or other names: 3-Hexyl-1-hydroxy-7,8,9,10-tetrahydro-6,6,9-trimethyl-6H-dibenzo[b,d]pyran; Synhexyl.);

~~(12)~~ (xvii) Peyote (Meaning all parts of the plant presently classified botanically as Lophophora williamsii Lemaire, whether growing or not, the seeds thereof, any extract from any part of the plant, and every compound, manufacture, salts, derivative, mixture, or preparation of the plant, its seeds or extracts.);

~~(13)~~ (xviii) N-ethyl-3-piperidyl benzilate;

~~(14)~~ (xix) N-methyl-3-piperidyl benzilate;

~~(15)~~ (xx) Psilocybin;

~~(16)~~ (xxi) Psilocyn;

~~(17)~~ (xxii) Tetrahydrocannabinols;

(xxiii) Ethylamine analog of phencyclidine (Some trade or other names: N-ethyl-1-phenylcyclohexylamine,

(1-phenylcyclohexyl)ethylamine, N-(1-phenylcyclohexyl)ethylamine, cyclohexamine, PCE.);

(xxiv) Pyrrolidine analog of phencyclidine (Some trade or other names: 1-(1-phenylcyclohexyl)-pyrrolidine, PCPy, PHP.);

(xxv) Thiophene analog of phencyclidine (Some trade or other names: 1-[1-(2-thienyl)-cyclohexyl]-piperidine, 2-thienyl analog of phencyclidine, TPCP, TCP.).

(4) Any material, compound, mixture, or preparation containing any quantity of the following substances having a depressant effect on the central nervous system, including their salts, isomers, and salts of isomers whenever the existence of those salts, isomers, and salts of isomers is possible within the specific chemical designation:

(i) Mecloqualone;

(ii) Methaqualone.

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

(i) Fenethylline;

(ii) N-ethylamphetamine.

(b) The controlled substances listed in this section may be rescheduled or deleted as provided for in Section 201.

COMMENT ON AMENDMENT

Schedule I is revised to reflect the substances controlled under Schedule I of the federal Act, as published in 21 CFR 1308.11 (April 1, 1987), and updated through the February 22, 1988, issue of the Federal Register. States that would not have a delegation of legislative authority problem may want to replace the specific listing of substances with an adoption of the federal schedules by reference, with any deletions or additions determined appropriate by the state administrator or to delete this section and rely on the state administrator to schedule a substance.

SECTION 205. ~~SCHEDULE II TESTS.~~

(a) The [appropriate person or agency] shall place a substance in Schedule II ~~if he finds~~ upon finding that:

(1) the substance has high potential for abuse;

(2) the substance has currently accepted medical use in treatment in the United States, or currently accepted medical use with severe restrictions; and

(3) the abuse of the substance may lead to severe ~~psychic~~ psychological or physical dependence.

(b) The [appropriate person or agency] may place a substance in Schedule II without making the findings required by subsection (a) if the substance is controlled under Schedule II of the federal Controlled Substances Act by a federal agency as the result of an international treaty, convention, or protocol.

COMMENT ON AMENDMENT

The term "psychic" is replaced by the term "psychological" to conform to the finding required under the federal Act, 21 U.S.C. 812(b)(2)(C). Subsection (b) is added to allow placement of a substance on the schedule without the necessity of the findings required by subsection (a), if it is placed by a federal agency on the corresponding federal schedule pursuant to an international agreement. See 21 U.S.C. 811(d). As enacted in 1970 the federal Act contained such a provision, 21 U.S.C. 811(d)(1), which was expanded in 1978 with respect to application to the Convention on Psychotropic Substances, 21 U.S.C. 811(d)(2).

SECTION 206. ~~SCHEDULE II.~~

(a) ~~The~~ Unless specifically excepted by state or federal law or regulation or more specifically included in another schedule, the following controlled substances are listed ~~in this section are included~~ in Schedule II~~.~~:

~~(b)~~ (1) Any of the following substances~~,~~ ~~except those narcotic drugs listed in other schedules,~~ 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)~~ (i) Opium and ~~opiate~~ opium derivative, and any salt, compound, derivative, or preparation of opium or ~~opiate~~ opium derivative, excluding apomorphine, dextrorphan, nalbuphine, butorphanol, nalmefene, naloxone, and naltrexone, but including:

(A) Raw opium;

(B) Opium extracts;

(C) Opium fluid;

(D) Powdered opium;

(E) Granulated opium;

(F) Tincture of opium;

(G) Codeine;

(H) Ethylmorphine;

(I) Etorphine hydrochloride;

(J) Hydrocodone;

(K) Hydromorphone;

(L) Metopon;

(M) Morphine;

(N) Oxycodone;

(O) Oxymorphone;

(P) Thebaine.

~~(2)~~ (ii) Any salt, compound, ~~isomer,~~ derivative, or preparation thereof ~~which~~ that is chemically equivalent or identical with any of the substances referred to in ~~paragraph (1)~~ subparagraph (i), but not including the isoquinoline alkaloids of opium.

~~(3)~~ (iii) Opium poppy and poppy straw.

~~(4)~~ (iv) Coca leaves and any salt, compound, derivative, or preparation of coca leaves, including cocaine and ecgonine and their salts, isomers, derivatives, and salts of isomers and derivatives, and any salt, compound, derivative, or preparation thereof ~~which~~ that is

chemically equivalent or identical with any of these substances, but not including decocainized coca leaves or extractions of coca leaves which do not contain cocaine or ecgonine.

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

~~(c)~~ (2) Any of the following synthetic opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers whenever the existence of ~~these~~ those isomers, esters, ethers, and salts is possible within the specific chemical designation:

~~(1)~~ (i) Alfentanil;

(ii) Alphaprodine;

~~(2)~~ (iii) Anileridine;

~~(3)~~ (iv) Bezitramide;

~~(4)~~ (v) Dihydrocodeine;

~~(5)~~ (vi) Diphenoxylate;

~~(6)~~ (vii) Fentanyl;

~~(7)~~ (viii) Isomethadone;

~~(8)~~ (ix) Levomethorphan;

~~(9)~~ (x) Levorphanol;

~~(10)~~ (xi) Metazocine;

~~(11)~~ (xii) Methadone;

~~(12)~~ (xiii) Methadone - Intermediate, 4-cyano-2-dimethylamino-4, 4-diphenyl butane;

~~(13)~~ (xiv) Moramide - Intermediate, 2-methyl-3-morpholino-1, ~~1-diphenyl propane carboxylic~~ 1-diphenylpropane-carboxylic acid;

~~(14)~~ (xv) Pethidine (meperidine);

~~(15)~~ (xvi) Pethidine - Intermediate-A, 4-cyano-1-methyl-4-phenylpiperidine;

~~(16)~~ (xvii) Pethidine - Intermediate-B, ethyl-4-phenylpiperidine-4-carboxylate;

~~(17)~~ (xviii) Pethidine - Intermediate-C, 1-methyl-4-phenylpiperidine-4-carboxylic acid;

~~(18)~~ (xix) Phenazocine;

~~(19)~~ (xx) Piminodine;

~~(20)~~ (xxi) Racemethorphan;

~~(21)~~ (xxii) Racemorphan;

(xxiii) Sufentanil.

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

(i) Amphetamine;

(ii) Methamphetamine;

(iii) Phenmetrazine;

(iv) Methylphenidate.

(4) Any material, compound, mixture, or preparation containing any quantity of the following substances having a depressant effect on the central nervous system, including their salts, isomers, and salts of isomers whenever the existence of those salts, isomers, and salts of isomers is possible within the specific chemical designation:

(i) Amobarbital;

(ii) Pentobarbital;

(iii) Phencyclidine;

(iv) Secobarbital.

(5) (i) Dronabinol (synthetic) in sesame oil and encapsulated in a soft gelatin capsule in a federal Food and Drug Administration approved drug product [some other names for dronabinol: (6aR-trans)-6a,7,8,10a-

tetrahydro-6,6,9-trimethyl-3-pentyl-6H-dibenzo [b,d]pyran-1-ol, or (-)-delta-9-(trans)-tetrahydrocannabinol].

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

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

(i) Immediate precursor to amphetamine and methamphetamine: phenylacetone (Some trade or other names: phenyl-w-propanone; P2P; benzyl methyl ketone; methyl benzyl ketone.);

(ii) Immediate precursors to phencyclidine:

(A) 1-phenylcyclohexylamine;

(B) 1-piperidinocyclohexanecarbonitrile (PCC).

(b) The controlled substances listed in this section may be rescheduled or deleted as provided for in Section 201..

COMMENT ON AMENDMENT

Schedule II is revised to reflect the substances controlled under Schedule II of the federal Act, as published in 21 CFR 1308.12 (April 1, 1987), and updated through the April 15, 1987, issue of the Federal Register. States that would not have a delegation of legislative authority problem may want to replace the specific listing of substances with an adoption of the federal schedules by reference, with any deletions or additions determined appropriate by the state administrator or to delete this section and rely on the state administrator to schedule a substance..

SECTION 207. ~~[~~SCHEDULE III TESTS.~~]~~

(a) The [appropriate person or agency] shall place a substance in Schedule III ~~if he find~~ finds upon finding that:

(1) the substance has a potential for abuse less than the substances ~~listed~~ included in Schedules I and II;

(2) the substance has currently accepted medical use in treatment in the United States; and

(3) abuse of the substance may lead to moderate or low physical dependence or high psychological dependence.

(b) The [appropriate person or agency] may place a substance in Schedule III without making the findings required by subsection (a) if the substance is controlled under Schedule III of the federal Controlled Substances Act by a federal agency as the result of an international treaty, convention, or protocol.

COMMENT ON AMENDMENT

In subsection (a) "included" is used to refer to substances controlled on adoption of the Act (those substances "listed" in Sections 204, 206, 208, 210, and 212) and to substances controlled under Section 601 and administrative action. Subsection (b) is added to allow placement of a substance on the schedule without the necessity of the findings required by subsection (a), if it is placed by a federal agency on the corresponding federal schedule pursuant to an international agreement. See 21 U.S.C. 811(d). As enacted in 1970 the federal Act contained such a provision, 21 U.S.C. 811(d)(1), which was expanded in 1978 with respect to application to the Convention on Psychotropic Substances, 21 U.S.C. 811(d)(2).

SECTION 208. ~~[~~SCHEDULE III.~~]~~

(a) ~~The~~ Unless specifically excepted by state or federal law or regulation or more specifically included in another schedule, the following controlled substances are listed ~~in this section are included~~ in Schedule III~~.~~:

~~(b)~~ (1) Any material, compound, mixture, or preparation ~~which contains~~ containing any quantity of the following substances having ~~a potential for abuse associated with~~ a stimulant effect on the central nervous system, including their salts, isomers, and salts of isomers whenever the existence of those salts, isomers, and salts of isomers is possible within the specific chemical designation:

~~(1)~~ (i) ~~Amphetamine, its salts, optical isomers, and salts of its optical isomers~~ Any compound, mixture, or preparation in dosage unit form containing any stimulant substance included in Schedule II and which was listed as an excepted compound on August 25, 1971, pursuant

to the federal Controlled Substances Act, and any other drug of the quantitative composition shown in that list for those drugs or which is the same except for containing a lesser quantity of controlled substances;

~~(2)~~ (ii) ~~Phenmetrazine and its salts~~ Benzphetamine;

~~(3)~~ (iii) ~~Any substance which contains any quantity of methamphetamine, including its salts, isomers, and salts of isomers~~ Chlorphentermine;

~~(4)~~ (iv) ~~Methylphenidate~~ Clortermine;

(v) Phendimetrazine.

~~(c)~~ (2) ~~Unless listed in another schedule, any~~ Any material, compound, mixture, or preparation ~~which contains~~ containing any quantity of the following substances having ~~a potential for abuse associated with~~ a depressant effect on the central nervous system:

~~(1)~~ (i) Any compound, mixture, or preparation containing any of the following drugs or their salts and one or more other active medicinal ingredients not included in any schedule:

(A) Amobarbital;

(B) Secobarbital;

(C) Pentobarbital;

(ii) Any of the following drugs, or their salts, in suppository dosage form, approved by the federal Food and Drug Administration for marketing only as a suppository:

(A) Amobarbital;

(B) Secobarbital;

(C) Pentobarbital;

(iii) Any substance ~~which contains~~ containing any quantity of a derivative of barbituric acid, or any salt of a derivative of

barbituric acid~~, except those substances which are specifically listed in other Schedules~~;

~~(2)~~ (iv) Chlorhexadol;

~~(3)~~ (v) Glutethimide~~.~~;

~~(4)~~ (vi) Lysergic acid;

~~(5)~~ (vii) Lysergic acid amide;

~~(6)~~ (viii) Methyprylon;

~~(7) Phencyclidine;~~

~~(8)~~ (ix) Sulfondiethylmethane;

~~(9)~~ (x) Sulfonethylmethane;

~~(10)~~ (xi) Sulfonmethane;

(xii) Tiletamine and zolazepam or any of their salts (Some trade or other names for a tiletamine-zolazepam combination product: Telazol. Some trade or other names for tiletamine: 2-(ethylamino)-2-(2-thienyl)-cyclohexanone. Some trade or other names for zolazepam: 4-(2-fluorophenyl)-6,8-dihydro-1,3,8-trimethylpyrazolo-[3,4-e][1,4]-diazepin-7(1H)-one. flupyrazapon.).

~~(d)~~ (3) Nalorphine.

~~(e)~~ (4) Any material, compound, mixture, or preparation containing ~~limited quantities of~~ any of the following narcotic drugs, or ~~any~~ their salts ~~thereof~~ calculated as the free anhydrous base or alkaloid, in limited quantities as set forth below:

~~(1)~~ (i) Not more than 1.8 grams of codeine~~, or any of its salts,~~ 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)~~ (ii) Not more than 1.8 grams of codeine~~, or any of its salts,~~ per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

~~(3)~~ (iii) Not more than 300 milligrams of dihydrocodeinone~~, or any of its salts,~~ 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)~~ (iv) Not more than 300 milligrams of dihydrocodeinone~~, or any of its salts,~~ per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

~~(5)~~ (v) Not more than 1.8 grams of dihydrocodeine~~, or any of its salts,~~ per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

~~(6)~~ (vi) Not more than 300 milligrams of ethylmorphine~~, or any of its salts,~~ per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

~~(7)~~ (vii) Not more than 500 milligrams of opium per 100 milliliters or per 100 grams, or not more than 25 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

~~(8)~~ (viii) Not more than 50 milligrams of morphine~~, or any of its salts,~~ per 100 milliliters or per 100 grams with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

~~(f)~~ (b) The [appropriate person or agency] may except by rule any compound, mixture, or preparation containing any stimulant or depressant substance listed in subsections ~~(b)~~ (a)(1) and ~~(c)~~ (a)(2) from the application of all or any part of this [Act] if the compound, mixture, or preparation contains one or more active medicinal ingredients not having a stimulant or depressant effect on the central nervous system, and if the

admixtures are ~~included therein~~ in combinations, quantity, proportion, or concentration that vitiate the potential for abuse of the substances ~~which have~~ having a stimulant or depressant effect on the central nervous system.

(c) The controlled substances listed in this section may be rescheduled or deleted as provided for in Section 201.

COMMENT ON AMENDMENT

Schedule III is revised to reflect the substances controlled under Schedule III of the federal Act, as published in 21 CFR 1308.13 (April 1, 1987). States that would not have a delegation of legislative authority problem may want to replace the specific listing of substances with an adoption of the federal schedules by reference, with any deletions or additions determined appropriate by the state administrator or to delete this section and rely on the state administrator to schedule a substance. The introductory language of subsection (b) is revised to conform to the language contained in 21 CFR 1308.13(b). As used in subsection (b), "isomers" means optical, positional, or geometric isomers, as referenced in the federal Schedule III and as defined in Section 101(12). In subsection (a)(2) "included" is used to refer to substances controlled on adoption of the Act (those substances "listed" in Sections 204, 206, 208, 210, and 212) and to substances controlled under Section 601 and administrative action. Subsection (a)(2)(i) may be ambiguous due to the possibility of various interpretations due to the ". . . or . . . and . . ." language, e.g., does the prohibition apply to any preparation containing any drugs, any drugs and medicinal ingredients, or any salts and medicinal ingredients. The language with respect to salts in subparagraphs (i), (ii), (iii), (iv), (v), (vi), and (viii) of subsection (a)(4) is deleted because it duplicates the introductory language of paragraph (4).

SECTION 209. ~~[~~SCHEDULE IV TESTS.~~]~~

(a) The [appropriate person or agency] shall place a substance in Schedule IV ~~if he [it] finds~~ upon finding that:

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

(2) the substance has currently accepted medical use in treatment in the United States; and

(3) abuse of the substance may lead to limited physical dependence or psychological dependence relative to the substance included in Schedule III.

(b) The [appropriate person or agency] may place a substance in Schedule IV without making the findings required by subsection (a) if the substance is controlled under Schedule IV of the federal Controlled Substances Act by a federal agency as the result of an international treaty, convention, or protocol.

COMMENT ON AMENDMENT

In subsection (a) "included" is used to refer to substances controlled on adoption of the Act (those substances "listed" in Sections 204, 206, 208, 210, and 212) and to substances controlled under Section 601 and administrative action. Subsection (b) is added to allow placement of a substance on the schedule without the necessity of the findings required by subsection (a), if it is placed by a federal agency on the corresponding federal schedule pursuant to an international agreement. See 21 U.S.C. 811(d). As enacted in 1970, the federal Act contained such a provision, 21 U.S.C. 811(d)(1), which was expanded in 1978 with respect to application to the Convention on Psychotropic Substances, 21 U.S.C. 811(d)(2).

SECTION 210. ~~[~~SCHEDULE IV.~~]~~

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

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

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

(ii) Dextropropoxyphene (alpha-(+)-4-dimethylamino-1,2-diphenyl-3-methyl-2-propionoxybutane).

(2) Any material, compound, mixture, or preparation ~~which contains~~ containing any quantity of the following substances having a ~~potential for abuse associated with a~~ depressant effect on the central nervous system, including their salts, isomers, and salts of isomers whenever

the existence of those salts, isomers, and salts of isomers is possible within the specific chemical designation:

~~(1)~~ (i) Alprazolam;

(ii) Barbital;

(iii) Bromazepam;

(iv) Camazepam;

~~(2)~~ (v) Chloral betaine;

~~(3)~~ (vi) Chloral hydrate;

(vii) Chlordiazepoxide;

(viii) Clobazam;

(ix) Clonazepam;

(x) Clorazepate;

(xi) Clotiazepam;

(xii) Cloxazolam;

(xiii) Delorazepam;

(xiv) Diazepam;

(xv) Estazolam;

~~(4)~~ (xvi) Ethchlorvynol;

~~(5)~~ (xvii) Ethinamate;

(xviii) Ethyl loflazepate;

(xix) Fludiazepam;

(xx) Flunitrazepam;

(xxi) Flurazepam;

(xxii) Halazepam;

(xxiii) Haloxazolam;

(xxiv) Ketazolam;

(xxv) Loprazolam;

(xxvi) Lorazepam;

(xxvii) Lormetazepam;

(xxviii) Mebutamate;

(xxix) Medazepam;

(xxx) Meprobamate;

~~(6)~~ (xxxi) Methohexital;

~~(7) Meprobamate;~~

~~(8)~~ (xxxii) Methylphenobarbital (mephobarbital);

(xxxiii) Midazolam;

(xxxiv) Nimetazepam;

(xxxv) Nitrazepam;

(xxxvi) Nordiazepam;

(xxxvii) Oxazepam;

(xxxviii) Oxazolam;

~~(9)~~ (xxxix) Paraldehyde;

~~(10)~~ (xL) Petrichloral;

~~(11)~~ (xLi) Phenobarbital;

(xLii) Pinazepam;

(xLiii) Prazepam;

(xLiv) Quazepam;

(xLv) Temazepam;

(xLvi) Tetrazepam;

(xLvii) Triazolam.

(3) Any material, compound, mixture, or preparation containing any quantity of the following substance, including its salts, isomers, and salts of isomers, whenever the existence of the salts, isomers, and salts of isomers is possible: fenfluramine.

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

(i) Diethylpropion;

(ii) Mazindol;

(iii) Pemoline (including organometallic complexes and chelates thereof);

(iv) Phentermine;

(v) Pipradrol;

(vi) SPA ((-)-1-dimethylamino-1,2-diphenylethane).

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

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

(c) The controlled substances listed in this section may be rescheduled or deleted as provided for in Section 201.

COMMENT ON AMENDMENT

Schedule IV is revised to reflect the substances controlled under Schedule IV of the federal Controlled Substances Act, as published in 21 CFR 1308.14 (April 1, 1987). States that would not have a delegation of legislative authority problem may want to replace the specific listing of substances with an adoption of the federal schedules by reference, with any deletions or additions determined appropriate by the state administrator or to delete this section and rely on the state administrator to schedule a substance. As used in subsection (d), "isomers" means optical, positional, or geometric isomers, as referenced in the federal Schedule IV and as defined in Section 101(12).

SECTION 211. ~~[~~SCHEDULE V TESTS.~~]~~

(a) The [appropriate person or agency] shall place a

substance in Schedule V ~~if he [it] finds~~ upon finding that:

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

(2) the substance has currently accepted medical use in treatment in the United States; and

(3) abuse of the substance may lead to limited physical dependence or psychological dependence relative to the substances included in Schedule IV.

(b) The [appropriate person or agency] may place a substance in Schedule V without being required to make the findings required by subsection (a) if the substance is controlled under Schedule V of the federal Controlled Substances Act by a federal agency as the result of an international treaty, convention, or protocol.

COMMENT ON AMENDMENT

In subsection (a) "included" is used to refer to substances controlled on adoption of the Act (those substances "listed" in Sections 204, 206, 208, 210, and 212) and to substances controlled under Section 601 and administrative action. Subsection (b) is added to allow placement of a substance on the schedule without the necessity of the findings required by subsection (a), if it is placed by a federal agency on the corresponding federal schedule pursuant to an international agreement. See 21 U.S.C. 811(d). As enacted in 1970 the federal Act contained such a provision, 21 U.S.C. 811(d)(1), which was expanded in 1978 with respect to application to the Convention on Psychotropic Substances, 21 U.S.C. 811(d)(2).

SECTION 212. ~~[~~SCHEDULE V.~~]~~

(a) ~~The~~ Unless specifically excepted by state or federal law or regulation or more specifically included in another schedule, the following controlled substances are listed ~~in this section are included~~ in Schedule V~~.~~:

~~(b)~~ (1) Any material, compound, mixture, or preparation containing any of the following narcotic drug and its salts: buprenorphine.

(2) Any compound, mixture, or preparation containing ~~limited quantities of~~ any of the following narcotic drugs, or their salts calculated as the free anhydrous base or alkaloid, in limited

quantities as set forth below, which also contains one or more nonnarcotic active medicinal ingredients in sufficient proportion to confer upon the compound, mixture, or preparation, valuable medicinal qualities other than those possessed by the narcotic drug alone:

~~(1)~~ (i) Not more than 200 milligrams of codeine~~, or any of its salts,~~ per 100 milliliters or per 100 grams;

~~(2)~~ (ii) Not more than 100 milligrams of dihydrocodeine~~, or any of its salts,~~ per 100 milliliters or per 100 grams;

~~(3)~~ (iii) Not more than 100 milligrams of ethylmorphine~~, or any of its salts,~~ per 100 milliliters or per 100 grams;

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

~~(5)~~ (v) Not more than 100 milligrams of opium per 100 milliliters or per 100 grams;

(vi) Not more than 0.5 milligram of difenoxin and not less than 25 micrograms of atropine sulfate per dosage unit.

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

(i) Propylhexedrine;

(ii) Pyrovalerone.

(b) The controlled substances listed in this section may be rescheduled or deleted as provided for in Section 201.

COMMENT ON AMENDMENT

Schedule V is revised to reflect the substances controlled under Schedule V of the federal Controlled Substances Act, as published in 21 CFR 1308.15 (April 1, 1987) and updated through the April 4, 1988, issue of the Federal Register. States that would not have a delegation of legislative authority problem may want to replace the specific listing of substances with an adoption of the federal schedules by reference, with any deletions or additions determined appropriate by

the state administrator or to delete this section and rely on the state administrator to schedule a substance. The language with respect to salts in paragraphs (1)-(3) of subsection (c) is deleted because it duplicates the added introductory language of subsection (c).

SECTION 213. ~~[REPUBLISHING~~ PUBLISHING OF SCHEDULES.~~]~~ The [appropriate person or agency] shall ~~revise and republish the~~ publish updated schedules ~~semiannually for 2 years from the effective date of this Act, and thereafter~~ annually. Failure to publish updated schedules is not a defense in any administrative or judicial proceeding under this [Act].

COMMENT ON AMENDMENT

The language concerning semiannual publication of revised schedules is deleted in that the semiannual requirement was for the two years after initial adoption of the Act. For the federal Act the two-year period began one year after October 27, 1970. The administrative agency is encouraged to distribute updated schedules to all registrants under the Act.

SECTION 214. CONTROLLED SUBSTANCE ANALOG TREATED AS SCHEDULE I SUBSTANCE. A controlled substance analog, to the extent intended for human consumption, must be treated, for the purposes of this [Act], as a substance included in Schedule I. Within [ ] days after the initiation of prosecution with respect to a controlled substance analog by indictment or information, the [prosecuting attorney] shall notify the [appropriate person or agency] of information relevant to emergency scheduling as provided for in Section 201(e). After final determination that the controlled substance analog should not be scheduled, no prosecution relating to that substance as a controlled substance analog may continue or take place.

COMMENT ON CREATION OF SECTION

This section is based on Section 203 of the federal Controlled Substances Act, 21 U.S.C. 813, as added by the Anti-Drug Abuse Act of 1986, §§1201-1204 (the "Controlled Substance Analogue Enforcement Act of 1986"). Because a controlled substance analog, as defined by Section 101, is an unscheduled substance, the section provides for procedures to be initiated to schedule the analog as well as to prevent further prosecution if the analog is found to be not appropriate for scheduling as a controlled substance.

ARTICLE III

~~[~~REGULATION OF MANUFACTURE, DISTRIBUTION, AND

DISPENSING OF CONTROLLED SUBSTANCES~~]~~

SECTION 301. ~~[~~RULES.~~]~~ The [appropriate person or agency] may ~~promulgate~~ adopt rules and charge reasonable fees relating to the registration and control of the manufacture, distribution, and dispensing of controlled substances within this State.

COMMENT ON AMENDMENT

The term "promulgate" means to publish or make known officially, e.g., a decree. The term "adopt" is used in the Uniform Law Commissioners' Model State Administrative Procedure Act.

SECTION 302. ~~[~~REGISTRATION REQUIREMENTS.~~]~~

(a) Every person who manufactures, distributes, or dispenses any controlled substance within this State or who proposes to engage in the manufacture, distribution, or dispensing of any controlled substance within this State, ~~must~~ shall obtain annually a registration issued by the [appropriate person or agency] in accordance with ~~his [its]~~ rules adopted by the [appropriate person or agency].

(b) ~~Persons~~ A person registered by the [appropriate person or agency] under this [Act] to manufacture, distribute, dispense, or conduct research with controlled substances may possess, manufacture, distribute, dispense, or conduct research with those substances to the extent authorized by ~~their~~ the registration and in conformity with ~~the other provisions of~~ this Article.

(c) The following persons need not register and may lawfully possess controlled substances under this [Act]:

(1) An agent or employee of any registered manufacturer, distributor, or dispenser of any controlled substance if ~~he~~ the agent or employee is acting in the usual course of ~~his~~ business or employment;

(2) A common or contract carrier or warehouseman, or an employee thereof, whose possession of any controlled substance is in the usual course of business or employment;

(3) An ultimate user or a person in possession of any controlled substance pursuant to a lawful order of a practitioner or in lawful possession of a substance included in Schedule V ~~substance~~.

(d) The [appropriate person or agency] may waive by rule the requirement for registration of certain manufacturers, distributors, or dispensers ~~if he fit] finds~~ upon finding it consistent with the public health and safety.

(e) A separate registration is required at each principal place of business or professional practice where the applicant manufactures, distributes, or dispenses controlled substances.

(f) The [appropriate person or agency] may inspect the establishment of a registrant or applicant for registration in accordance with rules adopted by the [appropriate person or ~~agency's~~ agency] ~~rule~~.

COMMENT ON AMENDMENT

Subsection (b) is revised to remove the argument that a registrant needs to comply only with "other" provisions of the article and not with this section. In subsection (c)(3) "included" is used to refer to substances controlled on adoption of the Act (those substances "listed" in Sections 204, 206, 208, 210, and 212) and to substances controlled under Section 601 and administrative action.

SECTION 303. ~~[~~REGISTRATION.~~]~~

(a) The [appropriate person or agency] shall register an applicant to manufacture or distribute ~~controlled~~ substances included in ~~Sections 204, 206, 208, 210, and 212~~ Schedules I through V unless ~~he fit]~~ the [appropriate person or agency] determines that the issuance of that registration would be inconsistent with the public interest. In determining the public interest, the [appropriate person or agency] shall consider the following factors:

(1) maintenance of effective controls against diversion of controlled substances into other than legitimate medical, scientific, research, or industrial channels;

(2) compliance with applicable ~~State~~ state and local law;

(3) promotion of technical advances in the art of manufacturing controlled substances and the development of new substances;

(4) any convictions of the applicant under any ~~Federal and State~~ laws of another country or federal or state laws relating to any controlled substance;

~~(4)~~ (5) past experience in the manufacture or distribution of controlled substances, and the existence in the applicant's establishment of effective controls against diversion of controlled substances into other than legitimate medical, scientific, research, or industrial channels;

~~(5)~~ (6) furnishing by the applicant of false or fraudulent material in any application filed under this [Act];

~~(6)~~ (7) suspension or revocation of the applicant's ~~Federal~~ federal registration or the applicant's registration of another state to manufacture, distribute, or dispense controlled substances as authorized by ~~Federal~~ federal law; and

~~(7)~~ (8) any other factors relevant to and consistent with the public health and safety.

(b) Registration under subsection (a) does not entitle a registrant to manufacture ~~and~~ or distribute ~~controlled~~ substances included in Schedule I or II other than those specified in the registration.

(c) Practitioners must be registered to dispense any controlled substances or to conduct research with controlled substances included in Schedules II through V if they are authorized to dispense or conduct research under the law of this State. The [appropriate person or agency] need not

require separate registration under this Article for practitioners engaging in research with nonnarcotic ~~controlled~~ substances included in Schedules II through V where the registrant is already registered under this Article in another capacity. Practitioners registered under ~~Federal~~ federal law to conduct research with substances included in Schedule I ~~substances~~ may conduct research with substances included in Schedule I ~~substances~~ within this State upon furnishing the [appropriate person or agency] evidence of that ~~Federal~~ federal registration.

(d) ~~Compliance by manufacturers and distributors with the provisions of the Federal law respecting registration (excluding fees) entitles them to be registered under this Act.~~ A manufacturer or distributor registered under the federal Controlled Substances Act [21 U.S.C. 801 et seq.] may submit a copy of the federal application as an application for registration as a manufacturer or distributor under this section. The [appropriate person or agency] may require a manufacturer or distributor to submit information in addition to the application for registration under the federal Act.

COMMENT ON AMENDMENT

In subsection (a), "research" was contained in the federal Act as enacted in 1970 and is added to paragraph (1); language on promotion of technical advances, which was contained in the federal Act as enacted in 1970, is added as a factor; paragraph (4) is expanded to include convictions under laws of another country; paragraphs (5) and (6) are renumbered and retained even though not listed as factors in the federal Act; and the renumbered paragraph (6) is expanded to include consideration of suspension or revocation of registration of another state. Subsection (b) is revised to conform to the comparable federal provision, 21 U.S.C. 823(c). In subsections (a), (b), and (c) "included" is used to refer to substances controlled on adoption of the Act (those substances "listed" in Sections 204, 206, 208, 210, and 212) and to substances controlled under Section 601 and administrative action. Subsection (d) is revised to clarify that a manufacturer or distributor registered under federal law may be registered under this Act, upon submitting the information contained in the application for federal registration and any additional information required by the state. The applicant would still be subject to the determination under subsection (a).

SECTION 304. ~~[REVOCATION AND~~ SUSPENSION OR REVOCATION OF REGISTRATION.~~]~~

(a) A registration under Section 303 to manufacture, distribute, or dispense a controlled substance may be suspended or revoked by the [appropriate person or agency] upon ~~a~~ finding that the registrant has:

(1) ~~has~~ furnished false or fraudulent material information in any application filed under this [Act];

(2) ~~has~~ been convicted of a felony under any ~~State~~ state or ~~Federal~~ federal law relating to any controlled substance; ~~or~~

(3) ~~has~~ had ~~his~~ ~~Federal~~ the registrant's federal registration suspended or revoked and is no longer authorized by federal law to manufacture, distribute, or dispense controlled substances; or

(4) committed acts that would render registration under Section 303 inconsistent with the public interest as determined under that section.

(b) The [appropriate person or agency] may limit revocation or suspension of a registration to the particular controlled substance with respect to which grounds for revocation or suspension exist.

(c) If the [appropriate person or agency] suspends or revokes a registration, all controlled substances owned or possessed by the registrant at the time of suspension or the effective date of the revocation order may be placed under seal. No disposition may be made of substances under seal until the time for taking an appeal has elapsed or until all appeals have been concluded unless a court, upon application ~~therefor~~, orders the sale of perishable substances and the deposit of the proceeds of the sale with the court. Upon a revocation order becoming final, all controlled substances may be forfeited to the ~~State~~ state.

(d) The [appropriate person or agency] may seize or place under seal any controlled substance owned or possessed by a registrant whose registration has expired or who has ceased to practice or do business in the manner contemplated by the registration. The controlled substance must be

held for the benefit of the registrant or the registrant's successor in interest. The [appropriate person or agency] shall notify a registrant, or the registrant's successor in interest, who has any controlled substance seized or placed under seal, of the procedures to be followed to secure the return of the controlled substance and the conditions under which it will be returned. The [appropriate person or agency] may not dispose of any controlled substance seized or placed under seal under this subsection until the expiration of 180 days after the controlled substance was seized or placed under seal. The costs incurred by the [appropriate person or agency] in seizing, placing under seal, maintaining custody, and disposing of any controlled substance under this subsection may be recovered from the registrant, any proceeds obtained from the disposition of the controlled substance, or from both. Any balance remaining after the costs have been recovered from the proceeds of any disposition must be delivered to the registrant or the registrant's successor in interest.

(e) The [appropriate person or agency] shall promptly notify the ~~Bureau~~ Drug Enforcement Administration of all orders restricting, suspending, or revoking registration and all forfeitures of controlled substances.

COMMENT ON AMENDMENT

In subsection (a), paragraph (4) is added to authorize the state administering agency to make a finding to suspend or revoke registration similar to the finding provided by 21 U.S.C. 824(a)(4). The new language in subsection (d) authorizes seizure or placement under seal of controlled substances owned or possessed by a registrant whose registration has expired or who has otherwise ceased to practice or do business. This authorization is based on the similar authorization granted in 1984 to the United States Attorney General under 21 U.S.C. 824(g). The provision on recovery of costs is similar to the provision in Section 505(e)(2), which authorizes recovery of expenses of proceedings. The amendment in subsection (e) with respect to restricting a registration reflects the "limited" revocation or suspension under subsection (b).

SECTION 305. ~~[~~ORDER TO SHOW CAUSE.~~]~~

(a) Before denying, suspending, or revoking a registration, or refusing a renewal of registration, the [appropriate person or agency] shall

serve upon the applicant or registrant an order to show cause why registration should not be denied, revoked, or suspended, or why the renewal should not be refused. The order to show cause ~~shall~~ must contain a statement of the basis therefor and ~~shall~~ must call upon the applicant or registrant to appear before the [appropriate person or agency] at a time and place not less than 30 days after the date of service of the order, but in the case of a denial or renewal of registration the show cause order ~~shall~~ must be served not later than 30 days before the expiration of the registration. These proceedings ~~shall~~ must be conducted in accordance with [insert appropriate administrative procedures] ~~without regard to~~. These proceedings are independent of, but not in lieu of, any criminal prosecution or other proceeding. Proceedings to refuse renewal of registration ~~shall~~ do not abate the existing registration, which ~~shall remain~~ remains in effect pending the outcome of the administrative hearing.

(b) The [appropriate person or agency] may suspend, without an order to show cause, any registration simultaneously with the institution of proceedings under Section 304, or where renewal of registration is refused, ~~if he finds~~ upon finding that there is an imminent danger to the public health or safety which warrants this action. The suspension ~~shall continue~~ continues in effect until the conclusion of the proceedings, including judicial review thereof, unless sooner withdrawn by the [appropriate person or agency] or dissolved by a court of competent jurisdiction.

COMMENT ON AMENDMENT

Subsection (a) is revised to clarify that proceedings to deny, suspend, or revoke a registration are independent of and in addition to criminal prosecutions or other proceedings. See 21 U.S.C. 824(c).

SECTION 306. ~~[~~RECORDS OF REGISTRANTS.~~]~~ Persons registered to manufacture, distribute, or dispense controlled substances under this [Act] shall keep records and maintain inventories in conformance with the

recordkeeping and inventory requirements of ~~Federal~~ federal law and with any additional rules adopted by the [appropriate person or agency] ~~issues~~.

SECTION 307. ~~[~~ORDER FORMS.~~]~~ ~~Controlled substances~~ A substance included in Schedule I ~~and~~ or II ~~shall~~ may be distributed by a registrant to another registrant only pursuant to an order form. Compliance with the provisions of ~~Federal~~ federal law respecting order forms ~~shall be deemed~~ constitutes compliance with this ~~Section~~ section.

COMMENT ON AMENDMENT

"Included" is used to refer to substances controlled on adoption of the Act (those substances "listed" in Sections 204, 206, 208, 210, and 212) and to substances controlled under Section 601 and administrative action.

SECTION 308. ~~[~~PRESCRIPTIONS.~~]~~

(a) A controlled substance may be dispensed only as provided in this section.

(b) Except when dispensed directly by a practitioner, other than a pharmacy, to an ultimate user, ~~no controlled~~ a substance included in Schedule II may not be dispensed without the written prescription of a practitioner.

~~(b)~~ (c) In emergency situations, as defined by rule of the [appropriate person or agency], a substance included in Schedule II ~~drugs~~ may be dispensed upon oral prescription of a practitioner, reduced promptly to writing, signed by the practitioner, and filed by the pharmacy. Prescriptions ~~shall~~ must be retained in conformity with the requirements of Section 306. ~~No~~ A prescription for a substance included in Schedule II ~~substance~~ may not be refilled.

~~(c)~~ (d) Except when dispensed directly by a practitioner, other than a pharmacy, to an ultimate user, a ~~controlled~~ substance included in Schedule III or IV, which is a prescription drug as determined under [appropriate ~~State~~ state or ~~Federal~~ federal statute], ~~shall~~ may not be dispensed without a written or oral prescription of a practitioner. The prescription ~~shall~~ must

not be filled or refilled more than ~~6~~ six months after the date thereof or be refilled more than ~~5~~ five times, unless renewed by the practitioner.

~~(d)~~ (e) A ~~controlled~~ substance included in Schedule V ~~shall not~~ must be distributed or dispensed ~~other than~~ only for a medical purpose.

(f) A practitioner may dispense or deliver a controlled substance to or for an individual or animal only for medical treatment or authorized research in the ordinary course of that practitioner's profession. Medical treatment includes dispensing or administering a narcotic drug for pain, including intractable pain.

(g) No civil or criminal liability or administrative sanction may be imposed on a pharmacist for action taken in reliance on a reasonable belief that an order purporting to be a prescription was issued by a practitioner in the usual course of professional treatment or in authorized research.

(h) An individual practitioner may not dispense a substance included in Schedule II, III, or IV for that individual practitioner's personal use except in a medical emergency.

COMMENT ON AMENDMENT

This section is not intended to impose any limitation on a physician or authorized hospital staff to administer or dispense controlled substances to persons with intractable pain for which no relief or cure is possible or none has been found after reasonable efforts. See 21 CFR 1306.07(c). "Included" is used to refer to substances controlled on adoption of the Act (those substances "listed" in Sections 204, 206, 208, 210, and 212) and to substances controlled under Section 601 and administrative action. Subsections (a), (f), and (g) are derived from the California Health and Safety Code §§ 11152, 11153(a), and 11156. "Dispense" is defined in Section 101(5) to include prescribe, administer, package, label, and compound. In subsection (c) the requirement for the practitioner's signature is added due to a similar requirement in 21 CFR 1306.05 (July 1, 1987). Under that regulation, the responsibility for proper dispensing of controlled substances is upon the prescribing practitioner and a corresponding responsibility rests with a pharmacist who fills a prescription. In subsection (f) medical treatment is specifically described as including use of narcotic drugs for painkilling purposes to make it clear to practitioners that such use is not prohibited by this Act. In subsection (g) a reasonable belief exception is added for filling what appears to be a valid prescription.

SECTION 309. DIVERSION PREVENTION AND CONTROL.

(a) As used in this section, "diversion" means the transfer of any controlled substance from a licit to an illicit channel of distribution or use.

(b) The [appropriate person or agency] shall regularly prepare and make available to other state regulatory, licensing, and law enforcement agencies a report on the patterns and trends of actual distribution, diversion, and abuse of controlled substances.

(c) The [appropriate person or agency] shall enter into written agreements with local, state, and federal agencies for the purpose of improving identification of sources of diversion and to improve enforcement of and compliance with this [Act] and other laws and regulations pertaining to unlawful conduct involving controlled substances. An agreement must specify the roles and responsibilities of each agency that has information or authority to identify, prevent, and control drug diversion and drug abuse. The [appropriate person or agency] shall convene periodic meetings to coordinate a state diversion prevention and control program. The [appropriate person or agency] shall arrange for cooperation and exchange of information among agencies and with neighboring states and the federal government.

(d) The [appropriate person or agency] shall [annually] report to the governor and to the presiding officer [of each house] of the [legislative assembly] on the outcome of this program with respect to its effects on distribution and abuse of controlled substances, including recommendations for improving control and prevention of the diversion of controlled substances in this State.

COMMENT ON CREATION OF SECTION

This section is patterned after Wisconsin Statutes Section 161.36. In selecting controlled substances it is intended that medical usefulness of the controlled substances be considered. Note that "diversion" as used in Section 303(a)(5) refers to diversion "into other than legitimate medical, scientific, research, or industrial channels."

An Analysis of Major Drug Issues in Article I — Definitions and Article II — Standards and Schedules and Article III — Regulation of Manufacture, Distribution and Dispensing of Controlled Substances of the Proposed Amendments to the Uniform Controlled Substances Act (UCSA)

Analysis

SECTION 101. DEFINITIONS.

SECTION 201. AUTHORITY TO CONTROL. SUBSECTION (e)

SECTION 214. CONTROLLED SUBSTANCE ANALOG TREATED AS SCHEDULE I

Hypothetical

Joe Cooker is a former college student with a rudimentary knowledge of chemistry and a keen interest in illegal drugs both from the standpoint of abuse and economic profit. One day Joe learns through friends that by making a simple alteration in the chemical structure of the controlled substance ABC, he can produce a legal substance having the same or greater hallucinogenic effect on the central nervous system as the outlawed ABC. Joe and his friends invest in some laboratory equipment, set up a primitive lab in a garage, and begin manufacturing a new substance ABCX or "Utopia" in bulk quantities. No scientific studies of the physical or psychological effects of ABCX on humans have ever been conducted. Indeed, no animal studies of any kind have taken place. But Joe and his friends continue to manufacture and distribute ABCX in an indiscriminate manner. Soon, public health officials are receiving reports of ABCX abusers needing medical and psychological treatment. Law enforcement officials are helpless to stop this activity because ABCX is not a controlled substance and cannot become a controlled substance until years of animal studies and controlled tests on humans have occurred.

The State of Justice, where Joe resides, adopts an emergency scheduling provision similar to Section 201(e) of the proposed amendments to the UCSA. The state scheduling agency initiates an "emergency scheduling" proceeding with respect to ABCX by publishing a public notice. Joe and his cohorts catch wind of this proceeding and simply begin to produce a new and even more dangerous analog of the controlled substance ABC which they dub ABCZ or "Eros." Six months later, when the state completes the emergency scheduling of ABCX, there is none being produced or sold on the street. Nearly a year later, law enforcement personnel have identified the new substance as ABCX and, once again, the state initiates "emergency scheduling" proceedings. Joe and his cohorts merely create another variation on the chemical structure of ABC and remain in business fully oblivious to the public health consequences of their activities.

Analysis

Unless the State of Justice enacts an "analog" statute similar to Section 101(3) and Section 214 of the proposed amendments to the UCSA, this scenario may be played out indefinitely. Indeed, such scenarios were common prior to the 1986 enactment of the federal "analog" statutes. As set forth below, the proposed UCSA provisions are narrower than the federal provisions, provide full protection for legitimate scientific research and for use of analogs for purposes other than human consumption. They also provide safeguards against improper prosecution for mere accidental production of a controlled substance analog and they insure that the final determination of whether an analog is to be treated as a controlled substance is made by the appropriate state scheduling agency.

In 1986, Congress reported that "fentanyl" analogs had resulted in over 100 drug overdoses

because they were more than 3,000 times more potent than the heroin molecule on which they were based. Moreover, one designer drug--MPPP, an analog of Demerol (meperidine) had been marketed with processing impurities (MPTP) which caused almost total paralysis in dozens of users because of a suspected link between MTTP and Parkinson's disease. At least 400 additional persons had been identified as being at serious risk of developing Parkinson's disease because of their exposure to these impurities. There was, at the time, no provision under the UCSA or under federal law for prosecuting those responsible for the manufacture and sale of such uncontrolled substances.

Makers of "designer drugs," operating out of illicit laboratories, chemically alter a controlled substance by making a very slight alteration in the chemical structure of the controlled substance in order to produce a new, uncontrolled--and therefore "legal"--substance which produces an effect on the central nervous system nearly identical to that produced by the controlled substance on which it is based. Such "designer drugs" were originally produced in a successful effort to evade the drug laws. The new substances were produced more quickly than the Drug Enforcement Administration (DEA) could add them to the schedules of controlled substances; thus, the manufacture, distribution, and use of these "designer drugs" was not illegal under either federal or state drug laws. Moreover, each time DEA completed scheduling proceedings, the illicit chemists merely made another variation in the chemical structure and invented a new, uncontrolled designer drug.

There was nothing in the UCSA which would allow states to deal effectively with the "designer drug" problem in an expedited manner. Indeed, all a state scheduling agency could do was to initiate formal scheduling proceedings with respect to the substances which might consume months or even years during which the traffickers of designer drugs could ply their trade at will without any concern for the public health effects of their products. Section 201(e) of the proposed amendments seeks to rectify this situation by vesting state agencies with "emergency scheduling authority" which allows for the temporary placement of a substance in Schedule I based upon an expedited determination that such action is necessary to "avoid an imminent hazard to the public health." This "temporary scheduling" would expire at the end of one year. Moreover, a "temporary scheduling" order may not be made unless the state agency also initiates formal scheduling proceedings under Section 201(a) with respect to the substance.

Section 201(e) of the proposed amendments is similar to the "emergency scheduling" provision under federal law, which is codified as 21 U.S.C. 811(h). This provision was enacted in 1984 as part of the initial federal response to the "designer drug" problem. It authorized the Attorney General to place a substance in Schedule I on a temporary basis in order to avoid an "imminent hazard to the public safety," after a 30-day public notice period. This "emergency scheduling" order would expire at the end of one year unless extended for a six-month period during the pendency of formal scheduling proceedings. The legislative history of this provision made clear that its purpose was "to protect the public from drugs of abuse that appear in the illicit drug traffic too rapidly to be effectively handled under the lengthy routine scheduling procedures." S. Rep. No. 225, 98th Cong., 2d Sess., at 264, *reprinted in* [1984] U.S. Code Cong. & Ad. News 3182, 3446. However, even this "emergency scheduling" authority proved ineffective in stemming the tide of "designer drugs."

Indeed, a congressional report noted in 1986 that:

> DEA in the course of its investigation has found a very small number of illicit chemists have been very carefully developing new drugs to stay ahead of DEA's scheduling actions. As a consequence, **even with the emergency scheduling authority [of 21 U.S.C. 811 (h)(1)], the public remains at risk, and dangerous chemists are able to escape prosecution due to the following factors.** First, there is an enormous number of drugs which can yet be developed. Second, there is an unavoidable delay in discovering that such drugs are being distributed. Third, there is the unavoidable obstacle of establishing that these drugs are being

> abused and pose an imminent threat to the public health. Finally, there is the [lapse] of time needed to undertake and complete action to control the drugs. **The only way to effectively protect the public is to investigate and prosecute these chemists...prior to formal control of the drugs.**

H.R. Rep. No. 848, 99th Cong., 2d Sess., at 5 (1986) (*emphasis added*).

Section 101(3)(i) and Section 214 of the proposed amendments to the UCSA represent a reasonable and measured response to the problems noted by Congress in the foregoing passage. They would allow for prosecution of "designer drug" cases, in limited circumstances, prior to the completion of any "emergency" or routine scheduling proceeding. First, Section 101(3)(i) limited the definition of "controlled substance analog" to substances which:

> (1) are substantially similar to the chemical structure of a controlled substance in Schedule I or II; **and**
> (A) which have a stimulant, depressant or hallucinogenic effect on the central nervous system that is substantially similar to the effect of a controlled substance in Schedule I or II ; **or**
> (B) with respect to a particular individual, which the individual represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to that of a controlled substance in Schedule I or II.

The definition specifically excludes any substance (1) which is already a controlled substance; (2) which is subject to an approved new drug application; (3) which is subject to an exemption for investigational use by a particular person to the extent of conduct that is pursuant to that exemption; and (4) which is not intended for human consumption before such an exemption takes effect with respect to the substance. Moreover, Section 214 specifically provides that a controlled substance analog may only be treated as a substance included in Schedule I **"to the extent [it is] intended for human consumption."**

It is important to note, first of all, that the exceptions specified in Section 101(3)(i) insure that no prosecution is brought because of use of controlled substance analogs for legitimate scientific research or for purposes other than human consumption. This is as it should be since the motivating concerns behind these provisions are to protect the public health and safety and to allow for prosecution only of those unauthorized "chemists" and their "clients" who intentionally produce, distribute, and use "designer drugs" **for purposes of human consumption.** Likewise, this provision would not allow prosecution for the production of a controlled substance analog which was produced accidentally during the course of chemical research because such an "accidental analog" would not be produced for purposes of human consumption. (Such a prosecution would also be barred by the requirements in the controlled substance offense provisions that an offense be committed "knowingly or intentionally".) Equally important is the fact that this provision would apply only to substances which are structurally similar to a controlled substance in Schedule I or II **and** which are either substantially similar in their pharmacological effect or which are intended or have been represented by the defendant to have such a substantially similar effect.

Moreover, the proposed amendments contain safeguards against unfair prosecution and conviction even in the limited class of cases which falls within the scope of the statutes. Section 214 **requires** a prosecutor to notify the state scheduling agency of information relevant to "emergency scheduling" of a controlled substance analog within a certain number of days after initiating a prosecution with respect to that analog. Section 201(e) specifies that the state agency must initiate an "emergency scheduling" proceeding upon receipt of such notice. More importantly, Section 214 specifically provides that no prosecution relating to an analog may continue or take place following a final determination by the state agency that the substance should not be scheduled. Thus, the statutes insure that the final determination of what should be treated as a controlled substance will be made by the agency possessing the expertise to make such determinations scientifically and objectively.

It is also very important to note that the proposed UCSA amendments are much narrower than the comparable provisions of the Federal Controlled Substance Analogue Enforcement Act of 1986, which Congress enacted as Subtitle E of the Anti-Drug Abuse Act of 1986. The federal provisions, which are codified as 21 U.S.C. 802(32) and 813, resemble the proposed UCSA amendments in that they limit prosecutions only to cases involving analogs intended for human consumption and contain definitional exceptions which safeguard legitimate scientific research and production or use of analogs for purposes other than human consumption. However, where the proposed UCSA amendments allow only two alternative theories of prosecution (*i.e.*, the state must show in all cases that the analog has a chemical structure that is substantially similar to a controlled substance in Schedule I or II and must also show either that the analog, in fact, has a pharmacological effect that is substantially similar to that of a controlled substance in Schedule I or II or that the analog was represented or intended to have such a substantially similar effect by the particular defendant), the federal provisions allow three alternative and greatly simplified theories of prosecution.

Thus, a person may be convicted of an analog offense under the federal provisions if the government establishes either (1) that the alleged "analog" is substantially similar in structure to a controlled substance in Schedule I or II; (2) that the "analog" has a substantially similar pharmacological effect on the central nervous system as a controlled substance in Schedule I or II; or (3) that the "analog" has been represented or intended to have such a substantially similar effect by the particular defendant in a case. *See* 21 U.S.C. 802 (32)(a).

Thus, there is no requirement under the federal provisions, as there is under the proposed UCSA amendments, that an analog be shown to be substantially similar in chemical structure to a controlled substance in Schedule I or II in every case. Moreover, the federal statute does not require a prosecutor to notify the DEA of information relevant to "emergency scheduling" after initiating an analog prosecution, does not require the DEA to initiate "emergency scheduling" proceedings with respect to a particular substance after an analog prosecution is initiated based upon that substance, and does not provide that an analog prosecution shall not commence or continue if DEA makes a final determination not to schedule a controlled substance.

It should be noted that the federal analog provisions are being used extensively--and with considerable success--by federal prosecutors. A unanimous panel of the United States Court of Appeals for the Fifth Circuit upheld the federal statute against a vagueness challenge in a prosecution involving MDMA. See *United States* v. *Desurra*, 865 F.2d 651 (5th Cir. 1989).

Finally, it is simply specious to claim, as some have, that enactment of either the analog provisions or the emergency scheduling statute would violate the *ex post facto* clause. Neither proposed amendment would authorize prosecution for activities involving analog substances which occur prior to their enactment by the states. Once the analog provisions are adopted, it would thereafter be illegal to manufacture, distribute or possess "controlled substance analogs" for purposes of human consumption with the exception of legitimate scientific research. Similarly, once a substance is added to Schedule I on an "emergency basis" it will thereafter be illegal to manufacture, distribute or possess the substance at least during the term of the emergency scheduling order. Furthermore, once these proposed amendments are enacted, persons will be on fair notice of what the law requires for the reasons previously stated.

To summarize, there is no provision in the UCSA to deal with the "designer drug" problem. Thus, state law enforcement officials are powerless in combating the manufacture and abuse of such "uncontrolled" substances. Section 201(e) of the proposed amendments to the UCSA would go part of the way toward resolving this problem by giving state scheduling agencies authority to do "emergency scheduling" of substances on a temporary basis to avoid "an imminent hazard to the public safety". Section 101(3) and Section 214 of the proposed amendments to the UCSA would give state and local law enforcement personnel the power to bring "analog" prosecutions in limited numbers of cases while at the same time, protecting legitimate scientific research and use of analogs for purposes other than human consumption. Finally, these provisions would provide ade-

quate safeguards against criminal prosecution for the accidental production of a controlled substance analog and would insure that the final determination of whether an analog should be treated as a controlled substance be made by the state scheduling agency.

Article IV — Offenses and Penalties of the Proposed Amendments to the Uniform Controlled Substances Act (UCSA)

ARTICLE IV

~~[~~OFFENSES AND PENALTIES~~]~~

SECTION 401. ~~[~~PROHIBITED ACTS A - ~~]~~ PENALTIES.~~]~~

(a) Except as authorized by this [Act] ~~and except as provided in Section 409~~, it is unlawful for any person knowingly or intentionally to manufacture, distribute, deliver, or possess with intent to manufacture, distribute, or deliver, a controlled substance.

(1) ~~Any~~ A person ~~who violates~~ is guilty of a crime and upon conviction may be imprisoned for not more than [ ], fined not more than [ ], or both, for a violation of this subsection with respect to:

(i) ~~a controlled substance classified in Schedule I or II which is a narcotic drug, is guilty of a crime and upon conviction may be imprisoned for not more than [ ], or fined not more than [ ], or both~~ a mixture or substance containing heroin;

(ii) ~~any other controlled substance classified in Schedule I, II, or III, is guilty of a crime and upon conviction may be imprisoned for not more than [ ], fined not more than [ ], or both~~ a mixture or substance containing:

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

(B) cocaine, or any salt, isomer, or salt of isomer thereof;

(C) ecgonine, or any derivative, salt, isomer, or salt of isomer thereof; or

(D) any compound, mixture, or preparation containing any quantity of any substance referred to in clauses (A) through (C);

(iii) ~~a substance classified in Schedule IV, is guilty of a crime and upon conviction may be imprisoned for not more than [ ], fined not more than [ ], or both~~ a mixture or substance described in subparagraph (ii) which contains cocaine base;

(iv) ~~a substance classified in Schedule V, is guilty of a crime and upon conviction may be imprisoned for not more than [ ], fined not more than [ ], or both~~ phencyclidine or a mixture or substance containing phencyclidine;

(v) a mixture or substance containing lysergic acid diethylamide;

(vi) a mixture or substance containing methamphetamine or any of its salts, isomers, or salts of isomers; or

(vii) a mixture or substance containing [29] grams or more of marijuana.

(2) A person is guilty of a crime and upon conviction may be imprisoned for not more than [ ], fined not more than [ ], or both, for a violation of this subsection in the case of a controlled substance in Schedule I or II except as provided in paragraphs (1) and (5).

(3) A person is guilty of a crime and upon conviction may be imprisoned for not more than [ ], fined not more than [ ], or both, for a violation of this subsection in the case of a controlled substance in Schedule III.

(4) A person is guilty of a crime and upon conviction may be imprisoned for not more than [ ], fined not more than [ ], or both, for a violation of this subsection in the case of a controlled substance in Schedule IV or V.

(5) A person is guilty of a crime and upon conviction may be imprisoned for not more than [ ], fined not more than [ ], or both, for a violation of this subsection in the case of marijuana except as provided in paragraph (1).

~~(b) Except as authorized by this Act, it is unlawful for any person to create, deliver, or possess with intent to deliver, a counterfeit substance.~~

~~(1) Any person who violates this subsection with respect to:~~

~~(i) a counterfeit substance classified in Schedule I or II which is a narcotic drug, is guilty of a crime and upon conviction may be imprisoned for not more than [ ], fined not more than [ ], or both;~~

~~(ii) any other counterfeit substance classified in Schedule I, II, or III, is guilty of a crime and upon conviction may be imprisoned for not more than [ ], fined not more than [ ], or both;~~

~~(iii) a counterfeit substance classified in Schedule IV, is guilty of a crime and upon conviction may be imprisoned for not more than [ ], fined not more than [ ], or both;~~

~~(iv) a counterfeit substance classified in Schedule V, is guilty of a crime and upon conviction may be imprisoned for not more than [ ], fined not more than [ ], or both.~~

~~(c) Except as provided in Section 409, it is unlawful for any person knowingly or intentionally to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice, or except as otherwise authorized by this Act. Any person who violates this subsection is guilty of a misdemeanor.~~

[(b) Notwithstanding any other provision of this [Act]:

(1) It is unlawful for any person knowingly or intentionally to distribute, purchase, manufacture, or bring into this State, or possess [28] grams or more of any mixture or substance containing heroin. If the quantity involved is:

(i) [28] grams or more, but less than [100] grams, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ].

(ii) [100] grams or more, but less than [500] grams, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ].

(iii) [500] grams or more, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ].

(2) It is unlawful for any person knowingly or intentionally to manufacture, distribute, purchase, or bring into this State, or possess [56] grams or more of any mixture or substance containing cocaine or its related substances as described in subsection (a)(1)(ii). If the quantity involved is:

(i) [56] grams or more, but less than [450] grams, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ].

(ii) [450] grams or more, but less than [1] kilogram, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ].

(iii) [1] kilogram or more, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ].

(3) It is unlawful for any person knowingly or intentionally to manufacture, distribute, purchase, or bring into this State, or possess [5] grams or more of any mixture or substance containing cocaine base. If the quantity involved is:

(i) [5] grams or more, but less than [25] grams, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ].

(ii) [25] grams or more, but less than [50] grams, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ].

(iii) [50] grams or more, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ].

(4) It is unlawful for any person knowingly or intentionally to distribute, purchase, manufacture, or bring into this State, or possess [10] grams or more of any mixture or substance containing phencyclidine. If the quantity involved is:

(i) [10] grams or more, but less than [50] grams, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ].

(ii) [50] grams or more, but less than [100] grams, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ].

(iii) [100] grams or more, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ].

(5) It is unlawful for any person knowingly or intentionally to distribute, purchase, manufacture, or bring into this State, or possess [500] milligrams or more of any mixture or substance containing lysergic acid diethylamide. If the quantity involved is:

(i) [500] milligrams or more, but less than [1] gram, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ].

(ii) [1] gram or more, but less than [5] grams, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ].

(iii) [5] grams or more, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ].

(6) It is unlawful for any person knowingly or intentionally to distribute, purchase, manufacture, or bring into this State, or possess [56] grams or more of any mixture or substance containing methamphetamine or any of its salts, isomers, or salts of isomers. If the quantity involved is:

(i) [56] grams or more, but less than [450] grams, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ].

(ii) [450] grams or more, but less than [1] kilogram, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ].

(iii) [1] kilogram or more, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ].

(7) It is unlawful for any person knowingly or intentionally to distribute, purchase, manufacture, or bring into this State, or possess [10] kilograms or more of marijuana. If the quantity of marijuana involved is:

(i) [10] kilograms or more, but less than [50] kilograms, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ].

(ii) [50] kilograms or more, but less than [100] kilograms, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ].

(iii) [100] kilograms or more, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ].]

(c) Except as authorized by law, it is unlawful for a person knowingly or intentionally to possess any piperidine with intent to manufacture a controlled substance, or knowingly or intentionally to possess any piperidine knowing, or having reasonable cause to believe, that the piperidine will be used to manufacture a controlled substance contrary to this [Act]. A person who violates this subsection is guilty of a crime and upon conviction may be imprisoned for not more than [ ], fined not more than [ ], or both.

[(d) Notwithstanding any other provision of this [Act], with respect to any individual who is found to have violated subsection (b), adjudication of guilt or imposition of sentence may not be suspended, deferred, or withheld, nor may the individual be eligible for parole before serving the mandatory term of imprisonment prescribed by this section.]

(e) Notwithstanding any other provision of this [Act], the defendant or the attorney for the state may request the sentencing court to reduce or suspend the sentence of any individual who is convicted of a violation of this section and who provides substantial assistance in the identification, arrest, or conviction of any person for a violation of this [Act]. The arresting agency must be given an opportunity to be heard in reference to the request. Upon good cause shown, the request may be filed and heard in camera. The judge hearing the motion may reduce or suspend the sentence if the judge finds that the assistance rendered was substantial.

COMMENT ON AMENDMENT

Except for Section 406, which contains a specific reference to a misdemeanor, criminal penalties throughout the Act are referred to by language "is guilty of a crime and upon conviction may be imprisoned for not more than [ ], fined not more than [ ], or both." States that have a criminal penalty classification system may want to replace this language with references to their classified penalties, e.g., "is guilty of a class [ ] felony." Actual penalties are not included because it is felt that such a designation is purely a state decision. The penalties imposed under the federal Act are found at 21 U.S.C. 841 and additional federal penalties were created by the Anti-Drug Abuse Act of 1986, Public Law 99-570. "Included" is used to

refer to substances controlled on adoption of the Act (those substances "listed" in Sections 204, 206, 208, 210, and 212) and to substances controlled under Section 601 and administrative action. The criminal penalties in subsection (a) are reclassified based on the penalties in the federal Act, 21 U.S.C. 841(b) as amended by the Anti-Drug Abuse Act of 1986, Public Law 99-570, § 1002 (the "Narcotics Penalties and Enforcement Act of 1986"). In subsection (a)(1) there are no references to amounts of mixtures or substances containing the proscribed controlled substances, and the adopting state may want to insert amounts appropriate for that state. A reference to an amount is contained in subsection (a)(1)(vii) with respect to marijuana to allow a state that includes this provision to distinguish this provision from subsection (a)(5). The substance of the former subsection (b) is transferred to Section 404. The substance of the former subsection (c) is transferred to Section 406, as a new penalty section to reflect the fact that mere possession does not relate to the other prohibited acts of Section 401. The new subsections (b), (d), and (e) are based on Florida Statutes Section 893.135. The new subsection (c) is based on the offense in the federal Act with respect to piperidine, added in 1978 and found in 21 U.S.C. 841(d).

SECTION 402. ~~[~~PROHIBITED ACTS B - ~~]~~ PENALTIES.~~]~~

(a) It is unlawful for any person:

(1) who is subject to Article III to distribute or dispense a controlled substance in violation of Section 308;

(2) who is a registrant, to manufacture a controlled substance not authorized by ~~his~~ that person's registration, or to distribute or dispense a controlled substance not authorized by ~~his~~ that person's registration to another registrant or other authorized person;

(3) to refuse or fail to make, keep, or furnish any record, notification, order form, statement, invoice, or information required under this [Act]; or

(4) to refuse an entry into any premises for any inspection authorized by this [Act]~~; or~~.

(b) It is unlawful for any manufacturer or distributor, or agent or employee of a manufacturer or distributor, having reasonable cause to believe that a controlled substance will be used in violation of this [Act], to deliver the controlled substance.

~~(5)~~ (c) It is unlawful for any person knowingly or intentionally to keep ~~or~~, maintain, manage, control, rent, lease, or make available for use any store, shop, warehouse, dwelling, building, vehicle, ~~boat~~ vessel, aircraft, room, enclosure, or other structure or place, which that person knows is resorted to ~~by persons using controlled substances in violation of this Act~~ for the purpose of ~~using these substances, or which is used for~~ keeping for distribution, transporting for distribution, or ~~selling them~~ distributing controlled substances in violation of this [Act].

(d) Except as authorized by this [Act], it is unlawful:

(1) knowingly or intentionally to open or maintain any place for the purpose of unlawfully manufacturing controlled substance; or

(2) to manage or control any building, room, or enclosure, either as an owner, lessee, agent, employee, or mortgagee, and knowingly or intentionally rent, lease, or make available for use, with or without compensation, the building, room, or enclosure for the purpose of unlawfully manufacturing a controlled substance.

(e) A person does not violate subsection (c):

(1) by reason of any act committed by another person while that other person is unlawfully on or in the structure or place, if the person lacked knowledge of the unlawful presence of that other person; or

(2) if the person has notified a law enforcement agency of the illegal conduct.

(f) A person who violates subsection (d) is guilty of a crime and upon conviction may be imprisoned for not more than [ ], years, fined not more than [ ], or both, or fined not more than [ ] if the person is not an individual.

~~(b)~~ (g) ~~Any~~ Except as provided in subsection (f), a person who violates this ~~Section~~ section is guilty of a crime and upon conviction may be

imprisoned for not more than [ ], fined not more than [ ], or both.

COMMENT ON AMENDMENT

Subsection (b) is derived from the California Health and Safety Code § 11153.5(a). Subsection (a)(5) is converted to subsection (c) because the subject matter is not otherwise related to paragraphs (1) through (4), which relate to registrants. "Knows" is added to subsection (c) to clarify that knowledge of the resorting to is required. Subsection (d) is added in recognition of a similar offense with respect to establishment of manufacturing operations as found in the Anti-Drug Abuse Act of 1986, Public Law 99-570, § 1841. As is generally available under criminal statutes, duress should be available as a defense to prosecution under subsection (c). Actual penalties are not included because it is felt that such a designation is purely a state decision. The penalties imposed under the federal Act are found at 21 U.S.C. 842 and 856.

SECTION 403. ~~PROHIBITED ACTS C~~ - ; PENALTIES.~~~~

(a) It is unlawful for any person knowingly or intentionally:

(1) to distribute as a registrant a controlled substance ~~classified~~ included in ~~Schedules~~ Schedule I or II, except pursuant to an order form as required by Section 307 ~~of this Act~~;

(2) to use in the course of the manufacture ~~or~~, distribution, or dispensing of a controlled substance, or to use for the purpose of acquiring or obtaining a controlled substance, a registration number ~~which~~ that is fictitious, revoked, suspended, or issued to another person;

(3) to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge;

(4) to furnish false or fraudulent material information in, or omit any material information from, any application, report, or other document required to be kept or filed under this [Act], or any record required to be kept by this [Act]; or

(5) to ~~make, distribute, or possess any punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or~~

~~any likeness of any of the foregoing upon any drug or container or labeling thereof so as to render the drug a counterfeit~~ possess a false or fraudulent prescription with intent to obtain a controlled substance.

(b) ~~Any~~ A person who violates this ~~Section~~ section is guilty of a crime and upon conviction may be imprisoned for not more than [ ], ~~or~~ fined not more than [ ], or both.

COMMENT ON AMENDMENT

In subsection (a)(1) "included" is used to refer to substances controlled on adoption of the Act (those substances "listed" in Sections 204, 206, 208, 210, and 212) and to substances controlled under Section 601 and administrative action. The language with respect to a counterfeit substance is transferred to Section 404.

SECTION 404. COUNTERFEIT SUBSTANCES PROHIBITED; PENALTY.

(a) It is unlawful for any person knowingly or intentionally to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance which, or the container or labeling of which, without authorization, bears the trademark, trade name, or other identifying mark, imprint, number, or device, or any likeness thereof, of a manufacturer, distributor, or dispenser, other than the person who in fact manufactured, distributed, or dispensed the substance.

(b) It is unlawful for any person knowingly or intentionally to make, distribute, or possess a punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon any drug or container or labeling thereof.

(c) A person who violates this section is guilty of a crime and upon conviction may be imprisoned for not more than [ ], fined not more than [ ], or both.

COMMENT ON CREATION OF SECTION

The former Sections 404 and 405 are redesignated as Sections 417 and 418 to recognize their general relationship to the provisions of Article IV. A new Section 404 is created by consolidating counterfeit substance provisions previously found in Sections 101(e), 401(b), and 403(a)(5). Provisions in this section may duplicate drug branding and labeling provisions in other laws of the enacting state.

SECTION 405. IMITATION CONTROLLED SUBSTANCES PROHIBITED; PENALTY.

(a) It is unlawful for any person knowingly or intentionally to deliver, or possess with intent to deliver, a noncontrolled substance represented by that person to be a controlled substance.

(b) It is unlawful for any person knowingly or intentionally to deliver or possess with intent to deliver, a noncontrolled substance intended by that person for use or distribution as a controlled substance or under circumstances in which a person reasonably should know that the noncontrolled substance will be used or distributed for use as a controlled substance.

(c) It is not a defense that the accused believed the noncontrolled substance to be a controlled substance.

(d) A person who violates this section is guilty of a crime and upon conviction may be imprisoned for not more than [ ], fined not more than [ ], or both.

COMMENT ON CREATION OF SECTION

This section is based on Annotated Code of Maryland Article 27, § 286B. Some states are more expansive, e.g., Wisconsin Statutes Section 161.41(2m), which prohibits the manufacture of an imitation controlled substance in lieu of a controlled substance, while others include "prima facie" factors to be considered evidence of delivery of "look-alikes", such as prior convictions, evasive tactics, and proximity to controlled substances, as well as immunity for using imitation controlled substances as placebos, e.g., North Dakota Century Code Chapter 19-03.2. Factors that may be useful in determining whether this section is violated include whether the physical appearance is substantially identical to that of a controlled substance, whether the noncontrolled substance was packaged in a manner normally used for the illegal distribution of controlled substances, and whether delivery included an exchange of money or property substantially greater than the reasonable value of the noncontrolled substance.

SECTION 406. POSSESSION AS PROHIBITED ACT; PENALTIES. It is unlawful for any individual knowingly or intentionally to possess a controlled

substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of the practitioner's professional practice, or except as otherwise authorized by this [Act]. Any individual who violates this section with respect to a substance included in Schedule I or II, except for less than [29] grams of marijuana, is guilty of a [felony] and upon conviction may be imprisoned for not more than [ ], fined not more than [ ], or both. Any individual who violates this section with respect to a substance included in Schedule III, IV, or V is guilty of a [felony] [misdemeanor] and upon conviction may be imprisoned for not more than [ ], fined not more than [ ], or both. Any individual who violates this section with respect to less than [29] grams of marijuana is guilty of a [misdemeanor] and upon conviction may be imprisoned for not more than [ ], fined not more than [ ], or both.

COMMENT ON CREATION OF SECTION

This section is created to allow for the placement of the former Section 401(c), concerning possession of a controlled substance, after the sections providing for penalties for other prohibited acts. The former Section 401(c) is treated as a separate section because the offense is mere possession as opposed to the other prohibited acts of Section 401.

SECTION 407. CONSPIRACY; PENALTY. It is unlawful for any person to conspire to commit a violation of this [Act]. A person who violates this section is guilty of a crime and upon conviction is subject to the same penalty as provided for the offense that was the object of the conspiracy.

COMMENT ON CREATION OF SECTION

This section is based on 21 U.S.C. 846.

SECTION 408. SOLICITATION; [ATTEMPT;] PENALTY.

(a) It is unlawful for any person knowingly or intentionally to solicit, induce, encourage, or intimidate an individual to engage in specific conduct constituting a violation of this [Act].

(b) [It is unlawful for any person to attempt to commit a violation of this [Act].

(c)] A person who violates this section is guilty of a crime and upon conviction is subject to the same penalty as provided for the offense that was the object of the solicitation [or attempt].

COMMENT ON CREATION OF SECTION

Subsection (b) provides an option for a state that does not have a general statute imposing a penalty for attempting to commit a crime.

SECTION ~~406~~ 409. ~~[~~DISTRIBUTION TO ~~PERSONS~~ INDIVIDUAL UNDER AGE 18; DISTRIBUTION NEAR SCHOOLS OR COLLEGES; PENALTIES.~~]~~

(a) ~~Any person~~ An individual 18 or more years of age ~~or over~~ who violates Section ~~401(a)~~ 401 by distributing a controlled substance ~~listed in Schedules I or II which is a narcotic drug~~ to ~~a person~~ an individual under 18 years of age who is at least ~~3~~ two years ~~his~~ that individual's junior is guilty of a crime and upon conviction is punishable by ~~the fine authorized by Section 401(a)(1)(i), by~~ a term of imprisonment ~~of up to~~ and fine not exceeding [~~twice~~ two times] that authorized by Section ~~401(a)(1)(i), or by both~~ 401. ~~Any person 18 years of age or over who violates Section 401(a) by distributing any other controlled substance listed in Schedules I, II, III, IV, and V to a person under 18 years of age who is at least 3 years his junior is punishable by the fine authorized by Sections 401(a)(1), (ii), (iii), or (iv), by a term of imprisonment up to [twice] that authorized by Sections 401(a)(1)(ii), (iii), or (iv), or both.~~

(b) It is unlawful for any individual to violate Section 401 in or on, or within one thousand feet [300.48 meters] of, the real property comprising a public playground, a public or private elementary or secondary school, a public vocational school, or a public or private college or university. An individual who violates this subsection is guilty of a crime and upon

conviction is punishable by a term of imprisonment and fine not exceeding [two times] that authorized by Section 401.

(c) An individual who violates subsection (b) after a previous conviction under that subsection has become final, is punishable by a term of imprisonment not exceeding [three times] that authorized by Section 401.

(d) It is not a defense to a violation of subsection (a) that the accused did not know the age of an individual to whom a controlled substance was distributed.

(e) It is not a defense to a violation of subsection (b) or (c) that the accused did not know the distance involved.

[(f) Notwithstanding any other provision of this [Act], with respect to an individual who is found to have violated this section:

(1) adjudication of guilt or imposition of sentence may not be suspended, deferred, or withheld;

(2) the individual must be imprisoned for at least [ ] for a violation of subsection (a) or (b); and

(3) the individual is not eligible for parole before serving the mandatory term of imprisonment prescribed by this section.]

COMMENT ON AMENDMENT

Subsection (a) is revised to reflect the revised penalty structure in Section 401(a). "Included" is used to refer to substances controlled on adoption of the Act (those substances "listed" in Sections 204, 206, 208, 210, and 212) and to substances controlled under Section 601 and administrative action. The three-year differential was reduced to a two-year differential in lieu of accepting the 18-year-old/21-year-old age distinction in the federal Act, 21 U.S.C. 845, which could result in the stiffer penalty for an 18-year-old selling to a 20-year-old. Subsections (b) and (c) are added in recognition of similar penalties contained in the federal Act, 21 U.S.C. 845a, as enacted in 1984 and as amended by the Anti-Drug Abuse Act of 1986, Public Law 99-570, § 1104 (the "Juvenile Drug Trafficking Act of 1986"), which added vocational school, college, and university, and also included "manufacturing". Subsection (c) provides for a special subsequent offense penalty with respect to manufacturing or distributing controlled substances near schools. The penalty in Section 410 for a second offense would not apply in this case.

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

(a) It is unlawful for any individual 18 or more years of age knowingly or intentionally to employ, hire, use, persuade, induce, entice, or coerce an individual under 18 years of age to violate or assist in avoiding detection or apprehension for a violation of this [Act].

(b) An individual who violates subsection (a) is guilty of a crime and upon conviction is punishable by a term of imprisonment and fine not exceeding [two times] that authorized by Section 401.

(c) An individual who violates subsection (a) after a previous conviction under that subsection has become final, is punishable by a term of imprisonment not exceeding [three times] that authorized by Section 401(a).

(d) An individual who violates subsection (a) by employing, hiring, using, persuading, inducing, enticing, or coercing an individual who is under 15 years of age, may be imprisoned for not more than [ ] years and fined not more than [ ] in addition to any other punishment authorized by this section.

(e) It is not a defense to a violation of this section that the accused did not know the age of an individual protected under this section.

[(f) Notwithstanding any other provision of this [Act], with respect to an individual who is found to have violated this section:

(1) adjudication of guilt or imposition of sentence may not be suspended, deferred, or withheld;

(2) the individual must be imprisoned for at least [ ] for a violation of subsection (a) or (b); and

(3) the individual is not eligible for parole before serving the mandatory term of imprisonment prescribed by this section.]

COMMENT ON CREATION OF SECTION

This section is created to provide for a special offense for using minors in drug operations. The section is derived from similar provisions in the federal Act, as created by the Anti-Drug Abuse Act of 1986, Public Law 99-570, § 1102 (the "Juvenile Drug Trafficking Act of 1986") and from the California Health and Safety Code, § 11353.

SECTION 411. CONTINUING CRIMINAL ENTERPRISE; PENALTY.

(a) A person who engages in a continuing criminal enterprise is guilty of a crime and upon conviction is punishable by a term of imprisonment and fine not exceeding [two times] that authorized by Section 401 for the underlying offense. For purposes of this subsection, a person is engaged in a continuing criminal enterprise if:

(1) the person violates any provision of this [Act] which is a felony; and

(2) the violation is a part of a continuing series of two or more violations of this [Act]:

(i) which are undertaken by that person in concert with five or more other persons with respect to whom that person occupies a position of organizer, supervisor, or any other position of management; and

(ii) from which that person obtained substantial income or resources.

(b) A person who violates subsection (a) after a previous conviction under that subsection has become final, is punishable by a term of imprisonment not exceeding [three times] that authorized by Section 401.

[(c) Notwithstanding any other provision of this [Act], with respect to an individual who is found to have violated subsection (a) or (b):

(1) adjudication of guilt or imposition of sentence may not be suspended, deferred, or withheld;

(2) the individual must be imprisoned for at least [ ] for a violation of subsection (a) or (b); and

(3) the individual is not eligible for parole before serving the mandatory term of imprisonment prescribed by subsection (a) or (b).]

COMMENT ON CREATION OF SECTION

This section provides for penalties for continuing criminal enterprises, similar to the penalties contained in the federal Act, 21 U.S.C. 848, which was amended by the Anti-Drug Abuse Act of 1986, Public Law 99-570, § 1253 (the "Continuing Drug Enterprise Act of 1986"), which provides for enhanced penalties for principals of continuing drug enterprises. Under the comparable federal provision, 21 U.S.C. 848, the consensus of authority is that to establish a continuing "series" of violations the government must prove at least three felony violations, which does not necessarily mean that the government must obtain convictions on a minimum of three felony violations or that the defendant be indicted on three of the eligible predicate felonies. See United States v. Young, 745 F.2d 733 (2nd Cir. 1984).

SECTION 412. MONEY LAUNDERING AND ILLEGAL INVESTMENT; PENALTY.

(a) It is unlawful for any person knowingly or intentionally to receive or acquire proceeds, or engage in transactions involving proceeds, known to be derived from any violation of this [Act]. This subsection does not apply to any transaction between an individual and that individual's counsel necessary to preserve that individual's right to representation, as guaranteed by [insert reference to state's constitution] and by the Sixth Amendment of the United States Constitution; however, this exception does not create any presumption against or prohibition of the right of the state to seek and obtain forfeiture of any proceeds derived from a violation of this [Act].

(b) It is unlawful for any person knowingly or intentionally to give, sell, transfer, trade, invest, conceal, transport, or maintain an interest in or otherwise make available anything of value which that person knows is intended to be used for the purpose of committing or furthering the commission of any violation of this [Act].

(c) It is unlawful for any person knowingly or intentionally to direct, plan, organize, initiate, finance, manage, supervise, or facilitate

the transportation or transfer of proceeds known to be derived from any violation of this [Act].

(d) It is unlawful for any person knowingly or intentionally to conduct a financial transaction involving proceeds derived from a violation of this [Act] when the transaction is designed in whole or in part to conceal or disguise the nature, location, source, ownership, or control of the proceeds known to be derived from a violation of this [Act] or to avoid a transaction reporting requirement under state or federal law.

(e) A person who violates this section is guilty of a crime and upon conviction may be imprisoned for not more than [ ] years, fined not more than [ ], or both.

COMMENT ON CREATION OF SECTION

This section makes it unlawful to finance, invest, acquire, or expend finances or assets that are actually known to have been derived from or are intended to further narcotics trafficking. It also protects the legitimate Sixth Amendment rights of the defendant by exempting the defendant's attorney from prosecution for certain limited acts. However, it does not shield from forfeiture those funds otherwise subject to forfeiture. Subsection (d) is derived from 18 U.S.C.A. 1956(a)(1)(b).

~~[~~SECTION ~~408~~ 413. ~~[~~SECOND OR SUBSEQUENT OFFENSES; PENALTY.~~]~~

(a) ~~Any~~ A person convicted of a second or subsequent offense under this [Act] may be imprisoned for a term up to ~~twice~~ two times the term otherwise authorized~~,~~ and fined an amount up to ~~twice~~ two times that otherwise authorized~~, or both~~.

(b) For purposes of this ~~Section~~ section, an offense is considered a second or subsequent offense, if, ~~prior to his~~ before conviction of the offense, the offender has at any time been convicted under this [Act] or under any statute of the United States or of any ~~State~~ state relating to narcotic drugs, ~~marihuana, depressant~~ marijuana, stimulant, depressant, or hallucinogenic ~~drugs~~ substances and that conviction has become final.

(c) This Section does not apply to ~~offenses~~ a second or subsequent offense under Section ~~401(c)~~ 406, 409(b), 410(a), or 411.~~]~~

COMMENT ON AMENDMENT

Sections 409(b), 410(a), and 411 are excepted from the application of this section because second offense penalties for those sections are provided by Section 409(c), Section 410(c), and Section 411(b).

~~SECTION 409. [POSSESSION AND DISTRIBUTION OF MARIHUANA.]~~

~~(a) Section 401(a) and (c) do not apply to the following acts which, except as provided in subsection (c), are not unlawful:~~

~~(1) possession of marihuana by an individual for personal use; and~~

~~(2) distribution of small amounts of marihuana by an individual for no remuneration or insignificant remuneration not involving a profit.~~

~~(b) Possession by an individual of not more than one ounce of marihuana is presumed to be for personal use under subsection (a).~~

~~(c) Notwithstanding subsection (a), it is unlawful for any individual knowingly or intentionally to:~~

~~(1) possess in public more than one ounce of marihuana;~~

~~(2) distribute marihuana in public; or~~

~~(3) smoke or otherwise ingest marihuana in public.~~

~~A person who violates this subsection is guilty of a misdemeanor and upon conviction may be fined not more than $].~~

~~(d) Any amount of marihuana possessed or distributed in public is subject to summary seizure under Section 505(f).~~

~~(e) The use of a conveyance to facilitate the acts described in subsection (a) does not subject the conveyance to forfeiture under Section 505(a)(4).~~

COMMENT ON DELETION

Former Section 409, adopted in 1973 as an amendment to the Act, is deleted in recognition of the failure of any state to adopt the section.

~~[~~SECTION ~~407~~ 414. ~~[~~CONDITIONAL DISCHARGE FOR POSSESSION AS FIRST OFFENSE.~~]~~ Whenever ~~any person~~ an individual who has not ~~previously~~ been convicted previously within the past ten years of any offense under this [Act] or under any statute of the United States or of any ~~State~~ state relating to narcotic drugs, ~~marihuana~~ marijuana, or stimulant, depressant, or hallucinogenic ~~drugs~~ substances, ~~pleads~~ tenders a plea of admission, guilty, no contest, nolo contendere, or similar plea to a charge of possession of a controlled substance under Section 406, or is found guilty of ~~possession of a controlled substance under Section 401(c)~~ that charge, the court, without entering a judgment of guilt and with the consent of the accused, may defer further proceedings and place ~~him~~ that individual on probation upon terms and conditions that must include attendance and successful completion of an education program or, in the case of a drug dependent individual, of a treatment and rehabilitation program. Upon violation of a term or condition, the court may enter ~~an adjudication~~ a judgment of ~~guilt~~ conviction and proceed as otherwise provided. Upon fulfillment of the terms and conditions, the court shall discharge the ~~person~~ individual and dismiss the proceedings against ~~him~~ that individual. A nonpublic record of the dismissal must be retained by the [appropriate state agency] solely for the purpose of use by the courts in determining whether, in later proceedings, the individual qualifies under this section. Discharge and dismissal under this ~~Section shall be~~ section is without adjudication of guilt and is not a conviction for purposes of this ~~Section~~ section or for purposes of ~~disqualifications or disabilities imposed by law upon conviction of a crime.~~ employment, civil rights, or any statute or regulation or license or questionnaire or any other public or private purpose, but not including ~~the~~ additional penalties imposed for second or subsequent convictions ~~under Section 408. There may be only one discharge~~ or the setting of bail. Discharge and dismissal restores the individual, in the contemplation of the law, to the status occupied before

the arrest, indictment, or information. The individual may not be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of failure to recite or acknowledge that arrest, indictment, or information, or trial in response to any inquiry made of that individual for any purpose. Discharge and dismissal under this ~~Section~~ section may occur only once with respect to any ~~person~~ individual.~~,~~

COMMENT ON AMENDMENT

The added language on the effect of discharge and dismissal is based on similar language in the federal Act, 21 U.S.C. 844(b)(2), and on Annotated Code of Maryland, Article 27, § 292. The language on attendance and completion of a treatment and rehabilitation program is to point out a specific condition that must be imposed.

[SECTION 415. TREATMENT OPTION FOR VIOLATION OF [ACT]. Whenever an individual is adjudicated guilty of any violation of this [Act] for which the individual is eligible for probation, the court may impose a sentence as authorized by this [Act], may place that individual on probation as authorized by this section, or may impose a combination of a sentence and probation as authorized by this section. The court, with the consent of that individual and with the consent of a treatment facility having inpatient or outpatient programs for the treatment of drug dependent individuals, may place the individual, if found by the court to be in need of treatment, on probation upon terms and conditions, including participation in a treatment program of that facility. Treatment must be for the period the treatment facility considers necessary. Treatment or a combination of a sentence and probation including treatment may not exceed the maximum sentence allowable unless the convicted individual consents to continued treatment. Upon violation of a term or condition, including failure to participate in the treatment program, the court may revoke the probation and proceed as otherwise provided. Upon fulfillment of the terms and conditions, including

attendance and successful completion of the treatment program, the court shall terminate the probation.]

COMMENT ON CREATION OF SECTION

This section is created to provide for a treatment option in addition to or as an alternative to imprisonment. The section is intended as an authorization in addition to any authority of a court to place an individual on probation. See 18 U.S.C. 3553, 3651 for factors used by federal courts with respect to requiring participation in treatment programs. This section is bracketed so states that have a general statutory provision allowing commitment to a treatment facility need not use this section.

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

(a) Every person convicted of a violation of this [Act], and every individual placed on probation under Section 414, must be assessed for each offense a sum of not less than [$500.00] nor more than [$3,000.00]. The assessment is in addition to and not in lieu of any fines, restitution costs, other assessments, or forfeitures authorized or required by law.

(b) The assessment provided for in this section must be collected as provided for collection of [appropriate term, e.g. fines, restitution] and must be forwarded to the [appropriate agency] as provided in subsection (c).

(c) All moneys collected under this section must be forwarded to the [appropriate agency] for deposit in the drug abuse education and treatment fund. Moneys in the fund are appropriated on a continuing basis and are not subject to [state lapsing and related fiscal and appropriations restraints].

(d) The [appropriate state agency] shall administer expenditures from the fund. Expenditures may be made only for drug abuse education, prevention, and treatment services. Moneys from the fund may not supplant other local, state, or federal funds.

COMMENT ON CREATION OF SECTION

It is not intended that payment of the assessment is a condition for probation. Assessments under this section are not intended for use for law enforcement purposes. Property forfeited under Article V is available for such purposes. Each state should tailor the language in

subsection (c) to its own requirements for establishing special funds in the state treasury and to its own appropriation requirements.

SECTION ~~404~~ 417. ~~[~~PENALTIES UNDER OTHER LAWS.~~]~~ Any penalty imposed for violation of this [Act] ~~is~~ and any civil remedy imposed under this [Act] are in addition to, and not in lieu of, any civil ~~or~~ remedy, administrative penalty, or sanction otherwise authorized by law.

SECTION ~~405~~ 418. ~~[~~BAR TO PROSECUTION.~~]~~ If a violation of this [Act] is a violation of a ~~Federal~~ federal law or the law of another ~~State~~ state, a conviction or acquittal under ~~Federal~~ federal law or the law of another ~~State~~ state for the same act is a bar to prosecution in this State.

ARTICLE V

FORFEITURE OF PROPERTY

SECTION 501. DEFINITIONS. As used in this [Article]:

(1) "Attorney for the state" means the [principal prosecuting attorney of the political subdivision involved] [ ].

(2) "Interest holder" means a secured party within the meaning of Section 9-105 of the Uniform Commercial Code which has a perfected security interest. The term also includes a mortgagee, a holder of any other lien created and perfected in accordance with state law, or a beneficiary of an encumbrance pertaining to an interest in property, whose interest is able to be protected against a good faith purchaser for value.

(3) "Owner" means a person, other than an interest holder, who has an interest in property.

(4) "Proceeds" means property acquired or derived directly or indirectly from, maintained by, produced through, or realized through, conduct giving rise to forfeiture without reduction for expenses incurred for any purpose.

An
Analysis
of Major Drug Issues
in
Article IV — Offenses and Penalties
of the
Proposed Amendments
to the
Uniform Controlled Substances Act
(UCSA)

Analysis

SECTION 401. PROHIBITED ACTS A-; PENALTIES. SUBSECTION (b)

DISCUSSION OF 401(a) DISTRIBUTING RELATED OFFENSES

401(b) QUANTITY BASED ENHANCED PENALTIES

Overview

Section 401 generally prohibits the manufacture, cultivation, distribution or possession with intent to distribute controlled substances. The subsections are organized to permit flexibility in punishment ranges based on the dangerousness of the substance and the quantity involved.

401(a)(1) establishes separate punishment provisions for the seven most abused controlled substances (heroin, cocaine, cocaine base or "crack", PCP, LSD, methamphetamine and marijuana). This structure will facilitate its modification should drug abuse patterns change in the future.

401(a)(2)-(5) sets forth a descending penalty structure for remaining controlled substances based on the schedule in which they are located. This tracks Article II's long established approach of placing the drugs in schedules according to their medical value and potential for abuse.

402(b) targets persons dealing in large quantities of the same seven substances listed in 401(a)(1).

Each subsection in 401(b), sets forth 3 tiers of punishment based on ascending quantities. While amounts are suggested, they are bracketed in recognition that significant trafficking in Wyoming will handle different amounts than those in Florida.

Because prison overcrowding is a significant concern in the vast majority of jurisdictions, the bracketed amounts and years will permit states to identify those limited circumstances where some mandatory time is appropriate. A state with overcrowded prisons may place the amounts quite high and the years relatively low. Nevertheless, these provisions permit a state to identify those for whom prison space should be made. For drug traffickers certainty is at least as important as severity.

Hypothetical

The State of Justice adopts Section 401(b) of the proposed amendments to the UCSA and sets the threshold amount for imposition of enhanced or mandatory minimum penalties in large-scale trafficking cases involving cocaine at 500 grams or more of a mixture or substance containing cocaine and at five grams or more of a mixture or substance containing cocaine base ("crack").

Sometime thereafter, a drug courier named Sally Mule enters the State of Justice with one kilogram of 80 percent pure cocaine powder (cocaine hydrochloride) concealed on her person. Mule delivers the cocaine to Joe Doper pursuant to instructions from the supplier for whom she works. Joe Doper pays for the cocaine using money provided by Jack Financial, a well-to-do "investor" who has agreed with Doper that he will "front" the money for the cocaine but only after telling Doper that he doesn't want to know the specifics of the drug transaction and doesn't want to come anywhere near the cocaine itself.

Doper takes the kilogram of cocaine and "cuts" it once by adding one kilogram of Mannitol to create two kilograms (2,000 grams) of cocaine powder at less than 50 percent purity. He gives 1,000 grams of the diluted cocaine to Tom Aider and 1,000 grams to Dick Abettor. Tom Aider splits his cocaine into four equal quantities of 250 grams apiece for delivery to four of his "clients" and makes the deliveries.

Dick Abettor runs a chain of "stash houses" for the manufacture of "crack" throughout the city and delivers quantities of the cocaine to each of the houses where it is quickly converted into 100 grams of crack for delivery to the large number of "street dealers" working out of each of the houses. The police "take down" two of the houses later that day. In "House A", they find only one individual and 25 grams of crack. In "House B" they also find only one individual and 11 grams of crack divided into numerous plastic vials. Laboratory analysis of the 11 grams of crack reveals that it contains 9.8 percent of cocaine base.

Analysis

If Mule were arrested upon entering Justice, she would be subject to an enhanced or mandatory minimum penalty under Section 401(b) based upon her possession of the one kilogram of cocaine. This would be true notwithstanding her role as a "mere" courier because of her instrumental role in supplying the cocaine markets in Justice. However, a judge could consider her "minor" role in the drug trafficking scenario as a mitigating factor in setting a sentence within the range provided by Section 401(b). Moreover, if she agreed to make a "controlled delivery" of the cocaine to Doper following her arrest, she might avoid the enhanced or mandatory minimum penalties based upon her "substantial assistance" to law enforcement.

Both Doper and his co-conspirator, Jack Financial, would be subject to the enhanced or mandatory minimum penalties. Doper, of course, would be liable based on his role in trafficking the cocaine. Financial would be subject to the same penalties because he conspired with Doper concerning the acquisition of more than 500 grams of cocaine. This would be true notwithstanding his affirmative efforts to insulate himself from the drug trafficking.

Tom Aider and Dick Abettor would be subject to the penalties under Section 401(b) based on the fact that each of them distributed 1,000 grams of cocaine powder. This would be true notwithstanding the fact that the powder was less than 50 percent pure and thus contained less than 500 grams of pure cocaine because the penalties under Section 401(b) are based upon "gross weight," including that of any cutting agent, in order to reflect the realities of the drug markets.

The person found in "House A" would be subject to the Section 401(b) penalties based on his possession of 25 grams of crack (cocaine base). The person in "House B" would be subject to the same penalties based on his possession of the 11 "gross weight" grams of crack. It would defy credulity for either of these individuals to claim that they possessed such a large quantity of crack – a quantity set by the State Legislature of Justice to reflect the quantity typically involved in large-scale trafficking in Justice – merely for purposes of personal use.

The national market for narcotics and illegal drugs in the United States is pyramidal in structure. At the apex of the pyramid are the large-scale traffickers and suppliers who either import controlled substances into the United States or who deal in bulk quantities of controlled substances to smaller-scale drug wholesalers. In the middle, are the drug wholesalers who sell wholesale quantities of controlled substances to drug retailers or "street dealers." At the bottom of the pyramid are the ultimate consumers who buy small quantities of controlled substances for personal use. Together, the drug cultivators, manufacturers, smugglers, wholesalers, and all persons who assist them, make up what is known as the "supply-side" of the drug market.

UCSA does not differentiate between drug wholesaler/suppliers and drug retailers in terms of the penalties for trafficking offenses. Both are subject to the same range of penalties regardless of the quantity of drugs involved in their respective offenses. Both are eligible for probation, parole, or suspension of sentence. As a result, persons convicted of trafficking in relatively large "wholesale" quantities of controlled substances often avoid imprisonment altogether while drug retailers, convicted of trafficking in lesser quantities of the same controlled substance, often receive very substantial terms of imprisonment.

Section 401(b) of the proposed amendments to the UCSA will rectify this situation by allowing states to impose greatly enhanced maximum prison terms and, at their option, mandatory minimum prison terms on those involved in supplying the retail drug markets as indicated by the quantity of drug involved in the offense. Only the most

commonly abused substances have been singled out for "penalty enhancement" under this provision. Both the quantity of drug involved in the offense and the length of the prison term(s) to be served have been left bracketed to allow the individual states to set levels that reflect both the realities of their individual drug markets and the abilities of their prison systems to absorb those sentenced to mandatory minimum prison terms. The "mandatory minimum" option will permit a state to prioritize its scarce prison space for a class of drug offenders who in the view of its legislature, should go to prison in every case.

This provision of the proposed amendments is based on federal legislation. In 1986, Congress acted to combat the "supply-side" of the drug market by providing for the imposition of "mandatory minimum" prison terms against those who traffic in particularly large quantities of the most commonly abused controlled substances. *See* 21 U.S.C. §841(b)(1)(A)-(B) and §960(b)(1)-(2). These provisions require courts to impose prison terms of at least the specified minimum (*e.g.*, five or ten years), which varies depending on the quantity of drug involved in the offense and the prior drug conviction record of the defendant; they also allow the court, in its discretion, to impose a higher prison term up to the specified maximum. Persons sentenced under these provisions are not eligible for probation, parole or suspension of sentence but must serve the entire term of imprisonment imposed.

Congress stated its "strong belief" that:

> [T]he Federal government's most intense focus ought to be on [those] who are responsible for creating and delivering very large quantities of drugs....[Thus,] the Committee [reserved the most severe penalties for offenses involving] quantities of drugs which if possessed by an individual would likely be indicative of operating at such a high level. The quantit[ies] [are] based on the minimum quantity that might be controlled or directed by a trafficker in a high place in the processing and distribution chain.

The Committee determined that a second level of focus ought to be on the managers of the retail level traffic, the person who is filling bags with heroin, packaging crack into vials, or wrapping PCP into aluminum foil and doing so in substantial street quantities. The Committee is calling such traffickers serious traffickers because they keep the street markets going. [These traffickers are subject to a lesser level of mandatory minimum penalties.] H.R. Rep. No. 845, 99th Cong., 2d Sess. 11-12 (1986).

The federal mandatory minimum sentencing provisions have fulfilled their purpose of insuring that persons who traffic in extremely large quantities of the most commonly abused substances—and thus supply the retail markets—will face substantial prison terms which must be served in their entirety. The federal government has had enormous success with these provisions and, as discussed below, they have been consistently upheld by the federal courts. In addition, several states (*e.g.*, Florida) have enacted mandatory minimum prison terms for persons trafficking in large amounts of the most commonly abused substances.

A considerable body of caselaw has developed construing various features of the federal provisions which are also found in the proposed UCSA amendments. The following discussion addresses several of the more salient features. It also addresses the various unsuccessful constitutional challenges to the federal mandatory minimum sentencing scheme.

"Mixture or Substance"

The non-mandatory and unenhanced penalty provisions of Section 401(a) and the "enhanced/mandatory minimum" penalty provisions of Section 401(b) of the proposed amendments to the UCSA use a term from the federal mandatory minimum sentencing provisions in that they speak of a "**mixture or substance** containing [a specified controlled substance]." The purpose of this phrasing is to eliminate any concern with the purity of the controlled substance in determining which range of penalties apply to a particular offense. In other words, courts would take the controlled substance "as is" and consider only the gross weight—including the weight of any "cut", binder, carrier-medium or excipient—in determining the appropriate range of penalties under the statute.

Assume, for example, that a defendant stands convicted of distributing 100 grams of blotter paper that has been impregnated with LSD.[1] The net weight of the LSD in its pure form might be only 670 milligrams; under the proposed UCSA amendments, however, the trial court would consider only the gross weight of the substance, including that of the blotter paper medium, in determining the appropriate range of penalties for the defendant. The court could then select, from within that range of penalties, a higher or lower sentence based on the relative purity of the drug involved in the particular offense or any other factor that the court might consider in aggravation or mitigation of sentence.

Under the federal system, the aforementioned defendant would be subject to the penalties for trafficking offenses involving ten grams or more of "a mixture or substance containing a detectable amount of [LSD]" which requires imposition of a term of imprisonment ranging from ten years up to life if the defendant has no prior felony drug convictions. *See* 21 U.S.C. §841(b)(1)(A)(v). This would be true notwithstanding the fact that the net weight of the LSD was 670 milligrams. *See United States* v. *Marshall*, 706 F. Supp. 650 (C.D. Ill. 1989). The seeming harshness of this result disappears when one considers that, in the Marshall case, the defendant distributed 113 grams of blotter paper impregnated with 670 milligrams of LSD which translated into 11,751 "hits" or individual doses of LSD, with each "hit" sufficient to induce a "trip" lasting several hours or more. *Id.* at 651. *Accord United States* v. *Bishop*, 704 F. Supp. 910 (N.D. Iowa 1989) (punishment imposed based on gross weight of 19.75 grams of blotter paper impregnated with 263 milligrams of LSD constituting 2,630 individual "hits" or doses". *See also United States* v. *Smith*, 840 F.2d 886 (11th Cir. 1988) (punishment imposed based upon gross weight of a mixture containing cocaine base). *Cf. United States* v. *McGeehan*, 824 F.2d 677, 681 (8th Cir. 1987) (noting *in dicta* the use of the phrase "mixture or substance containing a detectable amount of [LSD] 'demonstrates' that Congress was aware of the difference between LSD and LSD combined with a carrier substance").

This reliance on gross weight in setting the ranges of enhanced or mandatory minimum penalties simply reflects the realities of the modern drug markets in which drugs are commonly marketed based not on purity but on the gross weight of the substance in question. *See* H.R. Rep. No. 845, 99th Cong., 2d Sess. at 12 (Congress took a "market-oriented approach" based upon "quantities...of mixtures, compounds, or preparations that contain a detectable amount of the drug—these are not necessarily quantities of pure substance"). Thus, a trafficker purchasing a kilogram of cocaine or heroin will expect that the kilogram is actually a mixture containing cocaine or heroin that has been "cut" or "stepped on" several times—the number of "cuts" will vary depending on the position of the seller and purchaser within the overall chain of distribution. As noted earlier, courts retain discretion to impose the highest penalties within the specified range on persons trafficking in large quantities of very pure substan-

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1. LSD, like many other controlled substances, is far too potent in its pure form to be of any use to anyone who would ingest it. It is necessary, therefore, to dilute the LSD prior to ingestion. LSD is commonly mixed with an alcohol solution in which the LSD molecules are diluted and dispersed while, at the same time, retaining their hallucinogenic properties. This alcohol-based liquid has a tendency to evaporate over time; thus, various means have been devised to "capture" the diluted LSD in a stable "carrier-medium" which may be easily digested. The most common methods include placing drops of the LSD/alcohol solution on small squares or onto sugar cubes. The carrier-medium containing the LSD is then sold to users who ingest the entire substance. Other controlled substances such as heroin, cocaine, and methamphetamine are commonly "cut" with non-active ingredients to reduce their purity and potency prior to human ingestion. The important point is that the blotter paper itself—or any other form of dilutant, cutting agent, or carrier-medium—is intended to be ingested by the user with the drug itself.

ces while imposing lesser penalties on persons trafficking in equal quantities of highly diluted or "cut" substances.

Federal courts have consistently upheld the rationality of this sentencing scheme based on gross weight against charges that it arbitrarily ignores factors of purity and therefore violates due process. For example, one court ruled, in rejecting such a challenge, that:

> Congress clearly intended to base [the] mandatory minimum sentences on **quantity**. Congress' objective is rationally related to the means chosen. Large-volume dealers, regardless of purity of narcotic, pose a substantial danger to society.

United States v. *Klein*, 860 F.2d 1489, 1500-01 (9th Cir. 1988) (emphasis in original). Similarly, a panel of the Fourth Circuit has held that:

> [w]hile there may well be incidences where the quality of cocaine involved could have an impact on whether the upper echelons of criminal society will be more severely punished, we think that measuring the criminal's punishment by the quantity of bulk drug material rationally serves Congress' intent to punish drug traffickers severely.

United States v. *Whitehead*, 849 F.2d 849, 860 n.26 (4th Cir.), *cert. denied*, 109 S. Ct. 534 (1988). *Accord United States* v. *Jackson*, 863 F.2d 1168, 1171 (11th Cir. 1989); *United States* v. *Ramos*, 861 F.2d 228, 231 (9th Cir. 1988); *United States* v. *Solomon*, 848 F.2d 156, 157-58 (11th Cir. 1988); *United States* v. *Savinovich*, 845 F.2d 834, 839 (9th Cir), *cert. denied*, 109 S. Ct. 369 (1988); *United States* v. *Holmes*, 838 F.2d 1175, 1177-78 (11th Cir.), *cert. denied*, 108 S. Ct. 2829 (1988); *United States* v. *Brady*, 680 F. Supp. 245, 247 (W.D. Ky. 1988).

Finally, it must be pointed out that the "gross weight" sentencing scheme is rational because it merely sets a range of penalties and, by implication, "permit[s] differentiation between different defendants based on aggravating factors such as the defendant's role in distributing narcotics or the purity of the narcotics." *See United States* v. *Pineda*, 847 F.2d 64, 67 (2d Cir. 1988) (*per curiam*). Indeed, "[i]t is clear that a ... court, in its discretion, may impose a sentence above the mandatory minimum, and up to the statutory maximum, whenever such aggravating factors are present." *Id.* The discretion of a court to impose greater or lesser sentences depending on the presence of aggravating or mitigating factors is discussed in greater detail in another subsection below.

As these cases and the federal experience make clear, ordering a scheme of enhanced penalties based on the gross weight of the controlled substance involved in an offense is rational, constitutional, and effective.

"Mixture or Substance" in 401(b)

The enhanced or mandatory minimum sentencing provisions of Section 401(b) were amended by the Conference to replace the term "mixture" with the phrase "mixture **or substance.**" This phrase is also found in the standard penalty provisions of Secion 401(a). As just explained, the terms "mixture" and "mixture or substance" are both intended to refer to the "gross weight" of a controlled substance as it is found at the time of seizure, including the weight of any cutting agents, carrier-mediums or excipients. The expression "mixture or substance" is used in the federal mandatory minimum sentencing scheme to refer to the same principle: the "gross weight" of the controlled substance. As set forth below, however, some federal courts have begun distinguishing between what constitutes a "mixture" and what constitutes a "substance" in cases involving blotter paper that has been saturated with LSD. This distinction has no effect on federal law enforcement because the federal statute employs the phrase "mixture or substance." However, such a distinction would have had unintended consequences in a state adopting the proposed amendments to the UCSA if Section 401(b) referred only to "mixtures" because many large-scale dealers of "substances" could thereby avoid the enhanced or mandatory minimum penalties. The Conference therefore substituted the term "mixture or substance" for the term "mixture" wherever it appeared in Section 401(b).

As just noted, federal courts construing the phrase "mixture or substance containing a detectable amount" have recently begun to ascribe different meanings to the term "mixture" and the term "substance" in cases involving blotter paper that has been saturated with LSD for purposes of

"street distribution." These courts have held that LSD, in its highly concentrated liquid form, constitutes a "mixture" while the blotter paper that has been saturated with the liquid LSD constitutes a "substance." One court, for example, recently rejected the argument that the term "mixture or substance" applied only to LSD in its liquid state and thus would not include the weight of any blotter paper carrier-medium:

> If the legislature had intended to go after LSD regardless of its purity, it could have stopped with the word "mixture"—that word alone encompasses the meaning Defendant ascribes to the statute. But the legislature went on and included the words "or substance containing a detectable amount" of LSD. This latter phrase goes beyond merely the mixture of the drug itself—it clearly contemplates the medium in which the drug is ingested, be it paper, sugar cube, chocolate chip cookies or any other substance"....Congress clearly understood the import of the words "mixture" and "substance" containing a detectable amount.

United States v. *Marshall*, 706 F. Supp. 650, 653 (C.D. Ill. 1989). Another court noted that:

> The question the court must resolve is whether the blotter paper in which the LSD was dispersed is "a mixture or substance" under the statute. The court finds that the blotter paper, which held the LSD in this case, is a "substance" which contains a detectable amount of LSD.

United States v. *Bishop*, 704 F. Supp. 910, 912 (N.D. Iowa 1989).

Section 401(b) was therefore amended to replace the term "mixture" with the phrase "mixture or substance" throughout the subsection, thereby avoiding the unintended distinction drawn in the foregoing cases.

Recommended Amendment—"Cocaine Base"

Section 401 draws a distinction between "cocaine base" and all other forms and derivatives of cocaine. In 401(b) this will enable states to set a lower threshold quantity for offenses involving the more dangerous and highly addictive "base" form of cocaine known as "crack" than for all other forms of cocaine. Some have expressed concern over the lack of a definition for the term "cocaine base" to be used in Section 401(b). However, the term is well-known to organic chemists and needs no further definition.

It should be noted that "the phrase 'cocaine base' is...included without definition in numerous state statutes." *See Brown*, 859 F.2d at 977 (citing Cal. Health & Safety Code Section 11054 (f)(1)). Moreover, the federal mandatory minimum sentencing scheme draws a distinction between "cocaine base" and all other forms of cocaine and does not define the term "cocaine base." The use of the undefined term "cocaine base" has been upheld as rational and as presenting no opportunity for prosecutorial abuse:

> If cocaine base is involved [in the offense], the defendant must be sentenced under...the more specific provision dealing with cocaine base....There is no inconsistency with Congress' [treatment of cocaine base [as opposed to other forms of cocaine].

Id. at 976-77. The same court found that the undefined term "cocaine base" was not vague:

> The government [in using the term "cocaine base"] adopts the nomenclature of organic chemistry which classifies compounds with the hydroxyl radical (OH-) as a base and those with the hydrogen nucleus (H+) as an acid. "Cocaine base" therefore is any form of cocaine with the hydroxyl radical; "cocaine base" excludes...the salt forms of cocaine.

Id. at 976. *Accord United States* v. *Collado-Gomez*, 834 F.2d 280 (2d Cir. 1987) (*per curiam*) (noting that Congress provided for enhanced penalties for offenses involving specified amounts of "a particularly addictive form of cocaine base, known as 'crack'").

Moreover, federal courts have consistently recognized that the term "cocaine base" means "crack" as opposed to other forms of cocaine. *See, e.g., United States* v. *Robinson*, 870 F.2d 612, 613 (11th Cir. 1989); *United States* v. *Ryan*, 866 F.2d 604, 605 (3rd Cir. 1989) (police officers "dis-

covered cocaine base or 'crack'" inside bag); *United States* v. *Johnson*, 862 F.2d 1135, 1137 (5th Cir. 1988) ("suitcases contained plastic bags filled with cocaine in base form, commonly known as 'crack'"); *United States* v. *Felix-Cordero*, 859 F.2d 250, 251 (2d Cir. 1988) (agents "arranged to purchase 200 vials of 'crack' (cocaine base)"); *United States* v. *Bartley*, 855 F.2d 547, 549 (8th Cir. 1988) (agent purchased "crack cocaine" which "was later analyzed to be 1.7 grams of cocaine base"); *Mitchell*, 699 F. Supp. at 2 ("paraphernalia commonly used to distribute cocaine base or 'crack'"); *United States* v. *Rodriguez*, 691 F. Supp. 1252 (W.D. Mo. 1988) (defendant "convicted of selling cocaine base ('crack')"); *United States* v. *Nenadich*, 689 F. Supp. 285, 285-86 (S.D.N.Y. 1988) ("indictment charged defendants with possessing cocaine base (commonly known as 'crack') with intent to distribute"); *United States* v. *Horton*, 685 F. Supp. 1479, 1480 (D. Minn. 1988) (defendant charged with "possession with intent to distribute cocaine base (crack)").

Deletion of Ambiguous Language in 401(b)

Section 401(b) of the proposed amendments to the UCSA is intended to give states the option of imposing "mandatory minimum" prison terms for serious trafficking offenses involving large quantities of certain controlled substances. The Section as presently drafted deletes language from the federal mandatory minimum sentencing provisions which has been criticized by the federal courts as inherently ambiguous.

The federal mandatory minimum sentencing provisions, which clearly were intended to provide for mandatory prison terms and optional fines, contains ambiguous language. For example, 21 U.S.C. §841(b)(1)(B) provides that a person convicted of a trafficking offense involving between 500 grams and five kilograms of a mixture or substance containing a detectable amount of cocaine:

> shall be sentenced to a **term of imprisonment** which may not be less than five years and not more than 40 years..., **a fine** not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000..., **or both**..

Defendants have unsuccessfully argued that this statute imposes two inconsistent penalty schemes, one allowing a court to impose merely a fine and the other requiring imposition of a five-year minimum term of imprisonment. *See, e.g., United States* v. *Colon-Ortiz*, 866 F.2d 6 (1st Cir. 1989); *United States* v. *Musser*, 856 F.2d 1484, 1486 (11th Cir. 1988); *United States* v. *Restrepo*, 676 F. Supp. 368 (D. Mass. 1987).

The federal courts, in rejecting these arguments, have relied on the fact that the legislative history of the sentencing provisions clearly states that Congress intended to require imposition of mandatory minimum prison terms and the fact that a separate provision in the same subparagraphs states that no person "sentenced under this subparagraph" shall be eligible for parole, probation or suspension of sentence, *Colon-Ortiz*, 866 F.2d at 9-10; *Restrepo*, 676 F. Supp. at 372-75. However, these courts have also criticized the ambiguity created by the inclusion of the term "**or both** " at the end of the penalty provisions.

For example, the panel in *Colon-Ortiz* stated:

> We cannot say that Section 841(b)(1)(B) as drafted affords fair notice to individuals as to the consequences of [a trafficking violation]. The express language of the statute describes two alternative penalty schemes that are directly contradictory. Given the "or both" language contained in the first sentence, the penalty provisions would appear to allow a court to consider the imposition of a prison term or a fine to be alternatives: "such person shall be sentenced to a term of imprisonment..., a fine..., or both". The [no parole, no probation, no suspension of sentence] language that concludes the paragraph, however, is strong indication that the statute calls for a mandatory term of imprisonment....The language of the statute is not only inconsistent, but is directly contradictory. This lack of clarity on the face of [the statute] constitutes a notice deficiency and raises serious due process concerns.

866 F.2d at 9. The panel, however, reviewed the statute's legislative history and other related sentencing provisions and concluded that:

> **[T]he "or both" language... was an inadvertent drafting error, and should be stricken from the statute.** We...conclude that Congress clearly intended to impose mandatory prison terms under this sentencing provision. **The notice deficiency in the statute can be cured easily by striking the "or both" language....**[T]he correct interpretation of the statute is to disregard the "or both" language, thus clarifying the penalties for violating [the trafficking statute].

Id. at 10-11. *Accord United States* v. *Musser*, 856 F.2d 1484, 1486 (11th Cir. 1988) ("The language ['term of imprisonment...,or fine..., or both'] might have been more precisely drafted, but lack of precision does not render it unconstitutionally vague").

There is no room for such an ambiguity and "notice deficiency" in a "uniform act." Thus the penalty provisions of Section 401(b) provides as follows:

"[may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ]."

"Possession" Offenses

It should be noted that Section 401(b) provides for imposition of the enhanced or mandatory minimum penalties for offenses involving possession of the large-scale quantities of controlled substances specified therein. This provision is plainly rational because the threshold quantities to be specified in Section 401(b) are those which would typically be involved in large-scale drug trafficking within the state in question. Indeed, it would defy credulity for anyone to claim to possess such quantities for purposes of personal use. This reflects the rule of law that possession of large quantities of a controlled substance, standing alone, may constitute sufficient evidence of possession with intent to distribute. *See, e.g., United-States* v. *Olivier-Becerril,* 861 F.2d 424, 426 n.1 (5th Cir. 1988); *United States* v. *Shum*, 849 F.2d 1090, 1095 (8th Cir. 1988); *United States* v. *Quintero*, 848 F.2d 154, 156 (11th Cir. 1988); *United States* v. *MacDougall*, 790 F.2d 1135 (4th Cir.1986).

Mandatory Minimum Penalties Do Not Unduly Restrict a Court's Discretion or Limit the Role of Counsel at Sentencing

Courts have consistently held that the federal scheme of mandatory minimum penalties based upon the gross amount of controlled substance involved in a drug offense do not unduly restrict a court's discretion at sentencing. For example, a panel of the Eleventh Circuit has held that:

> the statute only establishes the minimum and the maximum number of years to which a defendant may be sentenced and in no way circumscribes [the Federal provisions] which permit a defendant to present information concerning his background, character and conduct to aid the sentencer in determining an appropriate sentence. Thus, within the congressionally established range for sentences, nothing in [the statute] restricts the discretion of a sentencing judge in fashioning an individualized sentence in light of the specific facts of the offense or history of the offender.

Holmes, 838 F.2d at 1177. *Accord United States* v. *Kidder*, 869 F.2d 1328, 1334 (9th Cir. 1989); *Klein*, 860 F.2d at 1499; *Brady*, 680 F. Supp. at 248. Courts have also held that, because the "mandatory minimum" penalty scheme does not unduly restrict a judge's discretion at sentencing it does not violate the "separation of powers" doctrine. *See, e.g., Jackson*, 863 F.2d at 1171; *United States* v. *Linn*, 862 F.2d 735, 742 (9th Cir. 1988); *Klein*, 860 F.2d at 1499; *United States* v. *Kinsey,* 843 F. 2d 383, 393 (9th Cir.), *cert. denied*, 109 S.Ct. 99 (1988); *Holmes*, 838 F.2d at 1178.

Similarly, courts have consistently held that the "mandatory minimum" penalty scheme does not deny a defendant's Sixth Amendment right to counsel at sentencing.

> The Act provides a range—the range between the Congressionally established minimum and maximum sentences—of punishment for [drug] distribution. Counsel can assist a defendant with respect to the sentence imposed by the sentencer within [that

range].

Holmes, 838 F.2d at 1178. *Accord Klein*, 860 F.2d at 1501; *Pineda*, 847 F.2d at 67; *Brady*, 680 F. Supp. at 248.

Mandatory Minimum Penalties for Serious Drug Offenses Do Not Constitute "Cruel and Unusual" Punishment

Federal courts have consistently held that the "mandatory minimum" sentencing scheme for drug offenses involving large quantities of drugs does not constitute "cruel and unusual punishment" in violation of the Eighth Amendment. For example, one court noted that:

> Congress determined that the distribution of certain dangerous narcotics, such as cocaine base, constituted a national menace and therefore created a comprehensive scheme of graduated penalties proportionate to the nature and severity of the offense in question. We do not find that the penalties Congress provided are cruel or unusual.

United States v. *Brown*, 859 F.2d 974, 977 (D.C. Cir. 1988) (*per curiam*). *Accord Jackson*, 863 F.2d at 1171; *Linn*, 862 F.2d at 742; *Ramos*, 861 F.2d at 232; *Klein*, 860 F.2d at 1495-98 (noting, with approval, the Congressional conclusion that "possession of a sizable quantity of one of [the listed drugs] with intent to distribute is a grave offense" (*emphasis in original*)); *United States* v. *Cook*, 859 F.2d 777, 778-79 (9th Cir. 1988); *Musser*, 856 F.2d at 1486; *United States* v. *Zavala-Serra*, 853 F.2d 1512, 1518 (9th Cir. 1988); *Whitehead*, 849 F.2d at 860; *Solomon*, 848 F.2d at 157; *Savinovich*, 845 F.2d at 840 ("[i]n light of the severity of the crime and drug-related problems of today's society, we find that [the sentencing scheme] is proportionate to the crime committed"); *United States* v. *Murillo-Guzman*, 845 F.2d 314, 315 (11th Cir. 1988) (*per curiam*); *Kinsey*, 843 F.2d at 392-93; *Holmes*, 838 F.2d at 1178-79; *Brady*, 680 F. Supp. at 247; *Restrepo*, 676 F. Supp. at 377-78.

Defendant's Role in Drug Trafficking

Numerous courts have held that imposition of enhanced or mandatory minimum penalties, based upon the quantity of drug involved in the offense, is permissible notwithstanding the fact that the defendant may have played a minor or peripheral role in drug trafficking (*e.g.*, as a courier or "mule"). Indeed, courts express disdain for claims that defendants who play relatively minor or peripheral roles should be subject to non-mandatory penalties notwithstanding the quantity of drug involved in their respective offenses. For example, a panel of the Eleventh Circuit expressed its:

> disagreement with the appellant's characterization of his role as that of a mere courier. No drug organization can survive without the services of such individuals. While couriers may not share the same authority as others involved in a drug operation, they are nonetheless indispensable to the success of the operation, and thus Congress could certainly conclude that they are an appropriate target in the effort to halt the flow of drugs into and around the nation.

United States v. *Rodriguez-Suarez*, 856 F.2d 135, 137 n.1 (11th Cir. 1988). Moreover, the Supreme Court has lamented the contribution of "mules" and couriers to "the veritable national crisis in law enforcement caused by the smuggling of narcotics." *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 538 (1985).

Other courts are in agreement. *See, e.g., Cook*, 859 F.2d at 779 ("[Appellant] argues that she was merely a 'mule' doing the bidding of more sophisticated dealers. We are not persuaded that this diminishes the level of culpability that attaches to her acts)"; *Solomon*, 848 F.2d at 157 ("Congress could rationally have concluded that the possession with intent to distribute of a fairly large quantity of cocaine base, a dangerous controlled substance, posed a particularly great risk to the welfare of society warranting heavy sentences, regardless of the individual offender's particular position in the drug operation's hierarchy."). *See also United States* v. *Mitchell*, 699 F. Supp. 1, 3 (D.D.C. 1988) ("These ["crack"] couriers are in reality merchants of death. It is vital to the well-being of the city that trafficking of this type be stopped").

Application of the mandatory minimum penalties to such minor players is greatly mitigated by the fact that, as previously noted, courts have

"wide discretion to sentence a defendant within a range above the statutory minimum and may take into account factors such as the role of a particular offender." *Murillo-Guzman*, 845 F.2d at 315.

SECTION 402. PROHIBITED ACTS B -; PENALTIES

SUBSECTION (c)

Drugs are generally dealt in the relative security of motel rooms, houses, apartments and other structures leased, owned or controlled by the criminals dealing drugs. While most hotel, motel, apartment and property managers recognize that drug dealing is both criminal and, in the long run, bad for business, proposed subsection (c) provides sanctions for unscrupulous profiteers who give safe haven to those dealing drugs. Persons who knowingly permit drugs to be dealt are subject to felony prosecution.

Criminal activity committed by trespassers and activity that is reported to law enforcement do not, of course, subject persons to prosecution under this subsection. America's police and prosecutors are greatly encouraged by the fact this fair but tough strategy came about as a result of amendments from the floor during the 1988 Annual Meeting of the National Conference of Commissioners on Uniform State Laws.

SECTION 404. COUNTERFEIT SUBSTANCES PROHIBITED; PENALTY

This Section of the proposed amendments to the UCSA targets controlled drugs, illegally produced, which bear trademarks of legitimate companies. The problem this section addresses is typified with the drug commonly known as Quaaludes or Methaqualone. Methaqualone has commonly been manufactured in clandestine laboratories and then stamped with the legitimate manufacturer's imprint. These drugs, often contaminated and impure, are then sold as the genuine product in both legitimate and illegitimate markets. Counterfeiting has also occurred with Valium, Demerol and other frequently prescribed pharmaceuticals.

SECTION 405. IMITATION CONTROLLED SUBSTANCES PROHIBITED; PENALTY

This proposed Section prohibits the dealing in "turkey dope" or substances sold or held for sale as controlled drugs "speed" or cocaine which in fact are non-controlled substances such as caffeine or lidocaine. This must be contrasted with Section 404's prohibition of counterfeit substances in that counterfeit drugs are in fact controlled substances bearing a counterfeit marking while imitation controlled substances are not controlled drugs but rather non-controlled sold as controlled drugs.

Sometimes these imitations of controlled substances are sold with the *ab initio* intent to defraud the customer. However, most drug operations will keep some "turkey dope" on hand to sell persons suspected of being informers of law enforcement officers. This provision sanctions drugs dealers who guess correctly.

SECTION 406. POSSESSION AS PROHIBITED ACT; PENALTIES

This provision of the proposed USCA amendments applies to users of illegal drugs. Persons distributing, manufacturing, or possessing with the intent to do either are addressed in Section 401(a). Persons possessing large quantities of the most commonly abused drugs are addressed in Section 401(b). Earlier drafts of the proposed UCSA amendments would have reduced all "simple possession" offenses to misdemeanors. This represented a dramatic retreat that was inconsistent with existing punishments in virtually every jurisdiction with respect to Schedules I and II drugs.

America's police and prosecutors support sentencing flexibility which permits probation coupled with treatment and education to provide a "second chance" for those who demonstrate an

acceptance of their personal responsibility. Nevertheless, the threshold position must continue to be that possessing drugs, particularly the "hard drugs" in Schedules I and II, is a serious offense and absent an affirmative willingness by a defendant to rehabilitate, should be punished accordingly. Common sense supports the reports of those in the field. The credible threat of stern punishment provides the best incentive for many, once caught, to rehabilitate themselves by taking advantage of education and treatment programs. Similarly, stern punishment is also the only sure way to protect society from those who have, through their conduct, demonstrated they are not prepared to function as law abiding members of our society.

SECTION 407. CONSPIRACY; PENALTY

Section 407 of the proposed amendments to the UCSA specifies that "[i]t is unlawful for any person to conspire to commit a violation of [the UCSA]" and that a person who so conspires "is guilty of a crime and upon conviction is subject to the same penalty as provided for the offense that was the object of the conspiracy." Under this provision, therefore, persons who conspire to commit serious drug offenses involving more than the threshold quantities of the controlled substances identified in Section 401(b) of the proposed amendments to the UCSA would be subject to the enhanced or mandatory minimum penalties specified in that subsection.

This is as it should be since the object of the drug laws generally, and the enhanced or mandatory minimum penalties more specifically, is to deter equally both conspiracies to commit drug offenses and the actual commission of those offenses. Quite often the evidence against major traffickers only supports a conspiracy conviction since these traffickers only make the deals and are extremely careful to insulate themselves from any contact with the drugs through the use of loyal subordinates. The same is true of those "financiers" who "invest" in major drug deals, expecting an extremely high rate of return, but who do not want to know or be exposed to any of the drugs or drug trafficking operations. If we are truly to deter large-scale drug trafficking, we must equally deter those who plan and agree on the commission of large-scale drug offenses as those more directly involved in the commission of such offenses. The penalty provision of Section 407 would accomplish this purpose.

The federal government realized this point in 1988 when it amended the federal conspiracy statutes, 21 U.S.C. §§846 and 963. In 1986, Congress had enacted a "mandatory minimum" sentencing scheme for certain large-scale substantive drug trafficking offenses. However, the "conspiracy" statutes specified that persons who conspired to commit drug crimes were punishable by "imprisonment or fine or both **which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the...conspiracy.**" The bolded language, when viewed together with the rule of lenity, was interpreted as subjecting defendants who conspire to commit certain large-scale drug crimes to the new enhanced maximum penalties applicable to the substantive offenses but not to the new "mandatory minimum" penalties applicable to those offenses. This was incompatible with the will of Congress to deter both conspiracies and substantive drug offenses with the same force. Thus, in 1988, Congress amended the conspiracy statutes to provide that persons who conspire to commit drug offenses "**shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the conspiracy.**"

The same policy would be effectuated through the adoption of Section 407 of the proposed amendments to the UCSA. Adoption of this provision would not mean that those who "merely" conspire to commit large-scale trafficking offenses would receive penalties **identical** to those who actually complete the offense. As explained earlier, it would merely mean that these offenders would be subject to the same **range of penalties.** The trial judge would retain discretion to impose a lesser sentence within that range on a "mere" conspirator than he might impose on the actual drug trafficker. Nor would adoption of this provision militate against effective plea bargaining since the prosecutor would retain the option of allowing a defendant to plead to a charge in which no specific quantity of drug is mentioned, thus not triggering the enhanced or mandatory minimum penalties.

SECTION 408. SOLICITATION; [ATTEMPT;] PENALTY

This proposed UCSA amendment is intended to permit proactive undercover law enforcement strategies which target ongoing criminal conduct. The provision as written applies to persons who knowingly or intentionally solicit the purchase of, or attempt to, purchase illegal drugs. To achieve its purpose, however, the section should also apply to persons who offer to sell illegal drugs. These individuals should not receive a windfall because the customer or seller is an undercover police officer who prevents the crime from being completed.

SECTION 409. DISTRIBUTION TO INDIVIDUAL UNDER AGE 18; DISTRIBUTION NEAR SCHOOLS OR COLLEGES; PENALTIES

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

Hypothetical

Joe Doper is the 30-year-old kingpin of a street-level drug gang involved in the manufacture and sale of "crack" (cocaine base). Doper's distribution operation is run out of a bar, known as the "What It Is" lounge, which is located one block (300 feet) from the grounds of Mark Twain Elementary School. You cannot see the school from inside the bar because the bar has no windows. For the same reason, passers-by on the street cannot see into the bar. Doper's "stash house" where the "crack" is manufactured is located about one mile away, across the street from a public playground. Joe occasionally employs youngsters at the playground to act as "lookouts" for his "stash house" operation. He has taught them the identities of all undercover officers and of all unmarked cars.

At midnight on June 1, 1990, Joe gets a call from one of his corner "captains" that his dealers on that corner, which is a round-the-clock drug market, are running low on crack. Joe has his "cooker" make up 100 vials of crack which Joe then gives to a young "gofer" in the drug organization to take down to the bar and deliver it to the "captain." Unbeknownst to Joe, the "gofer" has just turned 18. He previously was employed as a "lookout" for one of Joe's corner "captains." The "gofer" takes the vials of "crack" and delivers them to the "captain" inside the bar at approximately 1:00 a.m.

The "captain" takes the crack and divides it up among his men working a corner that is several blocks away but still within 1,000 feet "as the crow flies" from Mark Twain school. One of the dealers is a 19-year-old named Curtis. Approximately one hour later, Curtis is approached by two individuals whom he knows to be crack addicts. Each of the individuals buys several vials of crack. Unbeknownst to Curtis, one of the individuals is 17 and the other is 16.

At the end of the night's shift, the "captain" collects the money from his team of dealers and drives to the bar to meet Joe. Joe arrives at the bar driving a 1990 BMW. It is approximately 8:30 a.m. and the bar is closed. The "captain" hands Joe a roll of cash as several students walk by on their way to school.

Analysis

Joe would be subject to the enhanced penalties under Section 409(b) of the proposed amendments to the UCSA for distributing the crack to the "gofer" within 1,000 feet of a public playground. This is true notwithstanding the fact that the transaction occurs past midnight when no juveniles are likely to be present at the playground. The purpose of Section 409(b) is to deter persons from conducting drug operations where the direct and indirect, immediate and more attenuated, consequences of those operations are likely to affect juveniles.

Joe would not be liable for distributing the crack to the "gofer" under Section 409(a) of the proposed amendments because the "gofer" has

just turned 18. If the "gofer" were under 18, Joe would be liable under Section 409(a) for distributing drugs to a juvenile and under Section 410(a) of the proposed amendments for using or hiring a juvenile to transport or carry a controlled substance. Joe would be liable under Section 410(a) for hiring juveniles to act as "lookouts" for his "stash house" operation. Like the federal statute on which it is based, Section 410(a) applies to those who employ juveniles to avoid detection or apprehension for a violation of the Act.

The "cooker" would face enhanced penalties under Section 409(b) for distributing the freshly made crack to Joe. However, the "cooker" would not be liable under Section 409(b) if all he did was manufacture the crack at the "stash house" and then personally carry it to a place more than 1,000 feet from a school or playground for distribution. This failure to include manufacturing offenses in Section 409(b) is troublesome because the "cooker" is just as likely as Joe to employ juveniles at the playground to act as "lookouts" and his operations will mean that drugs are readily available in the area around the playground whether he or one of his "clients" does the distribution. Under the federal statute on which Section 409(b) is based, the "cooker" would be liable for conducting a manufacturing operation within the prescribed distance from the playground.

The "gofer" would be subject to enhanced penalties under Section 409(b) for distributing the crack to the "captain" within 1,000 feet of a school. This is true notwithstanding the fact that the transaction cannot be seen from the school and that there are no juveniles likely to be present in or around the bar at 1:00 a.m. Again, the purpose of Section 409(b) is to deter persons from conducting their drug operations in areas where the direct and indirect consequences of those operations might affect juveniles. For the same reason, the "captain" and Curtis (indeed, all of the dealers on the corner) would be subject to enhanced penalties under Section 409(b) for distributing drugs within 1,000 feet of the school.

Curtis would also be subject to enhanced penalties under Section 409(a) for distributing crack to the 16-year-old, a juvenile who is more than two years his junior. This is true notwithstanding the fact that Curtis did not know the age of his customer. One who undertakes to sell drugs to young people should assume the risk that they may be juveniles for purposes of this statute. Curtis would **not**, however, be subject to the enhanced penalties under Section 409(a) as presently drafted, based on his sale to the 17-year-old juvenile, because of the requirement that the juvenile recipient of the drugs be two years the junior of the distributor. This requirement merely acts to protect the drug trafficker and should be eliminated.

One of the most devastating consequences of our national drug problem is the impact of drug trafficking on our nation's youth. Particularly in urban areas, young people are increasingly using dangerous and highly addictive drugs such as "crack", PCP, and methamphetamine which are readily available on many school grounds. Newspaper reports of pre-teen dropouts who have become major street-dealers of crack, often making thousands of dollars a week and spending it all on their own self-destruction, are commonplace. And, throughout our nation, drug traffickers have learned to hire juveniles as "lookouts" or street-dealers thereby reducing their own exposure to law enforcement authorities while, at the same time, resting secure in the knowledge that their juvenile "employees," if arrested, will face little or no "hard time" and therefore are unlikely to cooperate with law enforcement authorities. The consequence for our society is the complete and utter corruption of an increasing number of young victims.

Equally insidious, but more difficult to quantify, is the effect of exposing young people to the "rewards" of drug trafficking. Inner-city children are often forced to bear witness to the street-trafficking of illegal drugs on their way to and from their local schoolyards and playgrounds. Everyday, they see the large bankrolls of the street-dealers and the expensive cars and jewelry of the drug traffickers. Most of their parents undoubtedly aspire to a better life for their children and work to instill in them the values of hard work, ambition and achievement. These parents and children must overcome enormous obstacles and disadvantages even without the prevalence of open-air drug markets and "crack houses" operating throughout their neighborhoods. But the corrupting effect of the drug markets is nearly insurmountable. Children, who are not yet them-

selves drug users or employed by drug traffickers, must decide each day whether to resist or give in to the "easy money" and "free and easy" lifestyle that comes from selling drugs. Teenagers who work part-time in fastfood restaurants, strive to get into the best schools, join the armed services, or work to obtain a ROTC scholarship to college must seem foolish when one can literally make $5,000 a week or more dealing drugs on the street.

Sections 409 and 410 of the proposed amendments to the UCSA provide a much-needed degree of deterrence through the use of enhanced penalties against drug traffickers who would deal drugs to minors, employ minors in their drug-dealing organizations, or corrupt minors by conducting their drug-dealing activities within close proximity to schools and playgrounds.

Section 409(a) of the proposed amendments to the UCSA is modeled on the federal statute authorizing enhanced penalties for the distribution of drugs to juveniles: 21 U.S.C. §845. It is, however, somewhat narrower in scope than its federal counterpart. The federal statute applies to any person **at least 18 years of age** who distributes a controlled substance to any person **under 21 years of age.** This attacks those who are legally accountable as adults for their criminal conduct while, at the same time, deterring the distribution of controlled substances to those who are school-age (*i.e.*, under 21) or younger. Section 409(a) provides for enhanced penalties for a person **at least 18 years of age** who distributes a controlled substance to an individual who is **"under 18 who is at least two years [the distributor's] junior."**

The elimination of the federal requirement that the "customer" be **under 21** is less troubling than the additional requirement, under the proposed UCSA amendment, that the "customer" also be at least two years the junior of the "dealer." There is no sound policy reason for this requirement. If the purpose of the statute is to deter the distribution of drugs to juveniles by those who are legally accountable as adults for their criminal conduct, this requirement adds nothing to serve that purpose and, in fact, merely adds a loophole by which young adult drug dealers can deal drugs to teenagers who are less than two years their junior and escape the enhanced penalties. Thus, an 18-year-old could sell drugs to anyone who was 16 or 17 without fear of the enhanced penalties. This "two-year age differential" should be eliminated.

Section 409(b) of the proposed amendments to the UCSA is modeled on the federal "schoolyard statute": 21 U.S.C. §845a. It is, however, considerably narrower in scope than its federal counterpart. First, it applies only to distribution offenses whereas the federal statute applies to distribution, manufacturing, or possession with intent to distribute offenses. Thus, persons operating "crack" manufacturing operations or "meth labs" within 1,000 feet of the protected areas, but who do not distribute drugs at these sites, would not face the enhanced penalties under the proposed amendments to the UCSA whereas they would under the federal statute. Second, the scope of "protected areas" is narrower in that private vocational schools, junior colleges, youth centers, public swimming pools, and video arcade facilities are excluded from the proposed UCSA amendment. We support enactment of proposed Section 409(b) notwithstanding its considerably narrower scope.

Section 410 of the proposed amendments to the UCSA is modeled on the federal statute imposing enhanced penalties for persons who employ juveniles to violate any of the federal drug laws: 21 U.S.C. §845b(a). It is, however, somewhat narrower in scope than its federal counterpart because it does not impose enhanced penalties for those who receive a controlled substance from a person under 18 years of age other than an immediate family member. It does, however, address the primary kind of conduct which the statute was meant to deter: the employment of juveniles by adult drug traffickers. We support enactment of this provision.

Courts have long recognized the validity of the Congressional concern with protecting children from the multiple evils inherent in drug trafficking, even in prosecutions under the so-called "schoolyard statute" (21 U.S.C. §845a) where no children were present or involved in the charged drug offense.

> The presumption that narcotics sales in the vicinity of an elementary or secondary school endanger the students and thus should be subject to stiffer penalties is substantially related to Congress's interest in shielding these

children from the evils of the drug trade. Whether or not a child is involved in or otherwise present during any particular sale of narcotics within one thousand feet of a school, subjecting the seller to enhanced penalties reasonably may be expected to deter the seller and other illicit dealers from conducting their operations near school property in the future. In such areas, where children congregate in large numbers before, during, and after school sessions, they are readily subject to the evils of addiction, a hazard to them not only physically and psychologically, but financially, with the prospect that their need for drugs, once they are addicted, will lead them into a life of crime to obtain funds to support their habit. They may be drawn into drug rings as participants themselves, aiding the sales and distribution of narcotics to others, including their schoolmates. Indeed, judicial notice may be taken of the destructive results of drug addiction, the source of which Congress clearly intended to keep out of the easy reach of schoolchildren. **It is difficult to imagine a more rational way of keeping drug traffickers out of areas where children are more likely to come into contact with them than to subject them to the risk of stiffer penalties for doing business near school property....**[D]efendant fails to consider the long term effect of Section 845a on the health and welfare of schoolchildren in general.

United States v. *Nieves*, 608 F. Supp. 1147, 1149-50 (S.D.N.Y. 1985) *(emphasis supplied; footnote omitted)*. Another court has said:

> [T]he statute is designed to protect schoolchildren from the **direct and indirect dangers of the narcotics trade.** The statute attempts to do this by creating, in effect, a circular area, with a radius of one thousand feet, around all elementary and secondary schools which will be free of any narcotics traffic, **and all of the direct and indirect evils posed by this activity.**

United States v. *Cunningham*, 615 F. Supp. 519, 520 (S.D.N.Y. 1985) (*emphasis supplied*). Still another court has rejected a challenge that the conviction was based on a transaction that took place inside a dwelling entirely out of the sight of any students:

> The consequences of such transaction **inevitably flow from inside the dwelling to the violent and dangerous milieu Congress sought to eliminate in the proximity of schools.**

United States v. *Holland*, 810 F.2d 1215 (D.C. Cir.), *cert. denied*, 107 S. Ct. 2199 (1987).

Other cases upholding the foregoing federal statutes include the following: *United States* v. *Carter*, 854 F.2d 1102 (8th Cir. 1988) (affirming conviction for employment of minor under Section 845b; defendant need not know age of distributee; "[t]o rule otherwise would permit drug dealers to close their eyes to the age of the minors who become part of the operation, without fear of reprisal"); *United States* v. *Ofarril*, 779 F.2d 791 (2d Cir. 1985), *cert. denied*, 475 U.S. 1029 (1986) (schoolyard statute; defendant need not know he was within proscribed distance); *United States* v. *Agilar*, 779 F.2d 123 (2d Cir. 1985), *cert. denied*, 475 U.S. 1069 (1986) (presumption that those who deal drugs within 1,000 feet of school are deserving of enhanced punishment is rational and constitutional); *United States* v. *Jones*, 779 F.2d 121 (2d Cir. 1985), *cert. denied*, 475 U.S. 1031 (1986) (upholding constitutionality of schoolyard statute); *United States* v. *Falu*, 776 F.2d 46 (2d Cir. 1985) (defendant need not know he was within proscribed distance); *United States* v. *Pruitt*, 763 F.2d 1256 (11th Cir. 1985), *cert. denied*, 474 U.S. 1084 (1986) (affirming conviction for distribution to minor under Section 845; defendant need not have known age of distributee); *United States* v. *LaFluer*, 669 F. Supp. 1029 (D. Nev. 1987) (proper to charge distribution to minor notwithstanding fact that minor was willing co-conspirator); *United States* v. *Dixon*, 619 F. Supp. 1399 (S.D.N.Y. 1985) (presumption that those who deal drugs within 1,000 feet of school are deserving of enhanced punishment is rational and constitutional).

SECTION 411. CONTINUING CRIMINAL ENTERPRISE; PENALTY

Hypothetical

Mr. K operates a heroin and cocaine distribution ring from his residence in Phoenix, Arizona. He has been doing this for nine months. He receives his drugs from couriers who obtain the drugs in Mexico. The drugs are often imported in leased trucks under his direction. On occasion, Mr. K also goes to Mexico to pick up drugs and discuss business with his foreign importer. Mr. K imports five pounds of heroin and cocaine weekly. The drugs are stored at his residence where they are prepared for distribution. In Phoenix Mr. K has six dealers who, under the supervision of Mr. K, prepare the drugs for sale and distribute them to mid-level dealers. The books and records are kept at the house by the wife of Mr. K. This record contains the date of sale, the amount sold, the price paid and the dealer responsible for the sale. Mr. K has no other visible means of support. The business is a strictly cash business. Some of the proceeds are used to pay expenses, some are placed in bank accounts under the wife's name, and some are kept in the house. The wife has no other source of income. Search warrants are executed and $100,000 in cash is found at Mr. K's residence. Another $50,000 is found with one pound of cocaine. The records are also seized. The records reflect that the business has a gross income of $500,000 with expenses of $200,000 over nine months of operation. Records also show that Mr. K has used some of the drug proceeds to establish ABC Corporation. Mr. K has one general partner in ABC corporation who does not know about Mr. K's drug dealing activity nor that ABC Corporation was purchased with drug proceeds.

Analysis

Section 412 of the proposed amendments to the UCSA is designed to reach those persons who engage in a Continuing Criminal Enterprise. *Jeffers* v. *United States*, 97 S. Ct. 2207 (1977). To engage in a Continuing Criminal Enterprise a person must:

1) violate a felony provision of this Act;
2) that violation must be part of a continuing series of two or more violations;
3) act in concert with five or more persons;
4) act as an organizer, supervisor or manager and;
5) receive substantial income or resources.

Under theses criteria only Mr. K is indictable for violating Section 412. The enterprise is ongoing and has been for nine months. Weekly shipments of drugs are received. Mr. K acts as an organizer/manager over more than five people: the couriers, the dealers and his wife. There are more than two violations of this act including sale of drugs, possession for sale and trafficking. Under the comparable federal law, 21 U.S.C. §848(d), to establish a continuing "series" of violations the government must prove at least three felony violations, which does not mean the government must obtain convictions on a minimum of three felony violations nor that the defendant must be indicted on the eligible predicate felonies, *United States* v. *Young*, 745 F.2d 733 (2nd Cir. 1984). Section 412 does not apply to possessory offenses pursuant to Section 406 of the proposed UCSA amendments.

Mr. K has received substantial income. Substantial income or resources means the worth or value obtained from the enterprise, not the individual defendant. *United States* v. *Sisca*, 503 F.2d 1337 (2nd Cir. 1974). Income includes money or other property. *United States* v. *Jeffers*, 532 F.2d 1101 (7th Cir. 1976), *rev'd on other grounds*, 97 S. Ct. 2221 (1977). It is not net income.

Section 411 is patterned after federal law 21 U.S.C. §848, which was amended by the Anti-Drug Abuse Act of 1986, Pub. L. 99-570, Section 1253 which provides for enhanced punishment. This is a separate and distinct offense from the underlying predicate offenses. It punishes leaders of drug organizations and federally is commonly known as the "Drug Kingpin" statute. *United States* v. *Sinito*, 723 F.2d 1250 (Ohio 1983), *cert. denied*, 469 U.S. §817. The federal provision carries a mandatory sentence. 21 U.S.C. §848(a). In addition to the mandatory sentence, parole is unavailable. *United States* v. *Valenzuela*, 646 F.2d 352 (9th Cir. 1980). The mandatory sentencing provisions have been upheld as constitutional. *United States* v. *Erwin*, 793 F.2d 656 (5th Cir. 1986), *cert. denied* 107 S. Ct. 589.

In addition to the criminal liability, separate civil remedies are also available under the proposed amendments to the UCSA. Turning first to forfeiture remedies, property is forfeitable if 1) it was used in any manner or part to facilitate conduct giving rise to forfeiture; 2) it is proceeds of conduct giving rise to forfeiture or 3) it is an interest in any enterprise that was established, operated or controlled through conduct giving rise to forfeiture. The residence of Mr. K is forfeitable because it was used to store and prepare drugs for sale. The **entire** residence is forfeitable and not just that part of the residence directly connected with drug activity. The language is clear from the words "the whole of all property, including every divided or undivided interest." Innocent lienholders and good faith purchasers for value are protected. These include banks, mortgage companies, and other commercial interests. The bank accounts in the wife's name are also forfeitable because they are proceeds of the violation. The wife does not fall within an exemption under Section 505 because she is a co-conspirator and acted with knowledge of the unlawful activity.

The $100,000 in cash is also forfeitable because it is proceeds. There is probable cause to believe the $100,000 is proceeds because Mr. K's only known source of income is from drug dealing. Under Section 514(d)(3), a prima facie case for forfeiture of property exists if the person has engaged in conduct giving rise to forfeiture, the property was acquired during the period of time the conduct was engaged in; and there is no other likely source for the property other than the conduct giving rise to forfeiture. This provision is based on 21 U.S.C. §853(d) which has been found to be constitutional. *United States* v. *Sandini*, 816 F.2d 869 (3rd. Cir. 1987). *United States* v. *Haro*, 685 F. Supp. 1468 (Wis. E.D. 1988). The $50,000 in cash is also forfeitable for the same reasons. In addition, it was found with one pound of cocaine. Section 514(d)(2) authorizes a permissible inference that money is proceeds of drug dealing or used or intended for use to facilitate drug dealing if it is found in proximity with the drugs.

ABC Corporation is forfeitable because it was established with drug proceeds, but only to the extent of the proceeds invested. The general partner's interest is exempt from forfeiture because he was not a party to the drug activity nor did he have any knowledge of it. Therefore, Mr. K would lose his interests but the general partner would not.

Mr. K is not entitled to offset the forfeiture by the extent of his expenses, which are $200,000. The definition of proceeds in 501(4) is all property derived from the conduct giving rise to forfeiture without reduction for expenses incurred for acquisition, maintenance or any other purpose. Only legitimate businesses can deduct business expenses. Illegitimate businesses have no rational or principled basis to claim deduction of expenses.

Finally, the forfeiture remedies must provide remedies relating to the $500,000 Mr. K acquired, but which cannot be located, and the leased trucks used to transport drugs. To the extent the $500,000 can be traced through accounts or expenditures, those derivative properties are forfeitable. However, to the extent they cannot be located, Section 517 comes into play. This provision allows the court to substitute other property up to the value of the property subject to forfeiture if that property cannot be located, has been transferred to a third party, is beyond the jurisdiction of the court, has been substantially diminished in value, has been commingled or is subject to any interest exempted from forfeiture.

Mr. K is liable for up to $500,000, and any property up to that value can be applied to satisfy the judgment regardless of whether the substitute property was connected to drug activity. Mr. K made $500,000 and is liable to disgorge $500,000. If the original profit is unavailable, the court may substitute an asset in its place. The substitute asset provision is based on 21 U.S.C. §853(p). A similar concept relating to RICO forfeiture has been upheld in *United States* v. *Benevento*, 663 F. Supp. 1115 (S.D.N.Y. 1987), *affd.*, 836 F.2d 129 (2nd Cir. 1988).

As to the leased vehicles, they would normally be exempt from forfeiture as the lessor would have an exempt interest. However, under the substitute asset provisions, Mr. K would be liable for the value of the leased vehicle even though the leased vehicle would not be forfeited. Drug dealers often use leased vehicles to avoid the forfeiture remedies; yet they still enjoy the economic advantage the vehicle provides in promoting the drug activity. The drug dealer should be liable for

the value of the asset he or his enterprise used to promote drug activity.

These new criminal tools reflect the principled stand that the organization behind the growing drug industry needs to be targeted and dismantled along with its corollary financial wealth.

SECTION 412. MONEY LAUNDERING & ILLEGAL INVESTMENT; PENALTY

Hypothetical

Mr. D operates a cocaine and marijuana distribution business. He generates thousands of dollars in profits monthly. He has no other source of income. Mr. D. has a business arrangement with a local leasing company whereby Mr. D leases vehicles to transport drugs across the country. The lease company owner is aware of the use of the vehicles and charges an extra 10 percent over the standard rate. Some of the drug profits are given to Mr.C to invest in real estate and Mr. C is told these are drug proceeds and to put the property in the names of others. Mr. C advises Mr. D about state and federal forms that have to be filled out for the down payment of $12,000. Mr. C advises Mr. D to make two deposits of $6,000 in order to avoid the reporting forms. Mr. D is eventually arrested. Through the years Mr. D has employed an elite private attorney to represent him and the members of his drug organization in drug matters related to the ongoing cocaine and marijuana business. The attorney has always been paid with cash up front. Through the years, the attorney has known that Mr. D makes his money from drug dealing. Mr. D has often bragged to his attorney how lucrative cocaine dealing has been for him.

Analysis

This fact pattern repeats itself in every significant drug business. The organizers make money and require the assistance of others to keep the business operating and to transform the illicit cash into openly usable income. The money laundering provision is designed to drive the contributors of goods and services away from the drug trafficking industry. Previously this class of persons was not prosecutable. These people are not traditionally co-conspirators or aiders and abettors in the drug trade itself. Instead, they form a parallel support service by supplying advice, services or products that facilitate the main industry. The true pivotal point of liability is their culpability in knowingly promoting the flow of money in legitimate commercial avenues which has been corrupted and tainted by its drug genesis. Yet the federal money laundering statute did no go into effect until 1986. 18 U.S.C. §1956, 1957. The UCSA has no money laundering provision, but Section 412 of the proposed UCSA amendments would criminalize money laundering with drug proceeds. There is a growing trend with the states to criminalize money laundering. In 1985, Arizona became the first state to enact a money laundering statute. Since then, both Connecticut and California have also enacted money laundering statutes. Florida and Georgia have money laundering prevention statutes.

A truly effective assault on the drug industry necessarily includes those who give economic support to its viability. In the fact pattern above several people have violated the money laundering statute. The owner of the lease company knows that his cars are being used to transport drugs. He not only supplies a necessary component to effectuate the distribution, he also parlays it into an opportunity to make more money himself. He has violated subsections (a) by knowingly receiving proceeds known to be derived from drug violations; and/or (b) by knowingly making available things of value which he knows are intended for the purpose of committing or furthering a drug violation, i.e., transportation of drugs.

Mr. C knowingly accepts drug profits and invests them in real estate. It is quite common for drug dealers to invest their profits in real estate. In addition, Mr. C is willing to place the property in nominee names and advise Mr. D on how to avoid reporting requirements. Mr. C has violated subsections (a) by engaging in a transaction involving drug proceeds; (c) by managing or facilitating the transfer of proceeds; and (d) by conducting a financial transaction with drug proceeds while disguising the source or ownership of the proceeds and advising Mr. D on how to avoid the $10,000 reporting requirement. Subsection (d) is derived from 18 U.S.C. §1956(a)(1)(b).

The attorney is receiving monies he knows are drug proceeds. He knows this from his continuous representation of Mr. D and the other members of the drug ring; the statements of Mr. D and the fact that Mr. D has no other source of income. Subsection (a)(1) excepts from criminal prosecution any transaction between an individual and that individual's counsel necessary to preserve that individual's Sixth Amendment right to counsel. This will guarantee that attorneys cannot be criminally prosecuted for money laundering if they knowingly receive drug proceeds as long as it is necessary to preserve the paying individual's right to counsel. The funds are not shielded from forfeiture. This concept is derived from the November 18, 1988, federal amendments to 18 U.S.C. §1957(f)(10). The federal law exempts the attorney from criminal liability but does not exempt the funds from forfeiture.

Under the proposed amendments to the UCSA, the attorney is explicitly protected only when he receives payment from the person to whom the right of representation attaches. The attorney is not protected if someone else pays the legal fees of the person to whom the right of representation attaches. In other words, if Mr. D hires the attorney, subsection (a)(1) applies; but if someone other than Mr. D hires the attorney, such as Mr. D's drug supplier, subsection (a)(1) does not apply. What this subsection protects against is the situation where a kingpin pays for the legal services of his underlings to insure their silence. In such a case, the attorney's loyalty flows to the kingpin and not the client he formally represents. To avoid such conflicts of interest, the fee must come from the person who has the right to counsel. No other formulation can guarantee true independence of the attorney from the higher ups.

The United States Supreme Court decided the issue of the forfeitability of drug proceeds that have been paid to an attorney in *United States* v. *Monsanto*, 109 S.Ct. 2657 (1989), and *In re Hearing as to Caplin & Drysdale*, 109 S.Ct. 2646 (1989).

The Court espoused strong policy arguments supporting the forfeiture of drug proceeds. First, these monies are proceeds of a crime. In no other case where the monies are proceeds of a crime that are subject to forfeiture, can the attorney claim an entitlement. For example, as the Court pointed out in *Caplin & Drysdale*, if A robbed a bank and hired an attorney with the stolen money, the attorney will not be heard to say he should keep that money as necessary to preserve A's right to counsel. Second, the government's interest relates back to the commission of the act giving rise to forfeiture. 18 U.S.C. §1963 (c); 21 U.S.C. §853(c). As a consequence transfers of corrupted property to third persons are void. Exemptions have been statutorily created for good faith purchasers for value. 18 U.S.C. §1963(m)(6)(h); 21 U.S.C. §853(n)(6)(b); and proposed UCSA amendment Section 505(f)(2),(4),(5),(6). An attorney usually does not become a good faith purchaser for value prior to the attachment of the government's interest because he commonly does not represent a person until after the commission of the act giving rise to forfeiture. By then, the government's interest has already attached. If a lawyer becomes a good faith purchaser for value after the attachment of the government's interest, his fees are protected from forfeiture. This is consistent with the proposed UCSA amendments protecting good faith purchasers for value, who are service or product providers.

Third, an individual has a right to counsel in a criminal proceeding. He has the right to counsel of his choice but this right is qualified. If he cannot afford an attorney, he will be appointed one.

Fourth, the government has a deeply rooted countervailing interest to eradicate the economic roots of drug enterprises. The drug war is not a figure of speech. It is a literal war in which drug traffickers are armed with AK 47s, Uzis and machine guns. DEA agents are now being outfitted with submachine guns as standard equipment. The injuries in today's emergency rooms mimic the injuries seen from the battlefield from Viet Nam.

Violence is the trademark of this imported industry which murders those in authority who continue the struggle against drugs. To allow a drug dealer to use his poisoned money to hire an attorney of his choice is to elevate the values of violence, addiction and drug trafficking to such a degree that a wealthy crook can purchase legal services, but a poor crook cannot. The constitutional right to counsel then becomes constitutional only to the extent one can buy it. Only money untainted by drug trafficking should be used to

hire an attorney. At least then corruption and dishonesty are not rewarded.

SECTION 414. CONDITIONAL DISCHARGE FOR POSSESSION AS FIRST OFFENSE

This provision of the proposed amendments is supported by America's police and prosecutors. It permits persons found possessing illegal drugs to avoid having a conviction on their records by meeting the following conditions: First, they must never have been convicted of a drug offense within the past ten years; Second, their probation must include successful completion of a drug education program or if the defendant is drug dependent a rehabilitation and treatment program.

Should the individual successfully complete the probation they are returned to the status occupied before their arrest. As long as they lead a law abiding life their offense ceases to exist for all purposes, public and private. The only circumstance that would result in the use of the discharged offense is the commission of additional crimes. In this limited situation, for purposes of bail or any additional penalty imposed on repeat offenders, the discharged offense would constitute a prior conviction.

While there is some feeling that persons applying for jobs in law enforcement, medicine, or law or testifying under oath ought to be required to acknowledge a drug history—the task force believes a compromise that encourages and rewards first offenders but permits the use of the prior record should they commit future crimes strikes a just balance.

SECTION 415. TREATMENT OPTION FOR VIOLATION OF [ACT]

This proposed UCSA amendment has the support of America's police and prosecutors as part of a comprehensive plan to provide courts with the tools necessary to assist those defendants who are genuinely seeking rehabilitation. Such programs will only be available, however, if funding plans like that proposed in Section 416 are also adopted.

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

This proposed amendment to the UCSA is based on New Jersey Statutes Annotated Section 2C:35-15. The New Jersey provision, has since its adoption, been responsible for the collection of nine-ten million dollars annually for drug education and treatment. The premise underlying this provision is that the offenders causing the problem are the most appropriate members of society to fund education and treatment.

Funding for drug education and treatment is provided through this "users fee" rather than by siphoning off asset forfeiture funds because experience has shown programs like this, such as victims compensation assessment programs, provide a more reliable funding base in that every jurisdiction will be convicting drug offenders while not every jurisdiction may have the resources for the long term investigations necessary for regular and substantial asset forfeiture.

As a policy matter funds collected under this provision should not be used for law enforcement purposes as this may reduce the incentive for jurisdictions to pursue asset forfeiture cases. Similarly, asset forfeiture funds should be used exclusively for law enforcement and prosecution purposes for the same reasons. Providing independent funding bases for education and treatment through this provision and for law enforcement through Article V eliminates counterproductive conflicts between these necessary components of a comprehensive response to the drug problem.

Article V — Forfeiture of Property of the Proposed Amendments to the Uniform Controlled Substances Act (UCSA)

subsection (c) to its own requirements for establishing special funds in the state treasury and to its own appropriation requirements.

SECTION ~~404~~ 417. ~~[~~PENALTIES UNDER OTHER LAWS.~~]~~ Any penalty imposed for violation of this [Act] ~~is~~ and any civil remedy imposed under this [Act] are in addition to, and not in lieu of, any civil ~~or~~ remedy, administrative penalty, or sanction otherwise authorized by law.

SECTION ~~405~~ 418. ~~[~~BAR TO PROSECUTION.~~]~~ If a violation of this [Act] is a violation of a ~~Federal~~ federal law or the law of another ~~State~~ state, a conviction or acquittal under ~~Federal~~ federal law or the law of another ~~State~~ state for the same act is a bar to prosecution in this State.

ARTICLE V

FORFEITURE OF PROPERTY

SECTION 501. DEFINITIONS. As used in this [Article]:

(1) "Attorney for the state" means the [principal prosecuting attorney of the political subdivision involved] [ ].

(2) "Interest holder" means a secured party within the meaning of Section 9-105 of the Uniform Commercial Code which has a perfected security interest. The term also includes a mortgagee, a holder of any other lien created and perfected in accordance with state law, or a beneficiary of an encumbrance pertaining to an interest in property, whose interest is able to be protected against a good faith purchaser for value.

(3) "Owner" means a person, other than an interest holder, who has an interest in property.

(4) "Proceeds" means property acquired or derived directly or indirectly from, maintained by, produced through, or realized through, conduct giving rise to forfeiture without reduction for expenses incurred for any purpose.

(5) "Property" means any interest in or privilege, claim, or right with respect to anything of value, whether real or personal, tangible or intangible.

(6) "Seizing agency" means the [appropriate agency] or a designee of the [appropriate agency].

(7) "Seizure for forfeiture" means seizure of property in accordance with Section 506.

COMMENT ON CREATION OF SECTION

In paragraph (2), a state should insert its own reference to §9-105. Holders of inchoate liens are intended to be protected through the "is able to be" language. In paragraph (4), "maintained by" is used in the sense that there would be no maintenance "but for" the conduct. See United States v. Horak, 833 F.2d 1235 (7th Cir. 1987).

SECTION 502. JURISDICTION; VENUE.

[(a) The [appropriate reference] has jurisdiction under this [Article] over (i) all interests in property if the property for which forfeiture is sought is within this State at the time the action is filed and (ii) the interest of an owner or interest holder in the property if the owner or interest holder is subject to personal jurisdiction in this state.]

[(b) In addition to the venue provided for under [the appropriate state law] or any other provision of law, a proceeding for forfeiture under this [Article] may be maintained in the [judicial district] in which any part of the property is found or in the [judicial district] in which a civil or criminal action could be maintained against an owner or interest holder for the conduct alleged to give rise to the forfeiture.]

COMMENT ON CREATION OF SECTION

Subsection (a) is bracketed as an option for those states that need to specifically provide that jurisdiction is based on either the presence of the person or the property. Jurisdiction is not based on the legality of the seizure. This corresponds to Section 506(h) which codifies case law that an illegal seizure does not deprive the court of jurisdiction.

SECTION 503. CONDUCT GIVING RISE TO FORFEITURE. Conduct giving rise to forfeiture is:

(1) an act or omission punishable [as a felony] [by confinement for more than one year] under this [Act], whether or not there is a prosecution or conviction.

(2) an act or omission occurring outside this State which would be punishable [as a felony] [by confinement for more than one year] and would be described in paragraph (1) if the act or omission occurred in this State, whether or not it is prosecuted in any state.

(3) an act or omission that is committed in furtherance of any violation of this [Act] and is punishable [as a felony] [by confinement for more than one year], including any inchoate or preparatory offense, whether or not the act or omission is prosecuted.

COMMENT ON CREATION OF SECTION

The types of conduct giving rise to forfeiture in paragraph (3) include conspiracy, attempt, or facilitation, which are not necessarily controlled substance-related offenses.

SECTION 504. PROPERTY SUBJECT TO SEIZURE AND FORFEITURE. The following property is subject to seizure and forfeiture:

(1) all controlled substances, raw materials, controlled substance analogs, counterfeit substances, or imitation controlled substances that have been manufactured, distributed, dispensed, possessed, or acquired in violation of this [Act];

(2) the whole of all property, including every divided or undivided interest, that is:

(i) furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this [Act]; or

(ii) used or intended to be used in any manner or part to facilitate conduct giving rise to forfeiture, but a conveyance subject

to forfeiture solely in connection with conduct in violation of Section 406 may be forfeited only pursuant to Section 514;

(3) all proceeds of any conduct giving rise to forfeiture;

(4) all weapons possessed, used or available for use in any manner to facilitate conduct giving rise to forfeiture; and

(5) any property affording a source of influence over any enterprise that a person has established, operated, controlled, or conducted by means of conduct giving rise to forfeiture.

COMMENT ON CREATION OF SECTION

This section includes the forfeiture of controlled substances and of the same types of property forfeited under 21 U.S.C. 881 and 18 U.S.C. 1961 et seq. Paragraph (2)(ii) includes books, records, ledgers, equipment, and research products such as formulas.

SECTION 505. PROPERTY EXEMPT FROM FORFEITURE.

(a) Property is exempt from forfeiture under this [Article] if:

(1) the owner or interest holder, at the time of acquisition of the property, did not know or have reason to know that the conduct making the property subject to forfeiture:

(i) was likely to occur, and, before the conduct making the property subject to forfeiture, either did not permit the property to be in the control of the person whose conduct has made the property subject to forfeiture with knowledge or reason to know that the conduct was likely to occur, or acted reasonably to attempt to prevent the occurrence of the conduct; or

(ii) had already occurred, provided that the owner or interest holder acquired the property in good faith, for value, and in the ordinary course of business or for ordinary personal, family, or household purposes; or

(2) the person whose conduct gave rise to its forfeiture did not have the authority to convey the property of the person claiming the

exemption to a good faith purchaser for value or a buyer in the ordinary course of business at the time of the conduct.

(b) Property is not exempt from forfeiture under this [Article], even though the owner or interest holder lacked knowledge or reason to know that the conduct making the property subject to forfeiture was likely to occur, if:

(1) with respect to a conveyance for transportation, the owner or interest holder holds the property jointly or in common or [as tenants by the entirety] [or in community] with the person whose conduct has made the conveyance subject to forfeiture;

(2) the owner or interest holder received substantial benefits, proportionate to the value of the owner's or interest holder's property, from the conduct making the property subject to forfeiture, unless the benefits were received in the ordinary course of business;

(3) the owner or interest holder holds the property for the benefit of or as nominee for the person whose conduct has made the property subject to forfeiture; or

(4) the owner or interest holder is criminally responsible for the conduct giving rise to forfeiture, whether or not there is a prosecution or conviction.

(c) Property acquired in good faith by a lawyer as payment for legal services or reimbursement of expenses related to legal services, in defense of a person who has been or may be charged with an offense under this [Act], is exempt from forfeiture under this [Article] to the extent the payment or reimbursement was reasonable and was earned [(alternative 1) before judicial determination that the property is subject to forfeiture] [(alternative 2) before the owner or interest holder obtained actual knowledge that the property was subject to forfeiture. The state has the burden of producing evidence of actual knowledge].

(d) To be eligible for an exemption under this section, an owner or interest holder must be in substantial compliance with any statute requiring its recordation or reflection in public records in order to perfect the interest in the property against a good faith purchaser for value.

COMMENT ON CREATION OF SECTION

The exemptions are not intended to provide any less protection for common carriers than is provided by specific common carrier exemptions under federal law, including 21 U.S.C. 881. The interests of bona fide purchasers for value are exempt from forfeiture. Those who are not good faith purchasers for value or buyers in the ordinary course of business are involuntary trustees who hold the property in trust for the persons entitled to remedies under this Act. This is consistent with Section 512(g) and 21 U.S.C. 853(c). The interests of persons who are accountable for the conduct giving rise to forfeiture (such as co-conspirators) are not exempt from forfeiture. Joint ownership interests with the interest of the person whose conduct gives rise to the forfeiture (such as spousal interests or partnership interests) are not exempt from forfeiture. Subsection (b)(2) is based on the principle that the receivers of proceeds of conduct giving rise to forfeiture are an appropriate category to whom to spread the risk of loss, except those who share in the economic fortunes of the wrongdoer only in an arms-length business transaction, which includes any commercial or consumer transaction. "Substantial" is included to define those persons who are economically tied to the wrongdoer such as an employee or a partner and is not the same as used in Section 411. In subsection (b)(1) the bracketed reference to community property should only be used in community property states.

SECTION 506. SEIZURE OF PROPERTY FOR FORFEITURE.

(a) Property subject to forfeiture under Section 504 may be seized for forfeiture by [appropriate person/agencies] upon process or a seizure warrant issued by any [appropriate court], on an affidavit demonstrating that probable cause exists for its forfeiture or that the property has been the subject of a previous final judgment of forfeiture in the courts of any state or of the United States. The court may order that the property be seized on such terms and conditions as are reasonable. [The order may be made in connection with a properly issued search warrant.]

(b) Except for real property, property subject to forfeiture under Section 504 may be seized for forfeiture without process if the property is seized under circumstances in which a warrantless seizure or arrest would be

reasonable and if there is probable cause to believe that the property is subject to forfeiture under this [Act]. A law enforcement officer may request a person having custody or control of property subject to seizure under this section to deliver the property to an officer of the court or to a law enforcement officer. Real property may not be seized without an adversarial judicial proceeding.

(c) Seizure under this section must be accompanied by an assertion by the seizing agency or an attorney for the state that the property is seized for forfeiture.

(d) Property may be seized constructively. Every constructive seizure of property must include posting notice of pending forfeiture in a conspicuous place on the property, giving notice of pending forfeiture to its owners and interest holders as provided in Section 507(c), and filing notice of pending forfeiture or of a forfeiture lien in the appropriate public records that relate to the type of property seized.

(e) The seizing agency shall deliver a receipt to the person from whose possession or control the property was seized. If no person is in possession or apparent control, the agency shall attach the receipt in a conspicuous place on the property or at the place of its seizure. The receipt must contain a general description of the property seized, the date and place of seizure, the name of the seizing agency, and the address and telephone number of the seizing officer or other person or agency from whom information about the seizure may be obtained.

(f) As soon as practicable after seizure for forfeiture, the seizing agency shall conduct an inventory and estimate the value of the property seized.

(g) A person who acts in good faith and in a reasonable manner to comply with an order of the court or a request of a law enforcement officer is not liable to any person on account of acts done in reasonable compliance

with the order or request. No liability may attach from the fact that a person declines a law enforcement officer's request to deliver the property.

(h) A possessory lien of a person, from whose possession property is seized, is not affected by the seizure.

(i) The jurisdiction of a court over property subject to forfeiture is not affected by a seizure, with or without process, in violation of the federal or state constitution.

COMMENT ON CREATION OF SECTION

This section is based on 21 U.S.C. 881. In subsection (c) the assertion requirement creates an objective standard, rather than a subjective standard, by which to determine if property has been seized for forfeiture. Subsection (i) is based on United States v. United States Coin and Currency, 91 S.Ct. 1041 (1971); One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania, 85 S.Ct. 1246 (1965); and Frisbie v. Collins, 72 S.Ct. 509 (1952).

SECTION 507. COMMENCEMENT OF FORFEITURE PROCEEDINGS.

(a) Forfeiture proceedings may be initiated only by providing notice of pending forfeiture or by filing a judicial forfeiture proceeding.

(b) If the state fails to initiate forfeiture proceedings against property seized for forfeiture by notice of pending forfeiture within [90] days after its seizure for forfeiture, or fails to pursue forfeiture of the property upon which a timely claim has been properly filed by filing a judicial forfeiture proceeding within [30] days after the filing of a timely claim that includes a request for filing a judicial forfeiture proceeding or, with respect to a claim that does not include such a request, within [90] days after notice of pending forfeiture, the property or the interest asserted by the claimant must be released from its seizure for forfeiture upon the request of an owner or interest holder. The state and all claimants who have filed a timely claim may agree to extend the time for filing a judicial forfeiture proceeding. For good cause shown, the court may extend the time for giving notice of pending forfeiture or filing a judicial forfeiture proceeding.

(c) Whenever notice of pending forfeiture [or service of an in rem complaint] is required under this [Article], a copy of the notice [or service] must be given in accordance with [reference to analagous state procedure or to paragraphs (1), (2), and (3)] and is effective upon personal service, mailing of written notice, or publication, whichever is earlier.

[(1) If the owner's or interest holder's name and current address are known or are reasonably ascertainable by the attorney for the state, by [either] personal service [or mailing a copy of the notice [or service] by certified mail, return receipt requested, to that address].

(2) If the owner's or interest holder's name or name and address are required by law to be on record with a [appropriate reference, e.g., register of deeds, secretary of state, motor vehicle department], or another state or federal agency to perfect or record an interest in the property, but the owner's or interest holder's current address is not known or reasonably ascertainable, by mailing a copy of the notice by certified mail, return receipt requested, to the last known address on the record.

(3) If the owner's or interest holder's address is not known or is not reasonably ascertainable by the attorney for the state, and is not on record as provided in paragraph (2), or the owner's or interest holder's interest in the property is not known, by publication in [one] issue of a newspaper of general circulation in the county in which the seizure occurs.]

(d) Notice of pending forfeiture must include a description of the property, the date and place of seizure, the name and address of the seizing agency, the conduct giving rise to forfeiture or the violation of law alleged, and a summary of procedures and procedural rights applicable to the

forfeiture action. If the state determines that property may be exempt, the attorney for the state shall so indicate in the notice of pending forfeiture.

(e) The attorney for the state may file, without a filing fee, a notice of lien for forfeiture of property upon the initiation of any civil or criminal proceeding under this [Act] or upon seizure for forfeiture. The attorney for the state may file, without a filing fee, a notice of lien for forfeiture of property in this State upon the initiation of a proceeding or seizure for forfeiture in any other jurisdiction under a state or federal statute substantially similar to this [Act]. The filing constitutes notice of the claim of a lien to any person claiming an interest in the seized property or in property owned by a person named in the notice of lien.

(1) The notice of lien must set forth:

(i) The name of the person and, in the discretion of the lienor, any alias, or any corporations, partnerships, trusts, or other entities, including nominees, that are either owned, entirely or in part, or controlled by the person;

(ii) The description of the seized property, the criminal or civil proceeding that has been brought under this [Act], the amount claimed by the lienor, the name of the [appropriate court] where the proceeding or action has been brought, and the case number of the proceeding or action if known at the time of filing;

(2) A lien under this subsection applies to the described seized property or to the named person, any aliases, fictitious names, or other names, including names of corporations, partnerships, trusts, or other entities, that are either owned, entirely or in part, or controlled by the named person, and any interest in real property owned or controlled by the named person. A separate notice of lien for forfeiture of property must be filed for any other person.

(3) The notice of lien creates, upon filing, a lien in favor of the lienor as it relates to the seized property or the named person or related entities. The lien secures the amount of potential civil liability and, if applicable, the fair market value of seized property relating to all proceedings under this [Act] to enforce the lien. The notice of lien referred to in this subsection must be filed in accordance with the laws of this State which relate to the type of property that is subject to the lien. The validity and priorities of the lien are determined in accordance with [reference to state law]. The lienor may amend or release, in whole or in part, a notice of lien filed under this subsection at any time by filing, without a filing fee, an amended notice of lien. The lienor, as soon as practical after filing a notice of lien, including an amended notice, shall furnish a copy of the notice to any person named in the notice and to any person whose interest in property subject to forfeiture is recorded. Failure to furnish notice under this paragraph does not invalidate or otherwise affect the validity of a lien filed in accordance with this subsection.

(4) Upon entry of judgment in favor of the state, the state may proceed to execute on the lien as in the case of any other judgment.

(5) A trustee, constructive or otherwise, who possesses, or holds title to or appears as record owner of property, who has notice that a notice of lien for forfeiture of the property, a notice of pending forfeiture of the property, or a civil proceeding for forfeiture of the property has been filed, shall furnish, within [10] days, to the [insert appropriate law enforcement authority] the following information:

(i) The names and addresses of the person or entity for whom the property is held;

(ii) The names and addresses of all other beneficiaries for whose benefit legal title to the seized property, or property of the named person or related entity, is held; and

(iii) A copy of the applicable trust agreement or other instrument, if any, under which the trustee or other person possesses, holds legal title, or appears as record owner of the property.

(f) A trustee, constructive or otherwise, who fails to comply with this section is [appropriate sanction].

COMMENT ON CREATION OF SECTION

The timeframe within which action must be initiated is subject to the "short-time" period of Section 512. The use of a specific timeframe displaces the due process standard under which a number of years has been allowed. See, e.g., Barker v. Wingo, 92 S.Ct. 2182 (1972). Subsection (b) defines when the forfeiture action is to be brought vis-a-vis the seizure. It is not a statute of limitations, which is found in Section 704. Failure to initiate proceedings timely requires the property to be re-seized before the initiation of another forfeiture proceeding. The notice provisions of subsection (c) are included because the notice provisions of the states apply to actions in personam and not actions in rem. The bracketed language in subsection (c)(1) should be used if the state allows service by mail in lieu of personal service. The lien under subsection (e) would have the priority determined under the general lien law of the state.

SECTION 508. NONAPPLICATION OF OTHER PROCESS; RELEASE OF PROPERTY.

(a) Property seized under Section 506 is deemed to be in the custody of the [appropriate person or agency]. The property is not subject to replevin, conveyance, sequestration, or attachment; nor is the property subject to a motion or order under [reference to statute relating to return of property held as evidence]. The property is subject to the interests of owners or interest holders which are exempt from forfeiture. The seizing agency or the attorney for the state may authorize the release of the property, or the attorney for the state may transfer the action to a federal or state agency or another attorney for the state by discontinuing the forfeiture proceedings in favor of other pending forfeiture proceedings.

(b) An owner of property seized under Section 506 may obtain its release by posting a surety bond or cash with the state in an amount equal to the fair market value of the property. The state may refuse to release the property if it is retained as contraband, as evidence of a violation of law, or by reason of design or other characteristic that makes the property particularly suited for use in illegal activities. If a surety bond or cash is posted and the property is forfeited, the court shall order the surety bond or cash forfeited in lieu of the property.

COMMENT ON CREATION OF SECTION

Release of the property to an owner, secured party, or lienholder is authorized under this section as well as Section 509(a)(4). An owner or interest holder may also petition the court for release of seized property after notice of the seizure pursuant to Section 512(c).

SECTION 509. CUSTODY OF SEIZED PROPERTY.

(a) If property is seized under Section 506, the [appropriate person or agency] may:

(1) remove the property to a place designated by the [appropriate court, person, or agency];

(2) retain the property as evidence if otherwise authorized by law;

(3) remove the property to a storage area for safekeeping or, if the property is a negotiable instrument or money, deposit it in an interest-bearing account;

(4) provide for an agency or custodian, including an owner or interest holder, to take custody of the property and to service, maintain, and operate it as reasonably necessary to maintain its value; or

(5) require the [appropriate administrative agency] to take custody of the property and remove it to an appropriate location for disposition in accordance with law.

(b) A person who acts as custodian of the property on order of the court or at the direction of the [appropriate person or agency] is not liable to any person on account of acts done in a reasonable manner in compliance with the order or direction.

SECTION 510. PETITION FOR EXEMPTION OF PROPERTY.

(a) An owner of or an interest holder in property seized under Section 506 may file a petition for exemption with the attorney for the state after seizure and within 30 days after the notice of pending forfeiture but not after a claim has been filed under Section 511 or a judicial forfeiture proceeding has been commenced by the state. The petition must comply with the requirement for claims in Section 513.

(b) The following apply if an owner or interest holder timely petitions for exemption:

(1) The attorney for the state must provide the seizing agency and the petitioner with a written proposed statement of exemption and statement of nonexempt interests relating to any or all interest in the property in response to each petitioner within [120] days after the effective date of notice of pending forfeiture.

(2) An owner or interest holder in any property declared nonexempt may file a claim as described in Section 513, within 30 days after notice under Section 507(c) of the statement of nonexempt interests.

(3) The attorney for the state may elect to proceed as provided for judicial forfeiture.

(4) If no petitioner files a claim within 30 days after notice under Section 507(c) of the statement of nonexempt interests, the statement of exemption and statement of nonexempt interests become final, and the attorney for the state shall proceed as provided in Sections 518 and 519.

(5) If a judicial forfeiture proceeding follows a notice of pending forfeiture which provides for the availability of exemption:

(i) No duplicate or repetitive notice or claim is required. If a claim has been filed pursuant to subsection(a), the claim must be determined in a judicial forfeiture proceeding after the commencement of a proceeding under Section 515(b) or 516(b).

(ii) The proposed statement of exemption and statement of nonexempt interests responsive to all petitioners who subsequently filed claims are void and will be regarded as rejected offers to compromise.

(c) If no petition for exemption is timely filed, the attorney for the state shall proceed as provided in Sections 518 and 519.

COMMENT ON CREATION OF SECTION

This section permits the state to determine exempt interests of owners or interest holders, thereby allowing their interests to be preserved without the necessity of litigation on their part.

SECTION 511. RELEASE OF SEIZED PROPERTY FOR LIMITED PURPOSES.

(a) A person charged with a criminal offense may apply at any time for release of property seized for forfeiture or subject to a forfeiture lien and necessary for defense of the criminal charge. The application must comply with the requirements for claims in Section 513. The court shall hold a probable cause hearing as described in Section 512 if the applicant establishes that:

(1) the applicant has had no prior adversarial judicial determination of probable cause relating to forfeitability of the property;

(2) the applicant does not have access to other funds or property adequate for payment of counsel; and

(3) the property is not subject to a claim of a person other than the state, or of any person who claims to have been damaged by the conduct alleged to give rise to forfeiture.

(b) An owner or interest holder may apply at any time for the release of property seized for forfeiture or subject to a forfeiture lien and necessary for the living expenses of the applicant or the applicant's dependents. The application must comply with the requirements for claims in Section 513. The court shall hold a probable cause hearing as described in Section 512 if the applicant establishes that:

(1) the applicant has had no prior adversarial judicial determination of probable cause relating to forfeitability of the property;

(2) the applicant does not have access to other funds or property adequate for payment of living expenses; and

(3) the property is not subject to a claim of a person other than the state, or of any person who claims to have been damaged by the conduct alleged to give rise to forfeiture.

(c) Unless the court finds there is probable cause for forfeiture of the property, the court shall order the property released. If the state elects not to contest the hearing, the court may release a reasonable amount of property for payment to the applicant's defense counsel in the criminal proceeding or for payment of living expenses.

(d) Property released under subsection (a) and paid for legal services actually rendered or released under subsection (b) and paid for living expenses actually incurred is exempt from forfeiture under this [Act].

SECTION 512. PROBABLE CAUSE HEARINGS.

(a) If property is seized for forfeiture or if notice of a forfeiture lien is filed without a previous judicial determination of probable cause or order of forfeiture or a hearing under Section 515(d), the court, on

application and after five days' notice to the attorney for the state, shall issue an order to show cause for a hearing to determine whether probable cause exists for forfeiture of the property. An owner of or interest holder in the property shall file the application within [30] days after the effective date of notice of its seizure for forfeiture or lien, or actual knowledge of it, whichever is earlier. The application must comply with the requirements for claims in Section 513. The hearing must be held within [30] days of the order to show cause unless continued for good cause on motion of either party. Unless the court finds there is probable cause for forfeiture of the property, the property must be released to the custody of the applicant or from the forfeiture lien pending the outcome of a judicial proceeding pursuant to this [Article].

(b) All applications filed within the [30] day period in subsection (a) must be consolidated for hearing.

COMMENT ON CREATION OF SECTION

An owner or interest holder may apply for a hearing to release the seized property or the lien filed against the properties pending the outcome of the judicial proceedings.

SECTION 513. FILING OF CLAIM.

(a) An owner of or interest holder in property seized for forfeiture may file a claim in the manner provided by this section.

(b) The claim must be delivered or mailed to the [seizing agency and to the attorney for the state] by any means authorized for service of process on the [agency and the attorney for the state] or by certified mail, return receipt requested, within [30] days after the effective date of notice of pending forfeiture. For good cause the court may grant an extension of time for the filing of a claim, upon conditions the court may determine, up to the time that a court has issued a final order in the matter.

(c) The owner or interest holder shall sign the claim under penalty of perjury. In a manner that is in substantial compliance with the following requirements, the claim must set forth:

(1) the caption of the proceedings as set forth on the notice of pending forfeiture, or if notice of pending forfeiture has not been given, a description of the property seized and, if known, the date and circumstances of the seizure;

(2) the name of the claimant and the address at which the claimant will accept mail;

(3) the nature and extent of the claimant's interest in the property;

(4) the date, identity of the transferor, and circumstances of the claimant's acquisition of the interest in the property;

(5) the specific provision of this [Article] relied on in asserting that the interest is not subject to forfeiture;

(6) all essential facts supporting each assertion; and

(7) the precise relief sought.

(d) If no claim is timely filed, the attorney for the state shall proceed as provided in Sections 518 and 519.

SECTION 514. JUDICIAL FORFEITURE PROCEEDING.

(a) (Alternative 1) The court, on application of the state, may enter restraining orders or injunctions, require execution of performance bonds, establish receiverships, appoint conservators, appraisers, accountants, custodians, or trustees, or take action to seize, secure, maintain, or preserve the property or its availability for forfeiture under this [Article], including issuance of process for its seizure or writ of attachment, whether before or after the filing of a notice of pending forfeiture or complaint for forfeiture.

(Alternative 2) A judicial forfeiture proceeding under this [Article] is governed by the [rules of civil procedure] except as otherwise provided in this [Article].

(b) On motion of any party and after notice and hearing, the court may order disposition of property that has been seized for forfeiture under any conditions the court may determine in order to satisfy a specified interest of any interest holder, if the court finds that the interest holder has filed a proper claim and:

(1) provides security equal to the value of the property; or

(2) has an interest that [the attorney for the state has stipulated] is exempt from forfeiture.

(c) In any proceeding pursuant to this section, a defendant is collaterally estopped from denying the essential allegations of a criminal offense of which the defendant has been convicted, regardless of the pendency of an appeal from that conviction. The attorney for the state may introduce evidence of a criminal conviction. Evidence of the pendency of an appeal is admissible. For the purposes of this section, a conviction results from a verdict or plea of guilty, including a [appropriate reference, e.g. no contest] plea. If the conviction is later overturned, the defendant may request the court to reopen the forfeiture proceeding.

(d) In hearings and determinations pursuant to this section:

(1) The court may receive and consider, in making any determination of probable cause or reasonable cause, all evidence admissible in determining probable cause at a preliminary hearing or by a magistrate pursuant to [appropriate reference to statute authorizing search warrant], together with inferences therefrom.

(2) The trier of fact may infer that money or a negotiable instrument was the proceeds of conduct giving rise to forfeiture or was used or intended to be used to facilitate the conduct upon evidence

that the money or negotiable instrument was found in proximity to contraband; drug paraphernalia; structures or conveyances primarily intended or designed to transport, manufacture, or conceal controlled substances; or records of transactions involving controlled substances.

(3) A prima facie case for forfeiture of property of a person exists under this [Article] if the state establishes probable cause that:

(i) the person has engaged in conduct giving rise to forfeiture;

(ii) the property was acquired by the person during the period of the conduct giving rise to forfeiture or within a reasonable time after the period; and

(iii) there was no likely source for the property other than the conduct giving rise to forfeiture.

(e) All property declared forfeited under this [Article] vests in this State as of the time of the commission of the conduct giving rise to forfeiture, together with the proceeds of the property after that time. Any property or proceeds transferred later to any person remains subject to forfeiture and thereafter must be ordered forfeited unless the transferee's interest is exempt under Section 505.

(f) An acquittal or dismissal in a criminal proceeding does not preclude civil proceedings under this [Article].

(g) For good cause shown, the court may stay civil forfeiture proceedings during a criminal trial of a related indictment or information alleging a violation of this [Act].

(h) An action under this [Article] may be consolidated with any other action or proceeding under this [Act] relating to the same property on motion by an interest holder and must be so consolidated on motion by the attorney for the state in either proceeding or action.

(i) The rules of civil procedure apply to all proceedings under this [Article] unless a different procedure is provided by this [Act].

COMMENT ON CREATION OF SECTION

Subsection (c) codifies the law of collateral estoppel. In conformance with case law, subsection (d) allows hearsay to be considered in determining probable cause or reasonable cause. The rebuttable presumption in subsection (d)(3) is similar to 21 U.S.C. 853(d).

SECTION 515. ADDITIONAL REQUIREMENTS FOR IN REM PROCEEDING.

(a) A judicial in rem forfeiture proceeding under this [Article] is subject also to the provisions of this section.

(b) An action in rem may be brought by the state pursuant to an application for an order of forfeiture or verified complaint for forfeiture and may be in addition to or in lieu of an in personam forfeiture proceeding.

(c) An owner of or interest holder in the property may file an answer asserting an exempt interest or other claim against the property. For purposes of this section, the owner or interest holder is referred to as a claimant.

(d) The claimant shall sign an answer under penalty of perjury. In a manner that is in substantial compliance with the following requirements, the answer must set forth:

(1) the caption of the proceedings;

(2) the name of the claimant and the address at which the claimant will accept mail;

(3) the nature and extent of the claimant's interest in the property;

(4) the date, identity of transferor, and circumstances of the claimant's acquisition of the interest in the property;

(5) the specific provision of this [Article] relied on in asserting that it is not subject to forfeiture;

(6) all essential facts supporting each assertion; and

(7) the precise relief sought.

[(e) The answer must be filed with the court within [20] days after service of the in rem complaint.]

(f) The answer must be accompanied by a bond to the [court] in the sum of $2,500.00, or in a greater amount as the court may determine, with sureties to be approved by the [appropriate reference] upon condition that in the case of forfeiture the claimant must pay costs and expenses of the proceedings as set forth in Section 518(f). In lieu of bond, a claimant may file, under penalty of perjury, an in pauperis bond. Any funds received by the [court] as the bond must be placed in an interest-bearing escrow account pending final disposition of the case.

(g) The hearing must be held within 60 days after service of the complaint unless continued for good cause and must be conducted by the court without a jury.

(h) The state must show the existence of probable cause for forfeiture of the property. If the court determines that the state has shown probable cause, further evidence may be admitted only in accordance with the [Uniform Rules of Evidence]. The claimant has the burden of showing by a preponderance of the evidence that the claimant's property is not subject to forfeiture.

(i) If the state does not show the existence of probable cause or a claimant has established by a preponderance of the evidence that the claimant has an interest that is exempt under Section 505, the court shall order the interest in the property returned or conveyed to the claimant. The court shall order all other property forfeited to this State and conduct further proceedings pursuant to Sections 518 and 519.

SECTION 516. ADDITIONAL REQUIREMENTS FOR IN PERSONAM PROCEEDING.

(a) A judicial in personam forfeiture proceeding under this [Article] is subject also to the provisions of this section.

(b) An action in personam may be brought by the state, alleging conduct giving rise to forfeiture.

(c) A temporary restraining order under this section may be entered ex parte on application of the state, upon a showing that:

(1) there is probable cause to believe that the property with respect to which the order is sought, is subject to forfeiture under this [Article]; and

(2) notice of the action would jeopardize the availability of the property for forfeiture.

(d) Notice of the entry of a temporary restraining order and an opportunity for hearing must be afforded to persons known to have an interest in the property. The hearing must be held at the earliest possible date consistent with [applicable civil rule] and is limited to the issues of whether:

(1) there is a probability that the state will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, conveyed, alienated, encumbered, disposed of, received, removed from the jurisdiction of the court, concealed, or otherwise made unavailable for forfeiture; and

(2) the need to preserve the availability of property through the entry of the requested order outweighs the hardship on any owner or interest holder against whom the order is to be entered.

(e) The state has the burden of proof by a preponderence of the evidence to show that the defendant's property is subject to forfeiture.

(f) On a determination of liability of a person for conduct giving rise to forfeiture under this [Article], the court shall enter a judgment of forfeiture of the property subject to forfeiture as alleged in the complaint and may authorize the [appropriate reference, e.g., county state's attorney or state attorney general, their agents] or any [law enforcement] officer to

seize all property subject to forfeiture pursuant to Section 504 or 517 not previously seized or not then under seizure. In connection with the judgment, the court, on application of the state, may enter any appropriate order to protect the interest of the state in property ordered forfeited.

(g) Subsequent to the finding of liability and order of forfeiture the following procedures apply:

(1) The attorney for the state shall give notice of pending forfeiture, in the manner provided in Section 507(c), to all owners and interest holders who have not previously been given notice.

(2) An owner of or interest holder in property that has been ordered forfeited and whose claim is not precluded may file a claim in accordance with Section 515(d), (f), and (g) within 30 days after initial notice of pending forfeiture or after notice under Section 507(c), whichever is earlier.

(3) If claims of owners of or interest holders in the property are not resolved under Section 510, the attorney for the state immediately shall file an action in rem as required by Section 515.

(4) The action is governed by the rules of civil procedure and Sections 514 and 515.

(5) The court may amend the in personam order of forfeiture if the court determines that a claimant has established that the claimant has an interest in the property and that the claimant's interest is exempt under Section 505.

(h) Except as provided in Sections 511 and 512, no person claiming an interest in property subject to forfeiture under this section may intervene in a trial or appeal of a criminal action or in a civil in personam action involving forfeiture of the property.

(i) Trial of an action under this section must be by jury upon the request of any party in accordance with the rules of civil procedure.

COMMENT ON CREATION OF SECTION

This section provides for a civil but not criminal action in personam. Subsection (c) is patterned after the federal forfeiture temporary restraining order provisions found in 21 U.S.C. 853(e). There is no need to show irreparable injury.

SECTION 517. FORFEITURE OF OTHER PROPERTY.

(a) The court shall order the forfeiture of any other property of a claimant or defendant up to the value of the claimant's or defendant's property found by the court to be subject to forfeiture under Section 504 if any of the forfeitable property had remained under the control or custody of the claimant or defendant and:

(1) cannot be located;

(2) was transferred or conveyed to, sold to, or deposited with a third party;

(3) is beyond the jurisdiction of the court;

(4) was substantially diminished in value while not in the actual physical custody of the [appropriate reference];

(5) was commingled with other property that cannot be divided without difficulty; or

(6) is subject to any interest exempted from forfeiture under this [Act].

(b) In addition to any other remedy provided for by law, if a notice of forfeiture lien or notice of pending forfeiture has been filed and notice given pursuant to Section 507, or if a complaint alleging conduct giving rise to forfeiture has been filed and notice given pursuant to Section 507 or [the applicable rule of civil procedure], the state may institute an action in [appropriate court] against any person with notice or actual knowledge who destroys, conveys, alienates, encumbers, disposes of, receives, removes from the jurisdiction of the court, conceals, or otherwise renders unavailable for forfeiture property alleged to be subject to forfeiture in the notice of

pending forfeiture or complaint, except as specifically allowed by this [Act]. The court may enter judgment in an amount equal to the value of the lien not to exceed the fair market value of the property, or, if the property was alleged to be subject to forfeiture, in an amount equal to the fair market value of the property, together with reasonable investigative expenses and attorney's fees. If a civil proceeding under this [Act] is pending, the action must be heard by the court in which the civil proceeding is pending.

(c) This section must be liberally construed to effectuate its remedial purposes.

COMMENT ON CREATION OF SECTION

This section subjects any property of a claimant or defendant to forfeiture, up to the value of the property subject to forfeiture, if the original property subject to forfeiture is no longer available for the listed reasons. Subsection (a)(6) applies to leased properties, or heavily encumbered properties. The section also applies to the proceeds proven to have been made by a claimant or defendant but which cannot be traced. A cause of action is created in subsection (b) against those who dispose of property and who had knowledge or notice that the property was subject to forfeiture. This section is not intended to abrogate the right of the state to obtain any other remedy available under state law such as an injunction, receivership, writ, attachment, garnishment, and any other remedy relating to fraudulent conveyances.

SECTION 518. ORDER OF FORFEITURE; TITLE TO FORFEITED PROPERTY.

(a) If no claim or no answer is timely filed in an action in rem, the attorney for the state may apply for an order of forfeiture and allocation of forfeited property pursuant to Section 519. Upon determination that the pleadings filed establish the court's jurisdiction, the giving of proper notice, and facts sufficient to demonstrate probable cause for forfeiture, the court shall order the property forfeited to the state.

(b) After final disposition of every claim timely filed in an action in rem, or after final judgment and disposition of every claim timely filed in an action in personam, the court shall enter an order that the state has clear title to the forfeited property. Title to the forfeited property and

its proceeds is deemed to have vested in the state as of the date of the commission of the conduct giving rise to the forfeiture under this [Article].

[(c) After entry of the order of the court forfeiting the subject property, the state may transfer title to the property to any subsequent purchaser or transferee. This State, and its courts, agencies, and political subdivisions, shall recognize the validity of the title so transferred.]

(d) After entry of judgment in favor of a person claiming property that is subject to forfeiture proceedings under this [Article], the court shall order that the property be released and delivered promptly to the person, free of every lien and encumbrance under this [Act], and shall order that the person's cost bond be discharged.

(e) Upon motion by the state and determination by the court, after hearing, that there was reasonable cause for the seizure for forfeiture or for the filing of the notice of pending forfeiture or complaint, the court shall order that the defendant or claimant is not entitled to costs or damages, and that the person or seizing agency who made the seizure and the attorney for the state are not liable for any damages on account of the seizure, suit, or prosecution. Nothing in this [Article] precludes a person from bringing a civil action to obtain damages for seizure of property without reasonable cause.

(f) The court, in its discretion, may order the payment of costs and expenses, including attorneys' fees and costs of investigation relating to the disproving of a claim, to or by any claimant except as provided in subsection (e).

SECTION 519. DISPOSITION OF FORFEITED PROPERTY.

(a) Whenever property is forfeited under this [Act], the [appropriate person or agency] may:

(1) retain it for official use or transfer the custody or ownership of any forfeited property to any local, state, or federal

agency. The attorney for the state shall ensure the equitable transfer of any forfeited property or of moneys under subsection (b) to the appropriate local, state, or federal law enforcement or prosecutorial agency so as to reflect generally the contribution of that agency's participation in any of the activity that led to the seizure or forfeiture of the property or deposit of moneys under subsection (b). A decision to transfer the property is not subject to review.

(2) sell that which is not required by law to be destroyed and which is not harmful to the public. The proceeds of any sale and any moneys forfeited or obtained by judgment or settlement under this [Article] must be deposited in the special asset forfeiture fund.

(3) require the [appropriate administrative agency] to take custody of the property and remove it for disposition in accordance with law.

(4) forward controlled substances to the Drug Enforcement Administration for disposition.

(b) A special asset forfeiture fund is established in the [appropriate state or local fiscal depository]. All moneys obtained under this [Article] must be deposited in this fund. Moneys in the fund are appropriated on a continuing basis and are not subject to [state lapsing and related fiscal and appropriations restraints]. The [appropriate agency] shall administer expenditures from the fund. Moneys from the fund may not supplant other local, state, or federal funds. The fund is subject to audit by the [appropriate agency]. Moneys in the fund must be distributed in the following order:

(1) for satisfaction of any bona fide security interest or lien;

(2) for payment of all proper expenses of the proceedings for forfeiture and sale, including expenses of seizure, maintenance of custody, advertising, and court costs; and

(3) the balance, as provided by subsection (a)(1) for use by enforcement and prosecutorial agencies but only for enforcement of this [Act].

COMMENT ON CREATION OF SECTION

Subsection (a)(1) allows for the transfer of forfeited property to agencies who participated in the forfeiture according to their participation. This is similar to 21 U.S.C. 881(e). Subsection (a)(2) authorizes sale of the property and requires deposit in a special fund for uses as provided by subsection (b). Each state should tailor the language in subsection (a)(2) and subsection (b) to its own requirements for establishing special funds in the state treasury and to its own appropriation requirements.

SECTION 520. SUMMARY FORFEITURE. Controlled substances included in Schedule I which are contraband and any controlled substance whose owners are unknown are summarily forfeited to the state. The court may include in any judgment of conviction under this [Act] an order forfeiting any controlled substance involved in the offense to the extent of the defendant's interest.

COMMENT ON CREATION OF SECTION

This section declares all contraband and controlled substances summarily forfeited. This includes the plants themselves.

SECTION 521. LIMITATION ON ACTION. No person claiming an interest in property subject to forfeiture may maintain any action against the state concerning the validity of the alleged interest other than as provided in this [Article].

ARTICLE ~~V~~ VI

~~[~~ENFORCEMENT AND ADMINISTRATIVE PROVISIONS~~]~~

[SECTION ~~501~~ 601. ~~[~~POWERS OF ENFORCEMENT PERSONNEL.~~]~~

~~(a)~~ Any officer or employee of the [appropriate agency] designated by the [appropriate person] may:

(1) carry firearms in the performance of ~~his~~ the officer's or employee's official duties;

An
Analysis
of Major Drug Issues
in
Article V — Forfeiture of Property
of the
Proposed Amendments
to the
Uniform Controlled Substances Act
(UCSA)

Analysis

INTRODUCTION

Most state codes contain numerous forfeiture provisions. State forfeiture statutes address a broad range of behavior considered to be destructive to the social good. Ancient forfeiture statutes provide for the forfeiture of property that is harmful in and of itself, such as contraband drugs, contaminated food, and dangerous weapons. Another type of forfeiture statute provides for the forfeiture of property used or intended for use in the commission of a criminal offense, such as slave ships and cars transporting heroin for sale. With the growing realization that capital fuels the drug industry, forfeiture statutes have been developed during the 1970s and 1980s to allow for the forfeiture of the proceeds of crime and interests in enterprises associated with the illicit activity.

The most common state forfeiture statutes provide for the forfeiture of property which intrinsically undermines the public good. Almost all states include some version of the present Uniform Controlled Substances Act, and many include provisions relating to weapons and explosives, gambling devices, drug paraphernalia, and imitation drugs. Forfeiture provisions call for the destruction of misbranded or adulterated foods, the destruction of unlawful devices used to take game, and even *in rem* procedures for the state's forfeiture and sale of illegal oil and gas products. A sub-type of contraband statute forfeits motor vehicles and watercraft with altered, removed, or defaced identification numbers and illegally branded cattle.

Forfeiture statutes forfeiting property used or intended for use in committing an offense include forfeiture of slave ships, pirate ships, and prohibition era statutes which provided for the forfeiture of unregistered stills, including all related products and personal property. A related group of statutes provides for closure of bawdy houses for a year, in effect a forfeiture of the property for that period, and the sale of related personal property to cover costs. Newly-enacted statutes forfeit a motor vehicle that is operated by a person driving under the influence of intoxicating liquor while the person's license is suspended or revoked for a prior such offense. In states providing for forfeiture of real property, crack houses used to store and sell cocaine are forfeitable.

The reality is that racket-based crime is more than a collection of individuals; it is an industry. The illegal drug industry is the largest and wealthiest. It is global in its reach. Businesses are essential to the drug industry's existence. Businesses provide support services which assist in the importation and distribution of drugs, such as supplying transportation. Businesses also provide the money laundering mechanism by which the billions generated through the trafficking of illegal drugs are introduced into legitimate channels. States have enacted racketeering statutes to address the network quality of illicit enterprises. Twenty-nine states now have a state racketeering

act, most of these statutes have a racketeering forfeiture section, relating to all racketeering predicate offenses listed or described in the act and to illegal conduct relating to enterprises as prohibited by the act.

The proposed UCSA amendments are drafted to incorporate all of these concepts in order to produce forfeiture legislation to financially counter the drug industry and remove its threat.

Forfeiture Background

The concept that property should be forfeited by the owner under certain circumstances has ancient roots. Biblical[1], Greek[2] and Roman[3] law knew forms of forfeiture. The forfeiture of property is one of the earliest sanctions of Anglo-Saxon law. Three types of forfeiture came to be distinguished: statutory forfeiture, forfeiture consequent to a criminal conviction and attainder, and deodand.

Statutes in England imposed a variety of forfeitures, principally as an means of tax enforcement. In the mid-seventeenth century Parliament enacted the Navigation Acts, the English forfeiture statutes which most impacted the American colonies and which are the forebears of modern statutory forfeiture. The Navigation Acts required that shipping had to be carried on English built, owned, and manned vessels, and provided that violations would result in the forfeiture of both the ships and the goods they carried.[4] Suits for these forfeitures were commenced by civil information. They could be brought against a person (*in personam*) or against the thing to be forfeited (*in rem*). Typically they were brought *in rem* against the vessel and the goods, as the owner could not be located or was beyond the jurisdiction of the court.[5]

Forfeiture consequent to a criminal conviction and attainder was the oldest and best known.[6] It was imposed on traitors and felons, who forfeited all of their personal and real property, not as a result of their conviction but of their attainder, a legislative pronouncement of legal death. Attainder also signified corruption of blood, that is, no descendant could ever trace a line of inheritance through the attained ancestor.

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1. *Exodus* 21:28 ("If an ox gore a man or woman, that they die: then the ox shall be surely stoned, and his flesh shall not be eaten; but the owner of the ox shall be quit.")
2. *See* O. Holmes, *The Common Law* 7 (1881).
3. 7 *Twelve Tables* 1, translated in 1 Scott, *The Civil Law* 69 (1932) ("If a quadruped causes injury to anyone, let the owner tender him the estimated amount of the damage; and if he is unwilling to accept it, the owner shall...surrender the animal that caused the injury.").
4. L. Harper, *The English Navigation Laws: A Seventeenth-Century Experiment in Social Engineeering* 109, 387-414 (1964).
5. *See* 3 W. Blackstone, *Commentaries* *262.
6. *See generally* 4 W. Blackstone, *Commentaries* *375-89. "Felony" under early English law included any breach of the feudal engagement. M. Radin, *Anglo-American Legal History* 234 (1936). As such, it resulted in the forfeiture of the feudal estate to the lord. *Id.* at 240. Chattels went to the king, whose regalian rights included all ownerless property—*bona vacantia*, which was the term applied to all outlaws' property. *Id. See also Avery* v. *Everett*., 100 N.Y. 317, 18 N.E. 148 (1888).

Forfeiture of estate was a natural consequence of a felony in the feudal context. The word "felony" meant, literally, a "faithless act"; it was a breach of the fealty owed to the feudal lord, and ultimately to the king from whom all property rights flowed. The punishment for the breach was generally death,[7] and forfeiture of estate made the necessary reassignment of property convenient. The term "felony" came to be defined as "an offense which occasions a total forfeiture of either lands or goods or both."[8]

The emergence of a merchant class, trade and manufacturing, and the metropolitan social organization that necessarily accompanied them, undermined the feudal foundations of this form of forfeiture. English law still provided, however, for corruption of blood and forfeiture of estate as a consequence for serious felonies and treason at the time of the adoption of the United States Constitution. Later, in 1814, Parliament limited corruption of blood to murder, but forfeiture of estate continued.[9] In 1870, England legislated the abolition of corruption of blood and forfeiture of estate for all felonies and treason, but did not eliminate forfeitures consequent to felony conviction, just forfeiture of estate. Other milder *in personam* forfeitures were substituted for various offenses.[10]

Deodands are sometimes spoken of as predecessors of American forfeiture statutes. *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-83 (1974). An instrument of death replaced the slayer's kin as the object of vengeance. At first, the instrument was taken and sold and the proceeds used to buy Masses for the victim. *Id.* at 681. Throughout the later Middle Ages, the king received the money, which provided a small but steady source of revenue.

In the American colonies, the extent to which English law and practice should be adopted was a matter of diverse opinion.[11] Forfeitures did not follow any uniform practice. For example, while the Crown did not insist on most statutory forfeitures since the proceeds would have gone to the colonial governments, it did insist on the enforcement of the Navigation Acts, which by their terms were applicable to the colonies. See *e.g.*, 12 Car. 2, ch. 18, c. II (1660).

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7. Civil death is a mitigation of this practice.
8. 1 J. Bishop, 382-83 (1856 ed.).
9. *Kent's Commentaries on American Law* 473-74 (1854 ed.).
10. 1 J. Bishop, *Commentaries on the Criminal Law* 585 (1892 ed.).
11. 1 J. Story, *Commentaries on the Constitution of the United States* §§163-165, 187-197 (Cooley 4th ed. 1873).

The Navigation Acts were enforced in the vice admiralty courts, not generally *in rem*, but *in personam*, and they were tried by the court without a jury.[12] Forfeiture consequent to conviction and attainder was largely abolished in Massachusetts,[13] allowed to fall into disuse in New York,[14] but was fairly widely employed in Pennsylvania,[15] and Virginia.[16]

Following the Revolution, forfeiture consequent to conviction and attainder fell into disrepute. The Constitution itself forbade bills of attainder – legislative, not judicial, determinations of guilt. U.S. Const. art. I, 9, cl. 3. It also limited corruption of blood and forfeitures of estate for treason to life estates. U.S. Const. art. III, 3, cl. 2. In 1790, Congress abolished by statute both corruption of blood and forfeiture of estate as a consequence of federal criminal prosecutions.[17]

A wide variety of statutes, however, continued the practice of declaring specific forfeitures, which could be imposed in criminal and civil proceedings, either *in personam* or *in rem*. How a particular forfeiture was to be treated was a question of legislative intent.[18] So, too, was the time when the forfeiture was to take place, that is, at the time of the offense[19] or at the time of the conviction. The usual forfeiture in the federal courts, however, was patterned after the Navigation Acts, and it was imposed in an *in rem* proceeding. It was also early held that property could be forfeited without a prior criminal conviction[20] and that the time of forfeiture would relate back to the time of the offense, even as against a *bona fide* purchaser for value.[21] *In rem* forfeitures were rationalized by the personification fiction. Personal guilt was not implicated. The prosecution was brought not against the owner, but the thing itself, and judgment was rendered against the whole world.

The Civil War brought about a change in the law of forfeiture. Traditional treason prosecutions could not be brought against most Rebels, for they were safely behind Confederate lines. Congress' solution was civil *in rem* forfeiture proceedings[22] which were eventually upheld by the Supreme Court.[23] Constitutional attacks on civil in rem forfeitures were turned back again by the Supreme Court[24] when they were used during prohibition to suppress the traffic in illicit alcohol. The con-

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12. *See generally* Wroth, *The Massachusetts Vice Admiralty Court and the Federal Admiralty Jurisdiction*, 6 Am. J. Legal Hist. 250 (1962).
13. 5 N. Dane, *A General Abridgement and Digest of American Law* 4 (1824).
14. J. Goebel & T. Naughton, *Law Enforcement in Colonial New York* 712-13, 716 (1944).
15. See *e.g.*, *Respublica* v. *Doan*, 1 U.S. (1 Dall.) 90, 95 (Pa. 1784) (forfeiture following outlawry).
16. A. Scott, *Criminal Law in Colonial Virginia* 109 (1930).
17. Act of April 30, 1790, ch. 9, § 24, 1 Stat. 112, 117 (1790) codified at 18 U.S.C. § 3563 (1982) (repealed eff. Nov. 1, 1986).
18. *United States* v. *1960 Bags of Coffee*, 12 U.S. (8 Cranch) 398 (1814).
19. *Id.* The Supreme Court declared as "settled doctrine" in *United States* v. *Stowell*, 133 U.S. 1, 16-17 (1890) the rule that forfeiture takes place immediately upon the commission of the offense and the right to the property then vests in the government.
20. *The Palmyra*, 25 U.S. (12 Wheat.) 1, 15 (1827); *see United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354 (1984) (neither jeopardy nor collateral estoppel precludes civil *in rem* forfeiture after criminal acquittal; civil character of proceeding is a question of legislative intent).
21. *See supra* notes 18 and 19.
22. *See generally*, J. Randall, *The Confiscation of Property During the Civil War* (1913).
23. *See* 3 C. Warran, *The Supreme Court in United States History* 38-139 (1922); *infra* note 32.
24. *J. W. Goldsmith, Jr.-Grant Co.* v. *United States*, 254 U.S. 505 (1921).

stitutional validity of in rem civil forfeitures today is settled beyond question.[25] It remains for the revised UCSA to improve on the long tradition of forfeiture.[26]

SECTION 501. DEFINITIONS

"Attorney for the state" invites states to consider which of the various governmental attorneys may be empowered to bring forfeiture actions, such as attorneys general, district/county/state's attorneys, city attorneys and legal representatives of law enforcement agencies.

"Interest holder" defines a special set of commercial interest holders, whose interest is perfected or would prevail over a good faith purchaser for value. The definition is designed to mirror the same protections within forfeiture as exist within the commercial world.

"Owner" encompasses the balance of persons with standing to participate in forfeiture actions.

"Proceeds" follows federal precedent that does not allow deduction for expenses, making "proceeds" the gross proceeds. 21 U.S.C. §881(a)(6). Deductions are designed to promote and encourage business activity. Through the use of deductions the business has more available capital because less income is taxable. It is contrary to an anti-drug position to allow drug dealers to take deductions for expenses incurred during drug trafficking.

"Property" is deliberately all-inclusive, sweeping in real and personal property, tangible and intangible.

"Seizing agency" invites each state to consider which categories of law enforcement agencies or personnel will be empowered to seize property for forfeiture.

"Seizure for forfeiture" is defined to distinguish seizures for forfeiture from seizures for other purposes, such as safekeeping or evidence, which do not implicate the property rights of the owner. The definition operates with subsection (c) of section 506, which requires that a seizure for forfeiture be accompanied by an assertion that the property is subject to forfeiture. If a seizure is made but it is not a seizure for forfeiture, the owner remains free to sell the property.

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25. *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-83 (1974). The United States Supreme Court has upheld all manner of federal forfeitures for 200 years. *See United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354 (1984) (neither jeopardy nor collateral estoppel prevents *in rem* forfeiture after criminal acquittal); *Russello* v. *United States*, 464 U.S. 16 (1983) (RICO *in personam* forfeiture); *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) (owner's innocence is no defense to forfeiture); *United States* v. *Stowell*, 133 U.S. 1, 16, 17 (1890) (forfeiture takes place immediately upon the commission of the offense); *Origet* v. *United States*, 125 U.S. 240 (1888) (statute providing for forfeiture of misdeclared cargo upon owner's conviction may also be enforced in separate civil *in rem* proceeding); *Tyler* v. *Defriees*, 78 U.S. (11 Wall.) 331 (1871) (Civil War Confiscation statutes upheld); *Miller* v. *United States*, 78 U.S. (11 Wall.) 268 (1871); *McVeigh* v. *United States*, 78 U.S. (11 Well.)259 (1871); *United States* v. *Brig Malek Adhel*, 43 U.S. (2 How.) 210 (1844) (innocence of owner of ship no defense); *The Palmyra*, 25 U.S. (12 Wheat.) 1, 15 (1827) (no prior criminal conviction of claimant necessary for forfeiture); *The Amy Warwick*, 1 F. Cas. 808, 811 (D. Mass 1862) (ship lawfully seized as prize of war from "enemy" Richmond, VA. businessmen), *aff'd sub. nom. The Prize Cases*, 67 U.S. (2 Black) 635 (1863); *United States* v. *LaVengeance*, 3 U.S. (3 Dall.) 297 (1796) (no jury required in *in rem* action).
26. The foregoing discussion of forfeiture history closely follows a portion of a draft of Model State Legislation on Sophisticated Criminal Activity edited for dissemination to state governments at the request of the National Association of Attorneys General ("NAAG") RICO Committee. The draft, in turn, relies extensively on the research and writing of an American Bar Association ad hoc RICO committee, which was made available by the committee to NAAG for the purpose of the model legislation commentary.

SECTION 502. JURISDICTION; VENUE

(a) Jurisdiction

This bracketed subsection is intended to take full advantage of either *in rem* jurisdiction, as in 28 U.S.C. §1395, based on the presence of the thing, or *in personam* jurisdiction, as in 21 U.S.C. §853(l) (Continuing Criminal Enterprise), 21 U.S.C. §881(j) (venue based on criminal case against owner in *in rem* forfeiture). It is based on minimum contacts with the forum state. It would allow a county prosecutor to consolidate actions against property seized in several states or even countries. *In personam* jurisdiction underlies the *in personam* forfeiture procedures in sections 516 and 517. Therefore, proceeds of drug dealing in State A may be forfeited in State B, into which they have been brought, and an *in personam* defendant may be ordered to surrender title to a load-vehicle van titled in State A to a court in State B, into which his drug enterprise spread, but in which state the van itself had not been used.

(b) Venue

This permissive venue provision allows expeditious adjudication of forfeitures even though items of property or defendants are scattered over several counties/districts. It reflects the same concerns as 18 U.S.C. §881(j). For example, a county prosecutor of a populous or centrally located county, or an attorney general, could litigate forfeiture cases involving property of drug enterprises ranging around the state. Practical considerations of resources, investigative support, expertise and timing of case development will often have major impact on venue selection. Flexibility will tend to encourage efficiently consolidated cases that are less expensive for claimants than fragmented cases spread over several counties.

SECTION 503. CONDUCT GIVING RISE TO FORFEITURE

Hypothetical

Cocaine dealer distributes cocaine in State A. Cocaine dealer also has distribution outlets in State B. In both states distribution of cocaine is a felony punishable by confinement for more than one year. In addition to actual sales of cocaine, the dealer also engages in attempted sales of cocaine which are also felonies. To insure his dominance over the cocaine market, the dealer uses violence to collect debts and to discourage competition. These acts of violence include assaults, murders and extortionate threats of violence, all of which are felonies.

Analysis

Conduct giving rise to forfeiture is the foundation upon which all forfeiture causes of action rest. Forfeiture occurs only if conduct giving rise to forfeiture has taken place. When conduct giving rise to forfeiture does take place, conduct may give rise to forfeiture even if the conduct occurred outside of the forum state, as long as it would be subject to prosecution where it occurred and meets the required degree of seriousness (felony/punishable by more than a year in custody). Thus, in the hypothetical, State A could bring a civil forfeiture action based on the drug dealer's conduct in both states. No criminal prosecution is necessary for a forfeiture to occur; however, minimum contacts are required with the forfeiting state for the forfeiture to be sustained. The civil effects of conduct giving rise to forfeiture are distinct from and not dependent upon criminal prosecution or conviction. *La Vengeance* 3 U.S. 297 (1796), *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354 (1984). Civil forfeiture reaches the property of the trade; whereas, criminal prosecution reaches the tradesman.

An inchoate or preparatory offense, which is punishable by more than a year in prison, gives rise to forfeiture if it is done in furtherance of a violation of the UCSA. An attempt to sell narcotics, for example, would give rise to forfeiture. If the dealer conspires with others, the conspiracy to sell narcotics would initiate conduct giving rise to forfeiture.

Subsection (3) also reaches felony acts that are done in furtherance of a drug offense even though the act is not a UCSA violation in itself. The murders and assaults done as part of the above hypothetical drug conspiracy would give rise to forfeiture. If the dealer bribed his distributors in order to buy their silence before judicial proceedings, the bribery would be conduct giving rise to forfeiture. A formulation that would only reach conduct that constitutes drug offenses would ignore the essential non-drug offenses that further the drug enterprises. The success of the drug trafficker depends not only on his ability to sell drugs, but also on his ability to launder money, eliminate competition, obstruct investigations and subvert the court process.

SECTION 504. PROPERTY SUBJECT TO FORFEITURE

This section of the propsed amendments creates five separate causes of action for forfeiture, one or more of which the state must allege and show as to each item of property forfeited. Five categories of circumstances subject property to forfeiture. In subsection (1) controlled substance analogs and counterfeit drugs are explicitly added to the UCSA's forfeiture of drugs that are themselves forfeited because of their connection to violations of the Act.

The introductory language of subsection (2), the whole of all property, incorporates the federal concept of the whole of any lot or tract of land. 21 U.S.C. § 881(a)(7). This vitiates the argument that only the trunk of the car is forfeitable because that was the only portion of the property used to transport the contraband. In real property forfeitures the entire tract of land is forfeitable even though the entire property was not dedicated to the illicit use. *United States* v. *Reynolds*, 856 F.2d 675 (4th Cir. 1988). Assume a drug dealer uses only 40 acres out of a total of 160 acres of farm land to grow marijuana. This marijuana growing plot is located in the center of the entire ranch. The statute provides for the forfeiture of the entire 160 acres. This avoids the absurd result that only the 40 acres is forfeitable; thereby leaving the owner or interest holder an "alienable" piece of property consisting of 120 acres with a 40-acre hole in the middle.

This policy is adopted in 21 U.S.C. § 881(a)(7), the model for section 504, which provides for the forfeiture of the whole of any lot or tract of land used or intended to be used in any manner or part to facilitate a drug offense. The same policy is contained in 21 U.S.C. § 853(a)(2) which provides for forfeiture of property of those convicted of a continuing criminal enterprise. Federal courts are unanimous that if property is subject to forfeiture, then the entire tract of land is subject to forfeiture. *United States* v. *The Premises and Real Property at 4492 South Livonia Road*, 889 F.2d 1258 (2nd Cir. 1989); *United States* v. *A Parcel of Land with a Building (etc.) at 40 Moon Hill Road*, 884 F.2d 41 (1st Cir. 1989); *United States* v. *Tax Lot 1500*, 861 F.2d 232 (9th Cir. 1988); *United States* v. *Santoro*, 866 F.2d 1538 (4th Cir. 1989).

It reflects practical considerations as well as policy considerations. A partitioned lot may not be marketable, and may destroy the marketability of both parcels. For example, ingress to the contained lot would be necessary, but would damage the surrounding land's value. It may not be possible as a practical matter. Utilities would also be required, with similar problems. Partitioning may violate subdivision statutes. In a residential setting, sub-division deed restrictions would generally be implicated, and utility access and hook-ups would often be impossible, illegal or impractical. Finally, who would want to buy a parcel of land, large or small, surrounded by the land of a drug dealer with every reason to be hostile and bitter toward their new neighbor?

Subsection (2)(ii) is the familiar "used or intended to be used" theory found in 21 U.S.C. §881(a)(6) and the UCSA, except that when the state seeks the forfeiture of a conveyance only for a possession offense, it must proceed *in personam*.

The proceeds of drug violations are forfeited, as in federal law, 21 U.S.C. §881(a)(6), 21 U.S.C. §853(a)(1)(CCE), 18 U.S.C. §1963(a)(1)(RICO). It effectuates the policy of the money laundering provisions that the proceeds of crime are contraband, a concept that dates to Biblical times. When Judas repented his betrayal of Jesus and returned the thirty pieces of silver that he had been given, the chief priests recognized it as "the

price of blood" and not lawful tender. *Matthew* 27:5-8.

If a dealer makes $100,000 and buys a house, the house is forfeitable as proceeds. *United States* v. *Real Estate at 116 Villa Rella Rd.*, 675 F. Supp. 645 (S.D. Fla. 1987). If a dealer buys stock which appreciates, the appreciation is proceeds. *Restatement, Restitution*, § 205.

Weapons are subject to forfeiture in the additional circumstance of their being "available for use" to facilitate conduct giving rise to forfeiture, even though there is no actual use or intent to use. The availability of a weapon to facilitate drug offenses is sufficient to overcome its drug offender-owner's possessory right in it.

The language of subsection (5) is modified to improve the awkward phrasing of 18 U.S.C. §1963(a)(2) (RICO). It reaches enterprise assets of corrupt enterprises, in addition to those actually used or intended for use. For example, in *United States* v. *Cauble*, 706 F.2d 1322 (5th Cir. 1983) *cert. denied* 104 S. Ct. 996 (1984), a Texas rancher's entire partnership interest in a partnership was forfeited, including land and personal property that was not individually used to import drugs in his massive drug smuggling activity. He had used the enterprise as a whole in his drug smuggling conduct.

SECTION 505. PROPERTY EXEMPT FROM FORFEITURE

The exemptions are a comprehensive and much-debated formulation of those interests whose confiscation would, in most cases, cause more commercial disruption than overall benefit to the integrity of the economy. Subsection (a)(1) deals with situations in which the claimant's state of mind with respect to the particular property is relevant. It exempts non-negligent owners, carving out the exemption that the U.S. Supreme Court declined to carve out in *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). It also exempts a claimant who acted knowing of the risk that the property would be used unlawfully but acting reasonably to prevent it. Thus, a person who learns that his airplane's lessee has been accused of drug smuggling may avoid forfeiture of the plane based on the lessee's subsequent drug flights by taking whatever steps are reasonable to prevent the illegal use., *e.g.* notifying authorities, acting to rescind the lease, etc. Subsection (a)(1) also exempts good faith purchasers for value. This exemption is a very significant expansion of exemptions from the traditional forfeiture of all intervening interests, including those of a *bona fide* purchaser. *United States* v. *Stowell*, 133 U.S. 1 (1890).

Subsection (a)(2) is concerned with the authority to convey. A person who has the authority to convey an interest, on his own behalf or as agent for another, has the power to cause its forfeiture as well. The "or" between paragraphs (1) and (2) should be "and."

Subsection (b) negates exemption from forfeiture under circumstances in which forfeiture is appropriate without consideration of the intent of the claimant with regard to the conduct giving rise to forfeiture. The claimant's exemption will not be recognized unless the claimant:

(1) is not, in conveyance cases, a member of the most common class of potential title holders that could claim lack of knowledge – the spouse or family member. This prevents, to a limited extent, the common forfeiture avoidance device of titling vehicles in the names of uninvolved relatives. It recognizes the practical reality that family members have reason to know of the conduct;

(2) is not an appropriate person to bear the risk of forfeiture in that they have not received substantial economic benefit from proceeds of the conduct giving rise to forfeiture (except in the ordinary course of business);

(3) is not a trustee or nominee of a wrongdoer and have a claim independent of such a person *i.e.*, as a good faith purchaser for value; and

(4) is not criminally responsible for the conduct giving rise to the forfeiture.

An example will illustrate the exemption provision's operation. X is a drug dealer who has moderately prepared himself for a government attempt at the forfeiture of his assets. He has a stash house that he has mortgaged, several vans used to transport drugs and held in the names of family member nominees, a residence purchased with proceeds and held in his wife's name, and bank accounts holding proceeds. After seizure, he assigns his interest in the bank accounts to a friend

out of state under their mutual agreement to avoid forfeiture. The mortgagee of the stash house passes each condition of exemption, and is exempt. The state will therefore take X's equity interest in the stash house subject to the mortgage. The family members' claims to the vans may succeed on (b)(1) and (b)(2), depending on the facts of the case, but will founder on (b)(3), designed to address nominees. The residence purchased with proceeds but claimed by an "innocent" spouse would be exempt as to her interest if she is a good faith purchaser, but would fail if her knowledge of the conduct or her financial benefit from the conduct of X ran afoul of (a)(1) or (b)(2). A spouse whose family expenses were substantially paid from the drug dealing would not be able to prevail. The friend to whom X assigned his bank accounts will fail the test of (b)(3).

Subsection (c) addresses the particular claims of criminal defense counsel. A special exemption provision for the exemption of defense attorneys fees is unnecessary and unwise. The Supreme Court has considered the issue in both the context of a pre-trial deprivation of counsel of choice (*Monsanto*) and the context of a recapture of drug proceeds paid to defense counsel after the representation was complete (*Caplin and Drysdale*).

Section 512 obviates the need for a special *Monsanto* hearing in forfeiture cases in which the claimant asserts that the seizure for forfeiture deprives him of funds for counsel of choice. It provides for a probable cause determination in every case, not just where a defense attorney's fee is involved. It is far more favorable to claimants than *Monsanto* suggested.

Section 511 completes the *Monsanto* need for a hearing and deals with the issue of recapture of an earned fee. It allows the attorney to have funds released based on a probable cause hearing or if the government is not ready or unwilling to proceed. In either event, funds released and used for attorney fees actually earned are forever exempt from forfeiture. They cannot be recaptured. This provision in effect overturns *Caplin and Drysdale's* most important holding, the holding that a earned fee can be recaptured after it is earned. It therefore provides all of the protection of the legal profession that can be provided without declaring the profession willing to accept drug money while on notice of its origins.

Subsection (d) reflects the position that the state should not protect interests that are not in substantial compliance with recordation statutes designed to set priorities and protect purchasers without notice. The state is, in effect, in the shoes of a hypothetical good faith purchaser.

SECTION 506. SEIZURE OF PROPERTY

The language of Section 506 is adapted from 21 U.S.C. §881. It has been modified to address two related concerns. First, it provides specific authorization for a seizure warrant, to augment state search warrant statutes. These search warrant statutes generally have no provisions for seizure of property that is not necessarily evidence of a crime. Second, it makes clear that it does not impose a statutory warrant requirement in addition to the requirements imposed by the Fourth Amendment.

A seizure for forfeiture may be made without a warrant, but authorization to seize without a warrant does not include authorization to search. Only where no invasion of a protected privacy interest, i.e. no search, is necessary to accomplish the seizure may the warrantless seizure for forfeiture be made. If a search is necessary, a warrant is required in the same circumstances that a warrant is required for searches. *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338 (1977; *Texas* v. *Brown*, 460 U.S. 730 (1983). The definition of a search here is the same as in Fourth Amendment law.

Subsection (d) encourages constructive seizure, by which the jurisdiction of the court is established without displacing the owner or disrupting the production of income. It is particularly useful in seizures of residences and ongoing businesses. Subsection (e) also provides assurance that owners and interest holders will learn of the seizure, whether it is a seizure of real or personal property.

Subsection (f) requires a prompt inventory, necessary for efficient property management and to protect the agency against claims of loss or mismanagement.

Subsections (f) and (g) provide protection for third-party holders of property being seized for forfeiture who deliver it on demand. A bank should not be subject to suit by the customer in these circumstances, nor should its possessory lien be affected, for example, when accounts and other collateral are pledged.

SECTION 507. COMMENCEMENT OF FORFEITURE PROCEEDINGS

Section 507 specifies a time period in which the state must act to maintain a forfeiture action. The UCSA has no time restrictions. These proposed time limits will require a much stricter standard than permitted under Due Process analysis. The Due Process limits were defined in *United States* v. *Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in United States Currency*, 461 U.S. 555 (1983). The Court applied a four-factor test borrowed from *Barker* v. *Wingo*, 407 U.S. 514 (1972), turning on the length of the pre-hearing delay, the reasons for the delay, the claimant's assertion of the right to a judicial hearing and the prejudice caused to the claimant's case by the delay. Subsection (a) clarifies that failure to pursue forfeiture within the statutory time limit does not result in dismissal, but only in the release of the property pending further proceedings. Those proceedings may be within the case, if one has been filed, or may be a new case. The proceedings may be commenced at any time within the seven-year statute of limitations set in Section 704.

Subsection (c) creates a general "mail box rule" for the effective date of notice and of other service of a complaint by the notice method. This conforms to the standard rules in civil practice. This is designed to prevent different due dates for claims, stipulations, answers, motions, etc. By making a single mailing or publication the state may greatly simplify the timekeeping necessary to track multiple claims and/or stipulations.

Subsection (c)(1)-(3) set forth the state's method of providing the notice of pending forfeiture to owners and interest holders.

Subsection (c)(3) provides for publication of the notice when the owners/interest holders address or interest is not known or reasonably ascertainable. Even though it appears that all possible claimants have received personal notice, it is prudent to provide notice by publication as well to avoid any doubt as to whether the judgment will bind all subsequent claimants.

Subsection (d) sets forth what information must be included in the notice of pending forfeiture. The notice must contain at a minimum, sufficient information to enable persons with an interest in the property to appear and protect their interest.

Subsection (e) allows the attorney for the state to file a lien for forfeiture of property upon the initiation of any civil or criminal proceeding under this Act. The lien secures the amount of potential liability for civil judgment and, if applicable, the fair market value of property seized for forfeiture. The filing of the lien constitutes notice to any person claiming an interest in the seized property or on property owned by the named person. The availability of this lien has the effect of encouraging the government to leave property, particularly real property, in the hands of its owner during litigation. Subsection (e)(5) requires a trustee with notice of a forfeiture lien or action to provide the name and address of the person for whom the property is held and a copy of the trust agreement.

SECTION 508. NONAPPLICATION OF OTHER PROCESS; RELEASE OF PROPERTY

Subsection (a) allows the attorney for the state to release the seizure for forfeiture on the property if the forfeiture or retention is unnecessary. It clarifies that a motion for release of property seized as evidence is not applicable. This follows the federal practice. *United States* v. *United States Currency $83,310.78*, 851 F.2d 1231 (9th Cir. 1988).

It also allows transfer of the action to another attorney for the state, or the federal government, for example, to consolidate in one county or to allow an office with greater resources to handle it.

It specifically recognizes exempt interests.

Subsection (b) allows an owner of property seized under this section to obtain a release of the property by posting a surety bond or cash in an amount equal to the fair market value of the property. The state may refuse to release the property if it is contraband, evidence of a violation of law or is suited for use in illegal activities, *e.g.* a

boat with a secret compartment installed in the hull. If the state prevails in the forfeiture, it obtains the bond amount as a substitute res. This benefits the claimant by allowing him free use and alienation of his property, and also because it prevents deterioration of the property during litigation. It benefits the state because it eliminates the cost of storage, creates an interest-bearing and therefore increasing fund rather than deteriorating or depreciating property, and eliminates the discount effect of government sale.

An example illustrates the several benefits. A vehicle is worth $20,000, fair market value, at the time it is seized for forfeiture. Its owner does not bond it out. A year later it has depreciated to $15,000 in value, and has accumulated $500 in storage and insurance expenses. Its net proceeds are $14,500. Now, if the owner of a second identical vehicle bonds it out for $20,000, the owner may sell it for $20,000. The bond is deposited and earns 10 percent interest for one year. There are no expenses. The net proceeds are $22,000. The owner or the government saves $5,500, over 25 percent of the original fair market value of the vehicle. The longer the litigation and the more susceptible the property is to depreciation, the greater the benefit shared by the parties.

SECTION 509. CUSTODY OF SEIZED PROPERTY

This section sets out the state's powers and duties with respect to seized property. The property can be removed to a place designated by the court, retained as evidence, removed to a storage area for safe keeping or deposited in an interest bearing account.

Subsection (a)(4) allows for a custodian, including an owner or interest holder, to take custody of the property. Authorized private persons may take custody of the property as well as government agencies. Often, the person most familiar with the property and most willing and able to manage it is the owner, an interest holder, or an agent for one of them. Custodianship agreements with private custodians may also be done on a contract basis for the state. Agreements may be made on a specific case, on a particular class of assets (*e.g.* vehicles) or on an across-the-board basis. Custodianship agreements greatly reduce and simplify the role of law enforcement officers in property maintenance, prevent unnecessary deprivations of property in the event that the owner prevails, and reduce judicial and administrative time and anxiety expended over property management and liability issues. Without these statutory additions, seizure of ongoing businesses and seizures of wasting assets would have to be done through cumbersome and expensive procedures to the detriment of all concerned.

Subsection (b) protects those who act in obedience to court orders from liability. For example, if a bank accepts seized money as a deposit, under a court's order, it is not susceptible to suit for conversion.

SECTION 510. PETITION FOR EXEMPTION OF PROPERTY

Section 510 allows the attorney for the state to make a stipulation of exemption of property available to owners of and interest holders in property seized for forfeiture. An owner or interest holder may elect to either file a claim against the property or a petition for stipulation of exemption of the property. Subsection (b) sets forth the procedure and time limitations if, in fact, an owner or interest holder timely petitions for stipulation of exemption. Stipulations will allow rapid exit from forfeiture actions for commercial interests, saving them expenses and eliminating uncertainty over their exemption as early as possible. Financial institutions benefit from this provision by being able to eliminate referrals of forfeiture matters to outside counsel. When property that the financial institution has an interest in is seized for forfeiture an in-house clerk routinely responds, saving time and expense. The rare complex case may be referred, if necessary.

Subsection (c) provides the procedure if no proper petitions for exemption are timely filed.

SECTION 511. RELEASE OF SEIZED PROPERTY FOR LIMITED PURPOSES

Subsection (a) allows the release of property under certain circumstances for payment of defense attorney's fees. Subsection (b) makes a similar exception for necessary living expenses. Both exempt property released from its seizure from forfeiture under these provisions. Therefore, a person such as a defense attorney who accepts payment after prevailing at the hearing provided for in this section and who provides services or goods in exchange for value is not in jeopardy of having their payment recaptured from them by the government. These provisions are responses to the U.S. Supreme Court's holding in *Caplin and Drysdale*. That case allows the recapture of already expended funds and finds that recapture is appropriate when the recipient had notice that the funds were subject to forfeiture.

It is not necessary that the criminal charge be related to the forfeiture proceedings. The criminal charge could be any criminal charge. The applicant must make an application by complying with the requirements for claims.

The hearing is divided into two stages. The first stage requires the applicant to establish he has had no previous adversarial judicial determination of probable cause, that he has no access to other sources of funds, and that the property is not subject to the claim of another, *e.g.*, the bank he allegedly robbed.

If there has been a non-adversarial finding of probable cause, the person may still apply for a hearing. It is only where the applicant has already had an adversarial determination of probable cause that the applicant cannot move for release of funds under this section.

If the applicant does not establish these three preliminary elements, there is no hearing on probable cause and the property is not releasable. If the applicant does establish the preliminary elements, the second stage of the procedure is triggered, which is the probable cause hearing. If no probable cause is found, property can be released to pay for legal services. Once the property is released and has paid for legal services actually rendered, that property is not later forfeitable even if the state can subsequently establish probable cause for the property's forfeiture, *i.e.* that it was the proceeds of drug offenses.

SECTION 512. PROBABLE CAUSE HEARINGS

This section creates a new and additional probable cause hearing that may be demanded by a claimant on five days' notice. A quick probable cause hearing is not required by Due Process and is not supplied by federal law. A delay of 18 months between seizure and hearing was approved by the U.S. Supreme Court in *United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in U.S. Currency*, 461 U.S. 555 (1983), and substantially longer delays have been approved in Circuit Court decisions. The purpose of this statutorily created hearing is to correct manifest error immediately. If no probable cause is found, the property is to be released to the custody of the applicant pending the outcome of forfeiture proceedings.

Either an owner or an interest holder may apply for this hearing. They can apply for this hearing within 30 days of the notice of seizure for forfeiture or lien or knowledge of the seizure or lien. The only issue at this hearing is whether probable cause exists for the forfeiture. Issues as to exemptions, defenses, or the manner of seizure are not relevant. This parallels other probable cause hearings such as grand jury proceedings or preliminary hearing proceedings. If no probable cause is found to exist, the property must be released to the applicant, or the property shall be released from the forfeiture lien. The release does not deprive the court of jurisdiction.

Subsection (b) provides that all the applicants' interests in property must be consolidated for a single hearing. This section is designed to protect against multiple hearings arising from the same seizure for forfeiture or forfeiture lien. Otherwise, a set of claimants could stagger their requests for hearings and force the state to show probable cause in each of many successive hearings.

SECTION 513. FILING OF CLAIM

Section 513 sets forth how an owner of or interest holder in property seized for forfeiture files a claim to assert an interest in property. Subsection (a) states that the claim must be delivered or mailed to the seizing agency and to the attorney for the state. The claim must be signed by the owner or interest holder under penalty of perjury and must set forth the items listed in paragraphs (1)-(7). An unverified claim is not sufficient. *United States* v. *Fifteen Thousand Five Hundred Dollars ($15,500.00) United States Currency*, 558 F.2d 1359, 1360 (9th Cir. 1977); *accord, United States* v. *One 1978 Piper Navajo PA-31 Aircraft*, 748 F.2d 316 (5th Cir. 1984); *United States* v. *U.S. Currency Amounting to Sum of Thirty Thousand Eight Hundred Dollars ($30,800.00)*, 555 F. Supp. 280, 283 (E.D.N.Y.), *aff'd mem.*, 742 F.2d 1444 (2nd Cir. 1983).

The claim is necessary to alert the government that a person with standing asserts an interest. Failure to file a claim triggers an application for an order of forfeiture under Sections 518 and 519. A timely filed claim forces the government to proceed with a judicial action, either *in rem* or *in personam* or both.

SECTION 514. JUDICIAL FORFEITURE PROCEEDING

This section refers to general procedures in judicial forfeiture proceedings that are applicable to both *in rem* and *in personam* actions.

Subsection (a) details procedures that may be ordered by the court to preserve the value of the property. The court may enter its orders at any time, whether before or after the seizure, as long as the orders are entered to seize, secure, maintain, or preserve the property or the availability of property subject to seizure.

Subsection (b) allows the court to sell property seized for forfeiture but not yet the subject of a judgment to satisfy a specified interest of any interest holder. However, the interest holder must 1) have properly filed a claim, or 2) have an interest stipulated as exempt from forfeiture. The section contemplates that the interest holder, or a person designated by the court, would then dispose of the property by commercially reasonable/public sale. The proceeds would be first applied to expenses incurred in connection with the sale and then applied to satisfy exempt interests in the order of their priority. If there are any proceeds left over, after satisfying the interest holder's interest, the excess proceeds, *i.e.* the owner's equity, would be returned to the court. This will assure timely foreclosures and prevent waste while protecting owner's equity for the owner or the state.

Subsection (c), preclusion, is borrowed from 18 U.S.C. §1964 (d), but adds the victim estoppel provision of 18 U.S.C. §3580(e). See *Emich Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558, 568 (1951). Orders short of conviction may also have a collateral estoppel effect. *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979).

Subsection (d)(1) states that the court may receive and consider all evidence generally admissible in such situations in making any determinations of probable cause.

Subsection (d)(2) allows the court to infer that any money found in proximity to contraband, drug paraphernalia, or various instrumentalities of conduct giving rise to forfeiture was proceeds of the conduct or was used or intended to be used to facilitate the conduct giving rise to forfeiture. The inference is found in case law and is codified in various state statutes, such as Arizona's A.R.S. 13-4305(B).

Subsection (d)(3) creates a permissible inference based on economic analysis. If the state establishes probable cause to believe that 1) the person has engaged in conduct giving rise to forfeiture (most frequently drug dealing), 2) the property was acquired by the person during or soon after the conduct giving rise to forfeiture, and 3) there was no likely source for the property other than the conduct, then *prima facie* case exists for forfeiture of the property. This is patterned on 21 U.S.C. §853(d), the federal Continuing Criminal Enterprise statute.

Subsection (e) vests all property declared forfeited to the state at the time of the commission of the conduct giving rise to forfeiture. This is known as the "relation back doctrine" because the government's title relates back to the time of the offense. It is consistently applied in federal law,

United States v. *Stowell*, 133 U.S. 1 (1890) (collecting cases), *United States* v. *$5,644,540 in United States Currency*, 799 F.2d 1357 (9th Cir. 1986), and has been added to federal and state statutes. 21 U.S.C. §881(h) (added by Pub.L. 98-473, 1984). As the forfeiture analysis is a commercial analysis, the interests of good faith purchasers for value are exempted from forfeiture. Interest holders are protected pursuant to Section 505.

Subsection (f) states that an acquittal or dismissal in a criminal proceeding does not preclude civil proceedings under this act. The prior acquittal of a defendant in a parallel criminal case does not bar his subsequent loss of property in a civil forfeiture case, since it is not a criminal case. *United States* v. *One Assortment of 89 Firearms*, 104 S. Ct. 1099 (1984).

Subsection (g) allows a stay of civil forfeiture proceedings. Stays are often sought by the government to prevent civil discovery of its criminal case and by the claimant to prevent civil discovery beyond the shelter of the Fifth Amendment that is provided in the claimant's criminal prosecution. This provision does not require a complete stay of the civil proceedings; partial stays often meet all parties needs better than complete stays.

Subsection (h) allows for consolidation of various forfeiture actions by an interest holder and the state.

Subsection (i) directs that the rules of civil procedure apply to all proceedings under this Act unless a different procedure is provided for. *In rem* procedures and a desire for expedition are two primary causes of needed variances from the usual rules of civil procedure.

SECTION 515. ADDITIONAL REQUIREMENTS FOR IN REM PROCEEDINGS

Subsections (a) and (b) state that if a forfeiture is authorized by law, it must be ordered by a court on an action *in rem* brought by the state. The *in rem* action may be brought in addition to or in lieu of *in personam* civil forfeiture procedure. The state brings the action pursuant to a notice of pending forfeiture or a verified complaint.

Subsection (c) allows only an owner of or an interest holder in the property to file an answer asserting a claim against the property in an *in rem* action. Subsection (c) interfaces with the definition of owner in section 501. If interests are required to be recorded, then only those interests that are in compliance with the recording statutes can be asserted in forfeiture actions. Subsection (c) also interfaces with the definition of interest holder in section 501 in that only those interests which would be perfected as against a *bona fide* purchaser can be asserted in forfeiture actions.

Subsection (d) sets forth what the owner or interest holder's answer must contain. It requires that the answer be signed by the owner or interest holder under penalty of perjury to discourage frivolous claims. It requires the answer to bear the caption of the proceedings to avoid different answers on the same property being assigned separate case numbers and separate judges. It requires the owner or interest holder to state the nature and extent of their interest in the property, the date and circumstances of their acquisition of the interest in the property, and the precise relief sought. This is based on Rule C(6) of the Supplemental Rules For Certain Admiralty and Maritime Claims (28 U.S.C. Appendix, F.R.C.P.).

Subsection (e) states that the answer must be filed with the court within [20] days after service of the civil *in rem* complaint, the common requirement of rules of civil procedure.

Subsection (f) requires that a cost bond must accompany the answer in case the claimant is ordered to pay all costs and expenses of the proceeding. Funds received will be placed in an interest bearing account pending final disposition of the case. The hearing must be held by the court without a jury within [60] days after service of the complaint, unless continued for good cause, under subsection (g). Cost bonds are required federally. See 21 C.F.R. §1316.76. The concept of requiring civil litigants to place bonds to secure their litigation rights is a common one. Losing civil litigants must, for example, post a supersedeas bond in order to appeal. In lieu of a cost bond, a claimant may file an *in pauperis* bond.

As acknowledged in subsection (h), forfeiture hearings consist of two portions. The state has the burden of going forward, and must show probable

cause for forfeiture. If, and only if, the state succeeds in doing so, the burden of proof shifts to the claimant. The claimant must show, by a preponderance of the evidence, that his interest is not subject to forfeiture. This arrangement has been used federally for 200 years. The probable cause portion applies only in forfeitures which are *in rem*. In all *in personam* forfeitures, the burden is on the state to establish its case by a preponderance of the evidence.

Subsection (i) requires the court to order the seized property to be returned to the claimant if the state does not show the existence of probable cause or if the claimant establishes that his interest is exempt from forfeiture.

SECTION 516. ADDITIONAL REQUIREMENTS FOR IN PERSONAM PROCEEDINGS

Subsections (a) and (b) provide for civil *in personam* proceedings.

Subsection (c) allows the state to obtain a temporary restraining order, without notice or an opportunity for a hearing, if the state demonstrates that 1) there is probable cause to believe that the property would be subject to forfeiture, and 2) notice of the temporary restraining order would jeopardize the availability of the property for forfeiture. The special statutory treatment of a temporary restraining order in this context arises from the 1984 amendments to the federal Continuing Criminal Enterprise and RICO statutes. There is no need for the government to show irreparable injury.

Subsection (d) requires that notice and opportunity for a hearing must be afforded to persons known to have an interest in the property once the restraining order is entered. The hearing must be held at the earliest possible date, and is limited to the issues of whether there is a probability that the state will prevail and failure to enter the order will result in the property being destroyed, conveyed, encumbered, etc., and whether the need to preserve the availability of the property outweighs the hardship on any owner or interest holder.

Under subsection (f), once the court determines the liability of a person for conduct giving rise to forfeiture, the court must enter judgment of forfeiture of the property and must also authorize the state to seize all property ordered forfeited which was not previously seized. The state can also obtain, by application to the court, any appropriate orders to protect the interest of the state in the property ordered forfeited. For example, if the property forfeited is out of state, the court can order the person found to be liable to deliver the property or a deed to the property to the state.

Subsection (e) recites that the state has the burden of proof by a preponderance of the evidence in an *in personam* forfeiture. This distinguishes *in personam* forfeitures from *in rem* forfeitures.

Subsection (g) details the procedures subsequent to the *in personam* finding of liability and order of forfeiture. Essentially, the judgment *in personam* relating to the defendant's interest is followed by an *in rem* proceeding to deal with the potential interests of the rest of the world. The statute directs the state to give notice of pending forfeiture to all owners and interest holders who have not previously been given notice. It allows an owner or interest holder to file a claim to the property ordered forfeited if his claim is not precluded. If the claims are not resolved, the attorney for the state shall proceed to file a forfeiture complaint, and the court shall hold a hearing to determine the claim without a jury. The court, in accordance with its findings at the hearing, may amend its order of forfeiture if the claimant establishes that he has an interest and that his interest is exempt from forfeiture. In the *in personam* proceeding, the only interests forfeited are those of persons who are liable for the conduct giving rise to forfeiture. The subsequent in rem proceeding determines all third party rights. The third party is prevented from intervention by subsection (h), but need not wait for this proceeding to have his interest determined. The third party may move for a quick release hearing pursuant to section 512, or the third party may apply for a stipulation of exemption pursuant to section 510.

Subsection (h) provides that except as provided in sections 511 and 512 no person claiming an interest in property subject to forfeiture may intervene in a trial or appeal of a criminal action or in an *in personam* civil action involving forfeiture of the property.

Subsection (i) simply applies the state rules relating to jury trials to *in personam* forfeitures.

SECTION 517. FORFEITURE OF OTHER PROPERTY

Subsection (a) allows the court to order the forfeiture of any other property of a claimant or defendant up to the value of the property found by the court to be subject to forfeiture if any of the forfeited property cannot be located, has been transferred, conveyed or sold to a third party, is beyond the jurisdiction of the court, has been substantially diminished in value, has been commingled or is subject to an exempt interest. This provision is modeled on 21 U.S.C. §853(p) (Continuing Criminal Enterprise). Its intent is to provide a method of effectuating forfeitures in the face of avoidance methods used by today's drug offenders. Its net effect is the creation of a publicly enforced tort of using property to empower drug enterprises, setting the measure of damages as the value of the property used for this purpose.

Subsection (b) allows the state to institute an action, after notice, to recover judgment in an amount equal to the value of the lien, or if there is no lien, in an amount not to exceed the fair market value of the property, together with reasonable investigative expenses and attorney fees, if, in fact, property subject to forfeiture is conveyed, alienated, disposed of, or otherwise rendered unavailable for forfeiture.

Subsection (c) states that this section must be liberally construed to effectuate its remedial purpose. It is modeled on a similar provision in federal RICO. *See, United States* v. *Turkette*, 452 U.S. 576 (1981). Many states have general provisions in their state codes to the same effect. Subsection (c) should be moved to Section 703, the civil action modeled on the federal Continuing Criminal Enterprise statute. It was drafted to modify that provision. That provision has been moved to its current location in section 703 and this subsection has been left behind.

SECTION 518. ORDER OF FORFEITURE; TITLE TO FORFEITED PROPERTY

Subsection (a) allows the attorney for the state to apply for an order of forfeiture and allocation of forfeited property if no claim or answer is timely filed in an *in rem* action. The state's application must show jurisdiction, proper notice and sufficient facts to demonstrate probable cause for forfeiture, in order for the court to order the property forfeited to the state.

Subsection (b) gives the state title to the forfeited property interest which vests with the state on the commission of the conduct giving rise to forfeiture.

Subsection (c) allows the state to transfer good and sufficient title to any subsequent purchaser or transferee. This provision is extremely important to the state because the ability to pass good title is critical to the price that the state will get for the property. Indeed, real property may not be saleable at all if title insurance cannot be obtained.

Subsection (d) simply allows for a person who has claimed and obtained a judgment recognizing an interest in property subject to forfeiture to have their property or interest released to them, free of liens and encumbrances. They also have their cost bond discharged, of course.

Subsection (e) protects the state from judgment in cases in which it had reasonable cause for the seizure or for the filing of the notice or complaint. *In rem* seizures inherently impact the interests of persons who are exempt, since the seizure of property is required for judicial jurisdiction and property often has exempt as well as non-exempt interest holders. Forfeiture cases are also particularly susceptible to failure of the evidence at the ultimate hearing because they become old waiting for the completion of the companion criminal case. Drug cases, especially, tend to grow weak with age due to the transient and unstable nature of the witnesses that are available to the government, and due to potential witnesses' fear and intimidation.

Subsection (f) gives the court power to order a claimant who fails to establish that his interest is

exempt from forfeiture to pay reasonable costs incurred by the state or any other claimant relating to disproving the claim, costs of investigation and costs of prosecution, including attorneys' fees.

SECTION 519. DISPOSITION OF FORFEITED PROPERTY

Subsection (a)(1)-(5) describe what the state can do with forfeited property. For example, the state can retain it for official use, transfer it, sell it, or destroy it. The state can require another agency to take custody of the property and dispose of it or forward it to the Drug Enforcement Administration. Subsection (b) provides for a special assets forfeiture fund into which all moneys obtained under this section must be deposited. The fund is subject to audit and must be distributed as follows: 1) To satisfy any *bona fide* security interest or lien, 2) for payment of expenses, and 3) the balance distributed proportionally for use by enforcement and prosecutorial agencies enforcing this Act. Return of income from forfeiture programs to law enforcement has become a major feature of federal "asset sharing," under which state and local agencies may obtain shares of federal forfeiture judgments resulting from cases the state and local officers worked on. Asset sharing has shown great potential for bringing agencies together in cooperative projects and for drawing prosecutors and law enforcement officers together in closer relationships. The result has been better cases based on greater legal oversight. Needless to say, law enforcement is in desperate need of resources for drug investigation and prosecution. A Wharton School of Economics study in 1986 showed that all U.S. drug enforcement expenditures by local, state and federal law enforcement, even including routine patrol expenses, amounted to about 1/20 of the annual income of the illegal U.S. drug industry.

SECTION 520. SUMMARY FORFEITURE

Section 520 allows for all controlled substances included in Schedule I which are contraband and any controlled substances whose owners are unknown to be summarily forfeited to the state. It is a feature of UCSA and of federal law. 21 U.S.C. §881(f), (g)(1).

SECTION 521. LIMITATION OF ACTION

Section 521 states that no person claiming an interest in property subject to forfeiture may commence or maintain any action against the state concerning the validity of the alleged interest other than as provided in this section. It prevents procedural complexity created by potential claimants electing to file separate law suits under causes of action such as replevin or trespass.

Article VI — Enforcement and Administrative Provisions

and

Article VII — Miscellaneous

of the

Proposed Amendments

to the

Uniform Controlled Substances Act

(UCSA)

(3) the balance, as provided by subsection (a)(1) for use by enforcement and prosecutorial agencies but only for enforcement of this [Act].

COMMENT ON CREATION OF SECTION

Subsection (a)(1) allows for the transfer of forfeited property to agencies who participated in the forfeiture according to their participation. This is similar to 21 U.S.C. 881(e). Subsection (a)(2) authorizes sale of the property and requires deposit in a special fund for uses as provided by subsection (b). Each state should tailor the language in subsection (a)(2) and subsection (b) to its own requirements for establishing special funds in the state treasury and to its own appropriation requirements.

SECTION 520. SUMMARY FORFEITURE. Controlled substances included in Schedule I which are contraband and any controlled substance whose owners are unknown are summarily forfeited to the state. The court may include in any judgment of conviction under this [Act] an order forfeiting any controlled substance involved in the offense to the extent of the defendant's interest.

COMMENT ON CREATION OF SECTION

This section declares all contraband and controlled substances summarily forfeited. This includes the plants themselves.

SECTION 521. LIMITATION ON ACTION. No person claiming an interest in property subject to forfeiture may maintain any action against the state concerning the validity of the alleged interest other than as provided in this [Article].

ARTICLE ~~V~~ VI

~~[~~ENFORCEMENT AND ADMINISTRATIVE PROVISIONS~~]~~

[SECTION ~~501~~ 601. ~~[~~POWERS OF ENFORCEMENT PERSONNEL.~~]~~

~~(a)~~ Any officer or employee of the [appropriate agency] designated by the [appropriate person] may:

(1) carry firearms in the performance of ~~his~~ the officer's or employee's official duties;

(2) execute and serve search warrants, arrest warrants, administrative inspection warrants, subpoenas, and summonses issued under the authority of this State;

(3) make arrests without warrant for any offense under this [Act] committed in ~~his~~ the officer's or employee's presence, or if ~~he~~ the officer or employee has probable cause to believe that the ~~person~~ individual to be arrested has committed or is committing a violation of this [Act] which may constitute a felony;

(4) make seizures of property pursuant to this [Act]; ~~or~~ and

(5) perform other law enforcement duties as the [appropriate person] designates.]

COMMENT ON AMENDMENT

This section is bracketed to provide an option to consider in granting powers to personnel of the appropriate agency, particularly powers normally associated with law enforcement personnel, e.g., the carrying of firearms.

SECTION ~~502~~ 602. ~~[~~ADMINISTRATIVE INSPECTIONS AND WARRANTS.~~]~~

(a) ~~Issuance~~ The procedure for issuance and execution of administrative inspection warrants ~~shall be~~ is as follows:

(1) A [judge of a ~~State~~ state court of record, or any ~~State~~ state magistrate] within ~~his~~ the [judge's or magistrate's] jurisdiction, and upon proper oath or affirmation showing probable cause, may issue warrants for the purpose of conducting administrative inspections of controlled premises as authorized by this [Act] or rules ~~hereunder~~ adopted under this [Act], and seizures of property appropriate to the inspections. For purposes of the issuance of administrative inspection warrants, probable cause exists upon showing a valid public interest in the effective enforcement of this [Act] or rules ~~hereunder~~ adopted under this [Act], sufficient to justify administrative inspection of

the area, premises, building, or conveyance in the circumstances specified in the application for the warrant~~:~~.

(2) A warrant ~~shall~~ may issue only upon an affidavit of a designated officer or employee having knowledge of the facts alleged, sworn to before the [judge or magistrate] and establishing the grounds for issuing the warrant. If the [judge or magistrate] is satisfied that grounds for the application exist or that there is probable cause to believe they exist, ~~he~~ the [judge or magistrate] shall issue a warrant identifying the area, premises, building, or conveyance to be inspected, the purpose of the inspection, and, if appropriate, the type of property to be inspected, if any. The warrant ~~shall~~ must:

(i) state the grounds for its issuance and the name of each ~~person~~ individual whose affidavit has been taken in support thereof;

(ii) be directed to ~~a person~~ an individual authorized by Section 501 to execute it;

(iii) command the ~~person~~ individual to whom it is directed to inspect the area, premises, building, or conveyance identified for the purpose specified and, if appropriate, direct the seizure of the property specified;

(iv) identify the item or types of property to be seized, if any; and

(v) direct that it be served during normal business hours and designate [the judge or magistrate] to whom it ~~shall~~ must be returned~~:~~.

(3) A warrant issued pursuant to this ~~Section~~ section must be executed and returned within ~~10~~ ten days ~~of~~ after its date unless, upon a showing of a need for additional time, the court orders otherwise. If property is seized pursuant to a warrant, a copy ~~shall~~ must be given

to the person from whom or from whose premises the property is taken, together with a receipt for the property taken. The return of the warrant ~~shall~~ must be made promptly, accompanied by a written inventory of any property taken. The inventory ~~shall~~ must be made in the presence of the ~~person~~ individual executing the warrant and of the person from whose possession or premises the property was taken, if present, or in the presence of at least one credible ~~person~~ individual other than the ~~person~~ individual executing the warrant. A copy of the inventory ~~shall~~ must be delivered to the person from whom or from whose premises the property was taken and to the applicant for the warrant~~.~~.

(4) The [judge or magistrate] who has issued a warrant shall attach ~~thereto~~ to the warrant a copy of the return and all papers returnable in connection therewith and file them with the clerk of the [appropriate ~~State~~ state court for the judicial district] in which the inspection was made.

(b) The [appropriate person or agency] may make administrative inspections of controlled premises in accordance with the following provisions:

(1) For purposes of this Section ~~only~~, "controlled premises" means:

(i) places where persons registered or exempted from registration requirements under this [Act] are required to keep records; and

(ii) places including factories, warehouses, establishments, and conveyances in which persons registered or exempted from registration requirements under this [Act] are permitted to hold, manufacture, compound, process, sell, deliver, or otherwise dispose of any controlled substance.

(2) ~~When~~ If authorized by an administrative inspection warrant issued pursuant to subsection (a), an officer or employee designated by the [appropriate person or agency], upon presenting the warrant and appropriate credentials to the owner, operator, or agent in charge, may enter controlled premises for the purpose of conducting an administrative inspection.

(3) ~~When~~ If authorized by an administrative inspection warrant, an officer or employee designated by the [appropriate person or agency] may:

(i) inspect and copy records required by this [Act] to be kept;

(ii) inspect, within reasonable limits and in a reasonable manner, controlled premises and all pertinent equipment, finished and unfinished material, containers and labeling found therein, and, except as provided in ~~subsection (b)(5)~~ paragraph (5), all other things therein, including records, files, papers, processes, controls, and facilities bearing on violation of this [Act]; and

(iii) inventory any stock of any controlled substance therein and obtain samples thereof~~;~~.

(4) This ~~Section~~ section does not prevent the inspection without a warrant of books and records pursuant to an administrative subpoena issued in accordance with [insert appropriate ~~State Code~~ state code section], nor does it prevent entries and administrative inspections, including seizures of property, without a warrant:

(i) if the owner, operator, or agent in charge of the controlled premises consents;

(ii) in situations presenting imminent danger to health or safety;

(iii) in situations involving inspection of conveyances if there is reasonable cause to believe that the mobility of the conveyance makes it impracticable to obtain a warrant;

(iv) in any other exceptional or emergency circumstance where time or opportunity to apply for a warrant is lacking; or~~,~~

(v) in all other situations in which a warrant is not constitutionally required~~.~~.

(5) An inspection authorized by this ~~Section shall~~ section may not extend to financial data, sales data, other than shipment data, or pricing data unless the owner, operator, or agent in charge of the controlled premises consents in writing.

SECTION ~~503~~ 603. ~~[~~INJUNCTIONS.~~]~~

(a) The [trial courts of this State] have [may exercise] jurisdiction to restrain or enjoin violations of this [Act].

(b) The defendant may demand trial by jury for an alleged violation of an injunction or restraining order under this ~~Section~~ section.

SECTION ~~504~~ 604. ~~[~~COOPERATIVE ARRANGEMENTS AND CONFIDENTIALITY.~~]~~

(a) The [appropriate person or agency] shall cooperate with ~~Federal~~ federal and other ~~State~~ state agencies in discharging ~~his [its]~~ the [appropriate person's or agency's] responsibilities concerning traffic in controlled substances and in suppressing the abuse of controlled substances. To this end, ~~he [it]~~ the [appropriate person or agency] may:

(1) arrange for the exchange of information among governmental officials concerning the use and abuse of controlled substances;

(2) coordinate and cooperate in training programs concerning controlled substance law enforcement at local and ~~State~~ state levels;

(3) cooperate with the ~~Bureau~~ Drug Enforcement Administration by establishing a centralized unit to accept, catalog, file, and collect

statistics, including records of drug dependent persons and other controlled substance law offenders within ~~the~~ this State, and make the information available for ~~Federal~~ federal, ~~State~~ state, and local law enforcement purposes. ~~He (it) shall~~, but may not furnish the name or identity of a patient or research subject whose identity could not be obtained under subsection (c); and

(4) conduct programs of eradication aimed at destroying wild or illicit growth of plant species from which controlled substances may be extracted.

(b) Results, information, and evidence received from the ~~Bureau~~ Drug Enforcement Administration relating to the regulatory functions of this [Act], including results of inspections conducted by it, may be relied and acted upon by the [appropriate person or agency] in the exercise of its regulatory functions under this [Act].

(c) A practitioner engaged in medical practice or research is not required or compelled to furnish the name or identity of a patient or research subject to the [appropriate person or agency], nor may ~~he~~ the practitioner be compelled in any ~~State~~ state or local civil, criminal, administrative, legislative, or other proceedings to furnish the name or identity of an individual that the practitioner is obligated to keep confidential.

~~SECTION 505. [FORFEITURES.]~~

~~(a) The following are subject to forfeiture:~~

~~(1) all controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this [Act];~~

~~(2) all raw materials, products and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this Act;~~

~~(3) all property which is used, or intended for use, as a container for property described in paragraphs (1) or (2);~~

~~(4) all conveyances, including aircraft, vehicles or vessels, which are used, or intended for use, to transport, or in any manner to facilitate the transportation, for the purpose of sale or receipt of property described in paragraph (1) or (2), but:~~

~~(i) no conveyance used by any person as a common carrier in the transaction of business as a common carrier is subject to forfeiture under this Section unless it appears that the owner or other person in charge of the conveyance is a consenting party or privy to a violation of this Act;~~

~~(ii) no conveyance is subject to forfeiture under this Section by reason of any act or omission established by the owner thereof to have been committed or omitted without his knowledge or consent;~~

~~(iii) a conveyance is not subject to forfeiture for a violation of Section 401(c); and;~~

~~(iv) a forfeiture of a conveyance encumbered by a bona fide security interest is subject to the interest of the secured party if he neither had knowledge of nor consented to the act or omission.~~

~~(5) all books, records, and research products and materials, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this Act.~~

~~(b) Property subject to forfeiture under this Act may be seized by the [appropriate person or agency] upon process issued by any [appropriate court] having jurisdiction over the property. Seizure without process may be made if:~~

(1) the seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;

(2) the property subject to seizure has been the subject of a prior judgment in favor of the State in a criminal injunction or forfeiture proceeding based upon this Act;

(3) the [appropriate person or agency] has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(4) the [appropriate person or agency] has probable cause to believe that the property was used or is intended to be used in violation of this Act.

(c) In the event of seizure pursuant to subsection (b), proceedings under subsection (d) shall be instituted promptly.

(d) Property taken or detained under this Section shall not be subject to replevin, but is deemed to be in custody of the [appropriate person or agency] subject only to the orders and decrees of the [court having jurisdiction over the forfeiture proceedings]. When property is seized under this Act, the [appropriate person or agency] may:

(1) place the property under seal;

(2) remove the property to a place designated by him [it]; or

(3) require the [appropriate administrative agency] to take custody of the property and remove it to an appropriate location for disposition in accordance with law.

(e) When property is forfeited under this Act the [appropriate person or agency] may:

(1) retain it for official use;

(2) sell that which is not required to be destroyed by law and which is not harmful to the public. The proceeds shall be used for

~~payment of all proper expenses of the proceedings for forfeiture and sale, including expenses of seizure, maintenance of custody, advertising and court costs.~~

~~(3) require the [appropriate administrative agency] to take custody of the property and remove it for disposition in accordance with law; or~~

~~(4) forward it to the Bureau for disposition.~~

~~(f) Controlled substances listed in Schedule I that are possessed, transferred, sold, or offered for sale in violation of this Act are contraband and shall be seized and summarily forfeited to the State. Controlled substances listed in Schedule I, which are seized or come into the possession of the State, the owners of which are unknown, are contraband and shall be summarily forfeited to the State.~~

~~(g) Species of plants from which controlled substances in Schedules I and II may be derived which have been planted or cultivated in violation of this Act, or of which the owners or cultivators are unknown, or which are wild growths, may be seized and summarily forfeited to the State.~~

~~(h) The failure, upon demand by the [appropriate person or agency], or his [its] authorized agent, of the person in occupancy or in control of land or premises upon which the species of plants are growing or being stored, to produce an appropriate registration, or proof that he is the holder thereof, constitutes authority for the seizure and forfeiture of the plants.~~

COMMENT ON DELETION OF SECTION

Former Section 505 is deleted. Forfeiture provisions are found in the new Article V.

SECTION ~~506~~ 605. ~~[~~BURDEN OF ~~PROOF~~ PRODUCING EVIDENCE; LIABILITIES.~~]~~

(a) ~~It~~ Except as provided in Section 505(c), it is not necessary for the ~~State~~ state to negate any exemption or exception in this [Act] in any complaint, information, indictment, or other pleading or in any trial,

hearing, or other proceeding under this [Act]. The burden of ~~proof~~ producing evidence of any exemption or exception is upon the person claiming it.

(b) ~~In the absence of proof that a person is the duly authorized~~ No person is presumed to be the holder of an appropriate registration or order form issued under this [Act]~~, he is presumed not~~. A person who claims to be the holder of the registration or order form~~.~~ ~~The~~ has the burden of ~~proof is upon his to rebut the presumption~~ producing evidence with respect to the registration or order form.

(c) No civil or criminal liability is imposed by this [Act] upon any authorized ~~State~~ state, county, or municipal officer, lawfully engaged in the ~~lawful performance~~ enforcement of ~~his duties~~ this [Act].

COMMENT ON AMENDMENT

The changes to subsections (a) and (b) are not intended to affect the rule in any state as to who has the burden of persuasion. Subsection (c) is revised to clarify that immunity from civil or criminal liability only extends to enforcement of the Act, not to performance of duties.

SECTION ~~507~~ 606. ~~[~~JUDICIAL REVIEW.~~]~~ All final determinations, findings, and conclusions of the [appropriate person or agency] under this [Act] are ~~final and conclusive decisions of the matters involved. Any person aggrieved by the decision may obtain~~ subject to judicial review ~~of the decision in the [appropriate State Court]. Findings of fact by the [appropriate person or agency], if supported by substantial evidence, are conclusive~~ pursuant to [the State Administrative Procedure Act].

COMMENT ON AMENDMENT

This section is revised in recognition of state administrative agencies practice acts, which generally provide for judicial review of agency decisions. The Uniform Law Commissioners' Model State Administrative Procedure Act (1981) provides for judicial review of final, and in some cases nonfinal, decisions of administrative agencies and for the scope of review. Paragraph 5-116(c)(7) of the model Act establishes the "substantial evidence on the whole record" test for judicial review of determinations of fact. Other standards are the "clearly erroneous" test or the "preponderance of evidence" standard.

SECTION ~~508~~ 607. ~~[~~EDUCATION AND RESEARCH.~~]~~

(a) The [appropriate person or agency] shall carry out educational programs designed to prevent and deter misuse and abuse of controlled substances. In connection with these programs ~~he~~ ~~[it]~~ the [appropriate person or agency] may:

(1) promote better recognition of the problems of misuse and abuse of controlled substances within the regulated industry and among interested groups and organizations;

(2) assist the regulated industry and interested groups and organizations in contributing to the reduction of misuse and abuse of controlled substances;

(3) consult with interested groups and organizations to aid them in solving administrative and organizational problems;

(4) evaluate procedures, projects, techniques, and controls conducted or proposed as part of educational programs on misuse and abuse of controlled substances;

(5) disseminate the results of research on misuse and abuse of controlled substances to promote a better public understanding of what problems exist and what can be done to combat them; and~~,~~

(6) assist in the education and training of ~~State~~ state and local law enforcement officials in their efforts to control misuse and abuse of controlled substances.

(b) The [appropriate person or agency] shall encourage research on misuse and abuse of controlled substances. In connection with the research, and in furtherance of the enforcement of this [Act], ~~he~~ ~~[it]~~ the [appropriate person or agency] may:

(1) establish methods to assess accurately the effects of controlled substances and identify and characterize those with potential for abuse;

(2) make studies and undertake programs of research to:

(i) develop new or improved approaches, techniques, systems, equipment, and devices to strengthen the enforcement of this [Act];

(ii) determine patterns of misuse and abuse of controlled substances and the social effects thereof; and~~;~~

(iii) improve methods for preventing, predicting, understanding, and dealing with the misuse and abuse of controlled substances; and~~;~~

(3) enter into contracts with public agencies, institutions of higher education, and private organizations or individuals for the purpose of conducting research, demonstrations, or special projects which bear directly on misuse and abuse of controlled substances.

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

(d) The [appropriate person or agency] may authorize persons engaged in research on the use and effects of controlled substances to withhold the names and other identifying characteristics of individuals who are the subjects of the research. Persons who obtain this authorization are not compelled in any civil, criminal, administrative, legislative, or other proceeding to identify the individuals who are the subjects of research for which the authorization was obtained.

(e) The [appropriate person or agency] may authorize the possession and distribution of controlled substances by persons engaged in research. Persons who obtain this authorization are exempt from ~~State~~ state prosecution for possession and distribution of controlled substances to the extent of the authorization.

COMMENT ON AMENDMENT

The various authorizations granted by this section may be relevant to several state agencies, e.g., education, human services, law enforcement, and occupational licensure. Thus, the "appropriate person

or agency" may be an entity other than the agency that administers this Act.

ARTICLE ~~VI~~ VII

~~[~~MISCELLANEOUS~~]~~

SECTION ~~601~~ 701. ~~[~~PENDING PROCEEDINGS.~~]~~

(a) Prosecution for any violation of law occurring ~~prior to~~ before the effective date of this [Act] is not affected or abated by this [Act]. If the offense being prosecuted is similar to one set out in Article IV of this [Act], then the penalties under Article IV apply if they are less than those under prior law.

(b) Civil seizures or forfeitures and injunctive proceedings commenced ~~prior to~~ before the effective date of this [Act] are not affected by this [Act].

(c) All administrative proceedings pending under ~~prior~~ previous laws ~~which~~ that are superseded by this [Act] ~~shall~~ must be continued and brought to a final determination in accord with the laws and rules in effect ~~prior to~~ before the effective date of ~~the~~ this [Act]. Any substance controlled under prior law but which is not listed ~~within Schedules I through V.~~ in Section 204, 206, 208, 210, or 212 is automatically controlled without further proceedings and ~~shall~~ must be ~~listed~~ included in the appropriate schedule.

(d) The [appropriate person or agency] shall initially permit persons to register who own or operate any establishment engaged in the manufacture, distribution, or dispensing of any controlled substance prior to the effective date of this [Act] and who are registered or licensed by the ~~State~~ state.

(e) This [Act] applies to violations of law, seizures and forfeiture, injunctive proceedings, administrative proceedings, and investigations which occur following its effective date.

COMMENT ON AMENDMENT

In subsection (c) "included" is used to refer to substances controlled on adoption of the Act (those substances "listed" in Sections 204, 206, 208, 210, and 212) and to substances controlled under Section 601 and administrative action.

SECTION ~~602~~ 702. ~~[~~CONTINUATION OF RULES; APPLICATION TO EXISTING RELATIONSHIPS.~~]~~ Any orders and rules ~~promulgated~~ adopted under any law affected by this [Act] and in effect on the effective date of this [Act] and not in conflict with ~~it~~ this [Act] continue in effect until modified, superseded, or repealed. Rights and duties that matured, penalties that were incurred, and proceedings that were begun before the effective date of this Act are not affected by Section 708.

COMMENT ON AMENDMENT OF SECTION

This last sentence was part of the repealer section, but is added here to provide separate treatment of different subject matter.

SECTION 703. CONTINUING CRIMINAL ENTERPRISE; CIVIL ACTION. The [appropriate authority] may maintain a civil action against any person or persons who violate Section 411 to obtain a judgment for joint and several damages in an amount equal to three times the proceeds acquired by all persons involved in the enterprise or by reason of conduct in furtherance of the enterprise, together with costs incurred for resources and personnel used in the investigation and prosecution of both criminal and civil proceedings. The standard of proof in actions brought under this subsection is a preponderance of the evidence.

[SECTION 704. STATUTE OF LIMITATIONS. A civil action under this [Act] must be commenced within [seven] years after the last conduct giving rise to forfeiture or to the claim for relief became known or should have become known, excluding any time during which either the property or defendant is out of the state or in confinement or during which criminal proceedings relating to the same conduct are in progress.]

COMMENT ON CREATION OF SECTION

This section creates a seven-year statute of limitations that dates from the date of actual discovery of the last conduct giving rise to forfeiture. This statute of limitations applies to any civil action under this action including forfeiture, continuing criminal enterprise, and an action pursuant to Section 515(c).

SECTION ~~603~~ 705. ~~[~~UNIFORMITY OF INTERPRETATION.~~]~~ This [Act] ~~shall~~ must be so applied and construed as to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among ~~those States which enact~~ states enacting it and to complement the policy of the federal Controlled Substances Act and of international treaties, conventions, or protocols to which the United States is a party which recognize that the medical and scientific use of controlled substances is essential to public health and welfare and that their availability for these purposes must be assured, but that the illegitimate manufacture, distribution, and possession of controlled substances is a threat to public health and welfare and must be prohibited.

SECTION ~~604~~ 706. ~~[~~SHORT TITLE.~~]~~ This [Act] may be cited as the Uniform Controlled Substances Act (1990).

SECTION ~~605~~ 707. ~~[~~SEVERABILITY.~~]~~ If any provision of this [Act] or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

SECTION ~~606~~ 708. ~~[REPEALERS.]~~ REPEALS. The following laws ~~specified below~~ are repealed ~~except with respect to rights and duties which matured, penalties which were incurred and proceedings which were begun before the effective date of this Act~~:

[List statutes to be repealed].

SECTION ~~607~~ 709. ~~[~~EFFECTIVE DATE.~~]~~ This Act ~~shall take~~ takes effect on ~~the first day after the beginning of the seventh month following the date of its enactment~~ [_____].

An Analysis of Major Drug Issues in Article VI — Enforcement and Administrative Provisions and Article VII — Miscellaneous of the Proposed Amendments to the Uniform Controlled Substances Act (UCSA)

Analysis

SECTION 703. CONTINUING CRIMINAL ENTERPRISE; CIVIL ACTION

A civil cause of action is authorized pursuant to Section 703 against the kingpin of a Continuing Criminal Enterprise. Each kingpin is liable for three times the value of the proceeds acquired by all persons by reason of their conduct in the enterprise. The liability of the drug kingpin is based on the gross proceeds of the entire enterprise whether acquired by the kingpin or any other participant in the enterprise. The kingpin would be liable for treble damages on all money made by his enterprise, an amount calculated based on the income of his dealers, the income recorded in the ledgers, the currency found at his residence and in bank accounts, and the money invested in his corporation. This is not a new concept. Both federal RICO, 18 U.S.C. §1963(a), and federal criminal forfeiture under Continuing Criminal Enterprise, 21 U.S.C. §853(a), authorize criminal penalties and a fine in the amount of twice the gross profits or proceeds of felony drug offenses. In civil RICO actions, pursuant to 18 U.S.C. §1964, treble damages are also authorized.

Appendix

Appendix

American Prosecutors Research Institute's Task Force on the Uniform Controlled Substances Act

Richard M. Wintory

Since receiving his J.D. degree from the University of Oklahoma College of Law in 1984, Mr. Wintory has been employed as an assistant district attorney with the Office of the Oklahoma County District Attorney, where he is assigned to the narcotics unit. In that capacity he prosecuted Oklahoma's first state wiretap cases, and as a special assistant United States attorney he tried RICO cases and designer drug cases.

On a one year leave of absence from his job as an assistant district attorney, Mr. Wintory currently serves as director of APRI's National Drug Prosecution Center.

As director he supervises the Center's work with the Uniform Controlled Substances Act and other model legislation; oversees Center training activities in complex areas of prosecution such as asset forfeiture; and leads Center efforts to assist district attorneys in developing community-based drug strategies.

Mr. Wintory lectures nationally on search and seizure law and narcotics prosecution for law enforcement organizations, including the Oklahoma Bar Association, Arizona Prosecuting Attorneys Advisory Council, Oklahoma Bureau of Narcotics and Dangerous Drugs, Louisiana District Attorney Association and Pennsylvania District Attorneys Association. In addition, he has authored and co-authored several publications including a Narcotics Prosecution Handbook. As a member of the Oklahoma District Attorneys Association Legislation Committee, Mr. Wintory assists in drafting Oklahoma drug trafficking laws.

Sandra L. Janzen

After graduating from the Arizona State University College of Law with a J.D. degree in 1977, Ms. Janzen joined the Office of the Maricopa County (Phoenix) Attorney as a deputy county attorney. During the last five and one-half years of her twelve year tenure she was assigned to the Organized Crime and Racketeering Division where she focused on asset forfeiture actions and large scale criminal narcotics investigations. Ms. Janzen is currently an assistant attorney general with the Arizona Attorney General's office specializing in civil forfeiture and related actions designed to dismantle Northern Mexico's drug importation cartels.

Ms. Janzen co-authored Arizona's forfeiture statute which became effective in 1986 and trains on this legislation for the Arizona Prosecuting Attorneys Advisory Council. Additionally, she lectures and writes extensively on asset forfeiture, money laundering, financial investigations, and conspiracy issues for the National College of District Attorneys, the National Criminal Justice Association, the National Association of Prosecutor Coordinators, the Louisiana District Attorneys Association, the Police Executive Research Forum and other law enforcement organizations.

Cameron H. Holmes

Mr. Holmes received his J.D. degree from Georgetown University in 1977. He joined the Organized Crime and Racketeering Unit of the Maricopa County Attorney's Office in 1978, and handled criminal prosecutions there through

1981. He then moved to the newly formed Organized Crime Project of the Arizona Attorney General's Office, which was dedicated solely to civil racketeering cases.

Mr. Holmes has spoken nationally on RICO, and testified and consulted in the passage of various state RICO laws and amendments to the federal RICO act. He has also authored amendments to Arizona's RICO, money laundering and forfeiture statutes, and coordinated Arizona's amicus briefs in three U.S. Supreme Court cases involving RICO.

In 1988 he served as associate counsel to the Senate Iran-Contra Committee where he employed international money tracing techniques. He has returned to Arizona as Assistant Chief Counsel, Special Investigation's Division, Arizona Attorney General's Office, heading a forfeiture support project.

For this project, Mr. Holmes served as a representative from the National Association of Attorneys General and attended numerous drafting sessions which were also attended by Fred Smith, director of the NAAG Civil RICO Project and Katrin Nelson, assistant director. They provided invaluable assistance in affording their individual views as experienced prosecutors. Points of view or opinions in this document do not represent the official views of the National Association of Attorneys Generals.

Harry S. Harbin

Mr. Harbin received his J.D. degree in 1982 from Georgetown University Law Center. For the next four years, he was a litigation associate with Wald, Harkrader & Ross, a Washington D.C. law firm. From 1986-1988, he served as a trial lawyer with the Narcotics and Dangerous Drug Section, Criminal Division, United States Department of Justice. His duties included appellate and trial litigation and policy formulation in the areas of drug and money laundering law, and approval of federal money laundering prosecutions. From 1988 to 1990, Mr. Harbin was deputy director of the Asset Forfeiture Office, Criminal Division, United States Department of Justice. As Deputy Director, he was responsible for appellate practice and policy formulation in the areas of asset forfeiture and money laundering, and approval of federal money laundering prosecutions. Mr. Harbin is currently Deputy Director of the new Money Laundering Office, Criminal Division, Department of Justice where he continues his work on national and international money laundering issues.

In addition to speaking nationally on asset forfeiture, money laundering, and drug law topics, he has co-authored a book entitled Handbook on the Anti-Drug Abuse Act of 1986 and "Money Laundering Amendments," a chapter in a forthcoming American Bar Association publication on the Anti-Drug Abuse Act of 1988.

Sherry Green-De La Garza

After graduating from George Washington University's National Law Center in 1984, Ms. Green-De La Garza worked as a research associate at the American Bar Association's National Center for Children and the Law. In addition to analyzing case law and statutes on child support enforcement, she coauthored the publication Retroactive Modification of Child Support Arrears. In 1986 and 1987, she clerked for a District of Columbia Superior Court judge. Her responsibilities included researching and writing in the areas of negligence, labor law, administrative law, and commercial law.

Ms. Green-De La Garza joined APRI's National Drug Prosecution Center as a staff attorney in 1988. She manages the Center's model legislation efforts; maintains a national clearinghouse of information relating to drug prosecution, education, and treatment; compiles and analyzes state and federal legislation and case law; and reviews professional studies, surveys, and other resource materials. Ms. Green-De La Garza conducts legal research and provides technical assistance to prosecutors.

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