Pharmaco Prohibita

by Richard Glen Boire

Control culture seems to be taking a renewed interest in esoteric visionary plants, with several recent cases foreshadowing potentially darker times to come.

In August 2002, members of the ayahuasca-using religious group known as the *União do Vegetal* (*UDV*) won a major legal victory when a federal court ruled that the group's use of ayahuasca was likely protected under the Religious Freedom Restoration Act (RFRA). While this was wonderful news, some of the underlying reasoning in the case was unsound, and has already been used to detrimental effect in another US case involving an Atlanta man who imported dried *Psychotria viridis* and *Banisteriopsis caapi* vines. Additionally, *Salvia divinorum* and its active principle salvinorin A are being targeted by a bill (HR 5607) in the US Congress, which seeks to place them both into Schedule I. Finally, in November, the Supreme Court of Holland, ruled that while living and wet psilocybian mushrooms are legal, dried mushrooms are illegal.

The *UDV* case arose after US Customs agents seized several bottles of ayahuasca imported from Brazil for use by members of a US-based branch of the *UDV*. Although the government did not file criminal charges, it warned the *UDV* that if they imported any more ayahuasca the government would treat the action as a federal drug offense. The *UDV* filed a lawsuit alleging that ayahuasca was not a scheduled substance under US law, and that even if it were considered a scheduled substance, *UDV's* use of it was protected by the First Amendment's Free Exercise Clause and by the Religious Freedom Restoration Act (RFRA).

In a 61-page ruling, Judge James Parker of the United States District Court for the District of New Mexico, found that although the government's actions did not violate the *UDV's* free exercise rights under the First Amendment, the seizure of the church's sacrament appears to have been in violation of the RFRA. The RFRA is a federal law passed by Congress in 1993 for the purpose of providing greater protection to religious free exercise than even the First Amendment, which had been significantly watered-down by a 1990 United States Supreme Court decision. (See *Employment Division, Dept. of Human Resources of Oregon* v. *Smith*, 494 US 872 [1990].) Judge Parker found:

> [The] Government has not shown that applying the [Controlled Substance Act's] prohibition on DMT to the UDV's use of hoasca furthers a compelling interest. This Court cannot find, based on the evidence presented by the parties, that the government has proven that hoasca poses a serious health risk to members of the UDV who drink the tea in a ceremonial setting. Further, the Government has not shown that permitting members of the UDV to consume hoasca would lead to significant diversion of the substance to non-religious use (*União do Vegetal* v. *John Ashcroft*, 1647 JF/RLF [2002] Opinion, p. 32).

The problem with the ruling was Judge Parker's finding that ayahuasca was indeed a controlled substance. This is the first time a court has expressly held that ayahuasca is indeed a "material, compound, mixture, or preparation that contains DMT" and is thus within Schedule I. The *UDV* argued that such an expansive reading of the "material, compound, mixture..." phrase would lead to absurd results, like outlawing our own brains, which endogenously contain DMT, and outlawing a host of plants that are generally considered legal. One way to make sense of the phrase, argued the *UDV*, was to interpret it as only applying to synthesized DMT, and not to DMT that occurs naturally. The legislative history of DMT's scheduling supports this reading. (Every time that DMT was discussed, it was in reference to synthetic DMT.) Judge Parker called these "interesting arguments," but he rejected them. Speaking about DMT-containing *Phalaris* grass, Judge Parker explained:

> During the hearing, the Plaintiffs presented evidence showing that certain plants growing in this country, including phalaris grass, contain DMT. The Plaintiffs' evidence included a document showing that the United States Department of Agriculture even recommends using one kind of phalaris for erosion control. The Plaintiffs appear to argue that if people are allowed to grow phalaris grass for nonreligious reasons, while the UDV's supply of hoasca is confiscated, this Court should conclude that the federal government must be discriminating against the Plaintiffs on the basis of religion. The Court does not believe that the evidence about phalaris would necessarily lead to that conclusion. Individuals with phalaris grass in their lawns may possess DMT in some sense. However, if there are no indications that the

> people with phalaris lawns are consuming the grass, law enforcement might legitimately choose not to prosecute, for reasons other than that the grass is being used for the secular purpose of having a lawn. Federal law enforcement entities might prioritize focusing on the UDV's hoasca use not because the use is religious, but instead because UDV members make much more extensive use of hoasca by personally ingesting it than a person with a phalaris lawn makes the grass. Before their tea was confiscated, UDV officials regularly distributed the tea to church members for consumption.

Some evidence presented at the hearing suggested that non-religious consumption of plants containing DMT does take place in the United States. This evidence included materials taken from the Internet—advertisements for plants containing DMT and testimonials from people claiming to have used teas similar to hoasca.

With respect to DMT naturally occurring in the human brain, Judge PARKER was of the opinion that this was insufficient to make the law absurd when applied to non-synthetic DMT found outside of the brain:

> The Plaintiffs observe that many plants and animals, including humans, contain DMT; and the Plaintiffs imply that because the CSA cannot be read to ban humans, that the statute must apply only to synthetic DMT. [But,] simply because banning humans would be absurd does not mean that banning any non-synthetic DMT found elsewhere would be absurd.

Although the *UDV* ruling concerned ayahuasca—the liquid tea—and not the ingredient plants in their living or dried form, Judge PARKER's language has already been read by at least one federal court judge to apply to plants that naturally contain DMT such as *Psychotria viridis*.

Earlier this year, a federal grand jury in Atlanta indicted a man on charges of illegal importation and possession of DMT after US Customs confiscated an inbound shipment of almost 1000 pounds of dried *Psychotria viridis* and *Banisteriopsis caapi*. This was not an extract, or a combined potion of the two plants. It was simply dried plant material. When the man correctly moved to dismiss the case on the ground that neither plant was a controlled substance, his motion was denied, largely because the judge in the case misread the *UDV* ruling as applying not only to prepared ayahuasca, but also to the bare plants themselves.

While both the *UDV* ruling and the Atlanta ruling were from low-level federal district courts, and hence have little binding precedence value, they are important rulings because subsequent courts facing similar issues will likely treat these cases as informative. They could be the first legal footholds to shutting down commerce in visionary plants that have heretofore been considered legal. Applying the US drug law to plants that endogenously produce "scheduled" phytochemicals would result in hundreds, if not thousands, of plant species being considered illegal. If the Controlled Substance Act schedules were intended to apply to plants that naturally produce psychoactive principles, why would mescaline, and peyote both be listed? Why would THC, and *Cannabis* both be listed? Why would cocaine and opium as well as their plant sources both be listed? Clearly, when the Controlled Substance Act has intended to outlaw a specific plant it has done so by name, and for good reason. A rule like that applied in the Atlanta case would require everyone to become expert phytochemists under threat of criminal imprisonment.

The Atlanta case will play out over the next few months, and the JLF "poisonous non-consumables" case (which involves some similar charges and issues) is set for trial in January, and could likewise result in adverse case law concerning visionary plants.

Finally, even in Holland, where we have traditionally looked for tolerance and sophistication when it comes to visionary plants, Hans van den Hurk, the owner of the Conscious Dreams smartshop, lost his final appeal before the Dutch Supreme Court. In November, the Court let stand an earlier ruling holding that just about any human "preparation" of a psilocybian mushroom (including drying or mixing into honey or syrup) transforms the mushroom into an illegal drug. Only fresh mushrooms remain legal, which could lead to a much lower supply and a much higher price in the Dutch smartshops. On the upside, freshness should be guaranteed.

Notes

Judge James Parker's decision can be read on-line at: www.cognitiveliberty.org/pdf/udv_decision.pdf.

Information about the Atlanta case and the JLF case can be found on-line by searching at: www.cognitiveliberty.org.

To learn more about HR 5607, visit: www.cognitiveliberty.org/dll/salvia_divinorum_action_center.htm.

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