The Entheogen Law Reporter

Issue No. 3 ISSN 1074-8040 Summer 1994

Magic Mushrooms & The Law

In the United States, the substances psilocybin and psilocin were declared illegal in October 1970, with the enactment of the Drug Abuse Prevention and Control Act of 1970.[1] Today, all fifty states have controlled substance laws that are largely modeled on the federal act. To date, psilocybin has been confirmed in over 80 different species of mushrooms, 46 within the genus *Psilocybe*. (Ott 1993: 309-314.) This article surveys the published court decisions directly examining the legality of possessing mushrooms endogenously containing psilocybin or psilocin.

The first published case directly addressing the issue of mushroom legality is *Fiske v. State* (Fla. 1978) 366 So.2d 423. Mr. Fiske was arrested as he emerged from a field in Collier County, Florida. (It is not clear from the opinion, but it appears that he was initially arrested for trespassing.) Near him, the officers found a bag of freshly picked wild mushrooms which laboratory testing revealed to contain psilocybin. Following a jury trial, Mr. Fiske was found guilty of possessing psilocybin in violation of the Florida Drug Abuse Prevention and Control Act. Mr. Fiske appealed his conviction arguing that the state statute, which only explicitly outlawed the substance psilocybin and said nothing about mushrooms, violated his federal and state constitutional rights to due process when applied to outlaw possession of wild mushrooms. (*Id.* at p. 424.)

The Florida Supreme Court examined the language of the Florida statute which placed in Schedule I, "any material which contains a quantity of the hallucinogenic substance psilocybin." The court held that it was unconstitutional to apply the statute to wild mushrooms, explaining:

> The statute makes no mention of psilocybic mushrooms or, for that matter, of any other psilocybic organic form that grows wild. If the statute were to specify that psilocybin was contained in certain identifiable mushrooms and were to name those mushrooms as unlawful, it would not be unconstitutional as applied. The statute as presently framed, however, gives no information as to

(Continued on p. 17.)

Spore Seller Raided

Log-book of 600 customer names seized!

On or about May 6, 1994, Alaska drug enforcement agents, armed with a search warrant, raided Power Products, an Alaska company selling *Psilocybe cubensis* mushroom growing kits. During the search, agents seized: books, glass jars, letters, and business records, including a log-book of all people (estimated at approximately 600) who corresponded with the company or ordered mushroom growing kits since the company began doing business in March 1993.

The raid was evidently the result of a Washington man who alerted authorities after finding his fourteen year old daughter in possession of either a Power Products' growing kit, or mushrooms produced by such a kit. Washington drug enforcement agents then traced the kit to Power Products in Juneau, Alaska.

(Continued on p. 24.)

IN THIS ISSUE

> what plants may contain psilocybin in its natural state. More particularly, the statute does not advise a person of ordinary and common intelligence that this substance is contained in a particular variety of mushroom. The statute, therefore, may not be applied constitutionally to [Mr. Fiske]. It does not give fair warning that the mushrooms possessed by appellant is a crime. [Citation omitted.] There is no vagueness problem with the statute on its face. It explicitly controls any material which contains psilocybin and makes possession of the material a felony. In capsule, pill or similar form the statute may be applied constitutionally for people will be wary of the criminal liabilities of possession of nonprescribed drugs in their common medicinal forms and will not ordinarily possess them innocently or without knowing of their content. (*Ibid.*)

Consequently, the Florida Supreme Court reversed Mr. Fiske's conviction.

The reasoning in *Fiske* was discussed but rejected in *People v. Dunlap* (Ill. App. 1982) 442 N.E.2d 1379. In *Dunlap*, two men were charged with numerous crimes including unlawful manufacture of a controlled substance and unlawful possession with intent to manufacture a controlled substance in violation of Illinois law, after agents seized *Psilocybe* mushrooms from one of the men's residence. (*Id.* at pp. 1380-1381.) The defendants moved to dismiss the charges on various constitutional and statutory grounds. The trial court granted their motion and dismissed the charges, holding that the Illinois law as applied to *Psilocybe* mushrooms violated the defendants' due process rights because the statute failed to specify which types of mushrooms were prohibited under the Illinois law. The trial court also stated that the statute did not specifically outlaw possession of the mushrooms themselves, as opposed to the extracted psilocin, and finally noted that cultivation of *Psilocybe* mushrooms was not illegal under the Illinois' definition of "manufacture." The state appealed the trial court's ruling.

The Illinois Appellate Court reversed the trial court. (*Id.* at p. 1388.) The appellate court explained that the state's law broadly, but without ambiguity, included within Schedule I, "any material...which contains any quantity of...psilocyn." The court held that these words "mean exactly that – any such material is a Schedule I substance, and thus mushrooms which, in their natural state, contain psilocyn, are included in Schedule I." (*Id.* at p. 1383.) The court also examined the Illinois statutory definition of "manufacture," which prohibited "the production, preparation, propagation, compounding, conversion or processing of a controlled substance, either directly of indirectly, by extraction from substances of natural origin, or independently by means of chemical synthesis..." (Ill.Rev.Stat. 1979, ch. 561/2, par. 1102(z).) The court read the definition of "manufacture" in conjunction with the statutory definitions of "production" and "produce" which proscribe the "manufacture, planting, cultivating, growing, or harvesting of a controlled substance," and concluded: "It has been stated that, by itself, the definition of "manufacture" might suggest that that term refers only to extraction, chemical synthesis or a combination thereof, but when read with the definition of production, *it is apparent that the growing of plant matter containing a controlled substance is prohibited.* [Citations omitted.]" (*Id.* at p.1386, emph. added.)

The Illinois Appellate Court also addressed the defendants' argument that the statute violated due process by failing to give adequate notice that possession of *mushrooms* is a crime. The court found no due process violation and rejected the opposite reasoning in *Fiske*:

> ...the *Fiske* majority... held, by implication, that the only natural reading of the phrase "any material" would be limited to a controlled substance "in capsule, pill or similar form." [Citation omitted.] In our view, this is an overly restrictive and artificial interpretation of that language. In fact, the term "material" is more commonly used to refer to an item which is the source of something else rather than a finished product. (See Webster's Third New International Dictionary, "material"), and thus,... a person of ordinary intelligence would be amply apprised by [the Illinois law] that possession of *Psilocybe* mushrooms is illegal. As applied to one possessing mushrooms known to contain psilocyn, the [Illinois] Controlled Substances Act is not unconstitutional. (*Id.* at p. 1385.)

The court noted, however, that naive mushroom cultivators or hunters were protected from prosecution because a conviction required proof that the person possessing the mushrooms knew they contained a controlled substance:

> An individual who cultivates or otherwise possessed *Psilocybe* mushrooms without knowing them to contain psilocyn would not be prosecuted successfully under [the] statute because in a prosecution for the possession or sale of controlled substances, the State must prove that a defendant had knowledge of the nature of the substance possessed or sold. (*Ibid.*)

Finally, the court rejected the defendants' argument that the classification of psilocin as a Schedule I substance was irrational. Noting that research on

the effects of psilocin "is not plentiful," the court held "[n]onetheless, it is not the case that some facts do not exist to support the General Assembly's decision to place psilocyn along with the other major hallucinogens in Schedule I." (*Id.* at p. 1388.) As a result of the above findings, the Illinois Court of Appeal concluded that the Illinois Controlled Substances Act "prohibits the knowing possession of mushrooms containing psilocyn...and is not unconstitutional for so doing." (*Ibid.*) Consequently, the court of appeal reversed the trial court's granting of the motion to dismiss and ordered the case remanded for further proceedings.

Two years after the Dunlap decision, a court in the state of Washington was presented with a similar issue on appeal. In *State v. Patterson* (Wash. 1984) 679 P.2d 416, agents executing a search warrant at Mr. Patterson's home, found "4,400 Mason jars containing psilocybin mushrooms." (*Id.* at p. 420.)

Following a trial Mr. Patterson was convicted of unlawful possession of a controlled substance and unlawful possession of a controlled substance with intent to deliver, both in violation of Washington law. (*Id.* at p. 416.) His appeal raised several issues, including the argument that "possession of any material containing psilocybin, does not include a natural plant which contains that chemical." (*Id.* at p. 421.) He contended that because the Washington statute did not explicitly describe the mushrooms as controlled substances, the legislature must not have intended to criminalize their possession. The appellate court disagreed, reasoning:

> the words of the statute have an unambiguous meaning that does not permit subjective interpretation. The [statute] makes it unlawful to "possess...a controlled substance." [Citation omitted.] "Controlled substance" is defined to include a "substance...in Schedules I through V...." [Citation omitted.] Schedule I includes "any material...which contains any quantity of...Psilocybin." [Citation omitted.] The key word "material" means "consisting of matter." Webster's Third New Int'l Dictionary 1392 (1976). This meaning is sufficiently explicit to include substances in their natural state as well as chemical derivatives or compounds. We conclude that it was the clear legislative intent to include the psilocybin mushroom as a controlled substance. (*Id.* at p. 421.)

The court distinguished *Fiske, supra*, by explaining that unlike the Florida law, guilt under the Washington statute did not require guilty knowledge or intent. (*Ibid.*)[2] In its concluding paragraph, the court also distinguished the factual landscape in Mr. Patterson's case from a hypothetical case in which a defendant was caught picking mushrooms rather than cultivating them. Implying that the former act might not be a crime, the court included the dicta: "In denying the motion, the trial court distinguished the case of a picker of mushrooms, who might only be subject to prosecution for criminal trespass, from that of the defendant, who was alleged to be a substantial mushroom grower and distributor." (*Id.* at p. 422.)

The legality of *Psilocybe* mushrooms came before the Kansas Court of Appeals in *State v. Justice* (Kans. 1985) 704 P.2d 1012. There, Mr. Justice unwittingly negotiated to sell mushrooms to an undercover Sheriffs detective. Though Mr. Justice never mentioned that the mushrooms specifically contained psilocybin, he did state on numerous occasions that the mushrooms were "strong," got you "high," and made you "closer to God." (*Id.* at p. 1013.) Mr. Justice was arrested after he sold some of the mushrooms (which were later confirmed to contain psilocybin) to the detective. (*Id.* at p. 1014.) He was convicted under state law and appealed, arguing that the Kansas statute outlawing possession of the substance psilocybin was unconstitutionally vague when applied to someone who possessed mushrooms containing the substance. (*Id.* at p. 1012.) In particular he argued that the Kansas legislature had been very clear in explicitly outlawing the plant sources of marijuana, opium, and mescaline, rather than simply the "hallucinogenic" substances themselves:

> Defendant contends that by contrast to the other hallucinogens listed in [the Kansas statute] psilocybin and psilocyn are the only ones with a major natural source, Psilocybe mushrooms, which are not clearly identified in the statute. He argues that this deficiency, in light of the specificity with which other controlled substances are described, creates doubt whether the mushrooms naturally containing psilocybin was intended to be controlled. This doubt, he contends, evidences the statute's failure to provide adequate notice that possession for sale of a mushroom containing psilocybin is prohibited. (*Id.* at p. 1015.)

The Kansas Court of Appeals answered Mr. Justice's argument by adopting the reasoning in *Dunlap* and *Patterson*, holding:

> it cannot be said that uncertainty is created by the listing of other controlled substances by both the name of the substance and its natural source. Perhaps the legislature could have drafted a statute listing the score of mushroom species known to contain psilocybin, but the failure to use more precise language to accomplish an identical goal does not render the existing law uncon-

stitutionally vague. (*Id.* at p. 1018.)

The most recent published case directly addressing the legality of mushrooms is *State v. Wohlever* (Ohio App. 1985) 500 N.E.2d 318. Ms. Wohlever was charged with aggravated trafficking in drugs in violation of Ohio law. The indictment against her read: "the defendant knowingly sold or offered to sell a controlled substance, to wit: Psilocybe Mushrooms, a Schedule I controlled substance...." (*Id.* at p. 319.) A jury found her guilty and she appealed, essentially arguing that the indictment failed to state a crime: "Defendant argues that Psilocybe mushrooms are not one of the controlled substances listed in Schedule I of [the Ohio Controlled Substances Act]; hence, an essential element in the crime of drug trafficking is missing from the indictment." (*Ibid.*)

The Ohio Court of Appeals agreed with Ms. Wohlever and reversed her conviction. The court based its decision on a unique rule set down by the Ohio Supreme Court requiring indictments to specifically name the type of controlled substance involved. (*Ibid.*) The court of appeal noted that Ms. Wohlever's indictment alleged that she sold or offered to sell "Psilocybe Mushrooms, a Schedule I controlled substance," and explained:

> But Psilocybe mushrooms are not among the substances listed in R.C. 3719.41 and possession of Psilocybe mushrooms is nowhere proscribed. Further, the state does not dispute that there are species of Psilocybe mushrooms which contain no hallucinogens. Psilocybin and psilocyn are controlled substances listed under Schedule I.... But the indictment here not only does not mention these specific substances, it does not name the type of substance -- hallucinogens.... The legislature has clearly detailed substances which are controlled and Psilocybe mushrooms are not among them. (*Id.* at pp. 319-320.)

CONCLUSION

It should be apparent from the above survey that despite the scheduling of the substances psilocybin and psilocin, the issue of *Psilocybe* mushroom legality is far from settled. Out of 50 states, only 5 states have published opinions directly addressing the issue and only 3 of those opinions directly hold that possession of psilocybin containing mushrooms is unlawful. The issue has never been directly addressed under federal law.

In other words, any person charged with a crime premised on the possession of mushrooms should begin their defense by filing a motion to dismiss the charges on the ground that the complaint does not state a crime.

The above cases will form the framework for the points and authorities supporting the validity of the motion to dismiss. The unfavorable cases can be distinguished by pointing out the absurdity that results from their reasoning -- see TELR No. 2 "Criminalizing Nature and Knowledge." *Patterson* is also distinguishable based on the peculiarity of Washington's criminal statute which does not include an intent element. Finally, review the favorable reasoning in the following Canadian cases: *Regina v. Parnell* (1979) 51 Can.Crim.Cas.2d 413 [defendant's conviction under Ca.Rev.Stat. 1970, ch. F-27, for possessing mushrooms containing psilocybin, reversed by the B.C. Court of Appeal, which held that the statute could not be construed as prohibiting possession of mushrooms since it made no mention of mushrooms. Accord, *Regina v. Cartier* (1980) 13 Alta.2d 164, 54 Can.Crim.Cas.2d 32; *Re Coutu and Prieur and the Queen* (1981) 61 Can.Crim.Cas.2d 149.

Readers are cautioned that the cases discussed in the above survey address that situation where the statute simply schedules the *substances* psilocybin and psilocin, and does not schedule or explicitly mention the natural fungi source. While the vast majority of state statutes adopt such a scheme, some do not. For

(Continued on p. 24)

Religious Freedom Restoration Act Asserted in Peyote Case

On June 15, 1991, Bill Stites, a documented member of the Peyote Way Church of God, was arrested by Federal Rangers in Texas who searched his car and found 32 peyote buttons which he had gathered for sacramental use. Because Mr. Stites was not a member of the Native American Church and did not have at least 25% Indian blood, he did not fall within the Texas exemption for religious peyote use. (See text of Texas exemption at p. 13, TELR No. 2.) Moreover, under the United States Supreme Court decision in *Employment Div., of Human Resources of Oregon v. Smith* (1990) 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876, Mr. Stites was effectively precluded from raising a defense based on the free exercise clause of the First Amendment. Consequently, on April 20, 1993, Mr. Stites judicially admitted that he possessed peyote in violation of Texas law.

Seven months later, President Clinton signed into law the Religious Freedom Restoration Act of 1993 (42 USC sec. 2000bb, et seq.) which restored the compelling state interest test to free exercise jurisprudence, and was expressly retroactive. Under the authority of this Act, Texas attorneys Ward Casey and Rick Hagen are challenging the legality of Mr. Stites' conviction, seeking the right to present his religious defense to a jury. More details on this case will be reported as they unfold. (*Ex Parte William Stites*, No. 2897-A, 83rd District Court of Brewster County, Texas.)

Bufo Alvarius Update

The *Bufo alvarius* case mentioned on page 7 of TELR No. 2 has been resolved with a diversion referral. (California's diversion system permits a court to divert a drug offender from the criminal justice system on the primary condition that the offender complete a drug education course.) As suggested in TELR No. 2, the laboratory analysis of the *Bufo alvarius* venom revealed that the active ingredient was 5-MeO-DMT -- an unscheduled substance. When the prosecutor received the laboratory report indicating that the substance was not illegal, the prosecutor amended the complaint against Mr. Shepard to charge a violation of California's Controlled Substance Analogue Act (Health & Safety Code sec. 11401). This additional layer of abstraction may have played a part in convincing the prosecutor that a conviction would be difficult to obtain, thereby influencing his decision to refer the case for diversion.

The following article, reprinted from the April 1994, edition of *California Lawyer* indicates that more prosecutions for possessing *Bufo alvarius* venom may be forthcoming.

Milk a Toad, Go to Jail

In a raid of Bob and Con-Shepard's Sonora home in January, narcotics officers discovered marijuana, mescaline, LSD, morphine—and four Colorado River toads, whose dried venom produces a killer high when smoked.

This is the first known psychedelic toad case in the world. But there's a catch in the Shepards' case. The psychoactive chemical found in toad venom is bufotenine. According to state chemists, however, the bufotenine extracted from the toads has a slightly different molecular structure than the bufotenine banned as a Schedule I controlled substance under state Health and Safety Code section 11054.

So Deputy District Attorney James Boscoe of Tuolumne County has charged the Shepards with a violation of section 11401: possessing a substance having a chemical structure substantially similar to an outlawed one.

And that, says John Schlim, a retired Fremont narcotics officer and nationally known expert on hallucinogens, could well lead to more toad-possession prosecutions, "now that the awareness is there."

OTHER *BUFO* BASED ARRESTS?

The following is excerpted from an article in the Tuesday, April 19, 1994, Los Angeles Times, Part E, page 1, Column 5:

> [In September 1993], a Tucson man was arrested when authorities discovered 62 desert toads in his home. Arizona law forbids the sale of native wildlife, but anyone with a fishing license may legally possess up to 10 desert toads. The man, who claimed the amphibians were pets, was charged with numerous counts of illegally possessing and transporting wildlife. [Another] case involved a University of Arizona student arrested after he ran an ad in the student newspaper soliciting desert toads, also called Colorado River Toads. Wildlife experts at first assumed these cases were part of the ongoing trade in which collectors ship exotic desert animals to black-market dealers, usually in Florida, Texas and California. Then Arizona officials learned of the February [sic] arrest of a California man for possession of bufotenine, a hallucinogenic chemical secreted by the toads.... "I don't think law enforcement was even aware this fad was going on until recently," said Lt. Dave Gonzales of the [Arizona] Department of Public Safety.

.... ALERT ....

High Court Expansively Construes Federal Mail Order Paraphernalia Act

Posters N Things, Ltd., et al. v. United States (No. 92-903, May 23, 1994, 94 DAR 6841)

In 1977, Lana Christine Acty incorporated a business known as Posters N Things, Ltd. Her corporation operated three sub-business: a diet-aid store, an art gallery, and a general merchandise outlet originally called "Forbidden Fruit," but later renamed "World Wide Imports" (World). Law-enforcement agents received complaints that World was selling drug paraphernalia. Other agents investigating other drug cases came across drug diluents and other drug paraphernalia that had been purchased from Forbidden Fruit.

In March 1990, agents armed with search warrants searched Ms. Acty's business and residence, seizing pipes, bongs, scales, roach clips, and drug diluents including mannitol and inositol. The agents also seized cash, business records, catalogs, and advertisements describing the products sold by World. Some of the advertisements promoted products such as "Coke Kits," "Free Base Kits," and diluents sold under the names "PseudoCaine" and "Procaine."

Ms. Acty and several others were charged with numerous federal crimes, including using an interstate conveyance as part of a scheme to sell drug paraphernalia, in violation of the Mail Order Drug Paraphernalia Control Act (formerly codified at 21 U.S.C. sec. 857)[1] and aiding and abetting the manufacture and distribution of cocaine in violation of 21 U.S.C. sec. 841(a)(1). Ms. Acty was convicted of the above offenses (and several others) and was sentenced to imprisonment for 108 months and fined $150,000. Her company was also fined $75,000.

Ms. Acty appealed her conviction arguing that she did not violate section 857 because she did not intend her products to be used with illegal drugs. She pointed out that the statute defined "drug paraphernalia" as "any equipment, product, or material of any kind which is primarily intended or designed for use [with illegal drugs]." (21 U.S.C. sec. 857(d).) In other words, Ms. Acty argued that liability under section 857 turned on *her subjective intent* on how the product was meant to be used--and that she did not intend purchasers to use her products with illegal drugs. (*Id.* at 94 DAR 6842.)

The United States Supreme Court examined the definition of "drug paraphernalia" as defined in section 857(d) and identified two categories of paraphernalia: (1) items "designed for use" with illegal drugs, and (2) items "primarily intended" for use with illegal drugs. (*Ibid.*) The Court relied on its earlier decision in *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, (1982) 455 US 489, 501, where it concluded that the phrase "designed for use" referred to "the design of the manufacturer, not the intent of the retailer or customer." In the Court's words:

> An item is "designed for use,... if it is principally used with illegal drugs by virtue of its objective features, i.e., features designed by the manufacturer. [Citation omitted.] The objective characteristics of some items establish that they are designed specifically for use with controlled substances. Such items, including bongs, cocaine freebase kits, and certain kinds of pipes, have no other use besides contrived ones (such as use of a bong as a flower vase). Items that meet the "designed for use" standard constitute drug paraphernalia irrespective of the knowledge or intent of one who sells or transports them. [Citations omitted.] (*Ibid.*)

Turning to those items "primarily intended" for use with controlled substances, the Court addressed the issue of whose intent is relevant. Ms. Acty submitted that as the defendant in the case, it was *her* intent that was relevant, not a buyer's intent or whether a buyer actually used the product as drug paraphernalia.

The Court rejected Ms. Acty's argument, holding that the phrase "'primarily intended... for use' refers to a product's likely use rather than to the defendant's state of mind." (*Ibid.*) The Court reasoned that the statute defining "drug paraphernalia" lists 15 items constituting per se drug paraphernalia, indicating that such items could be "primarily intended" for use with illegal drugs irrespective of a particular defendant's intent -- that is, as an objective matter. The Court also noted that the section defining "drug paraphernalia" lists eight objective factors that could be considered when determining whether an item constitutes drug paraphernalia, explaining "[t]hese factors generally focus on the actual use of the item in the community. Congress did not include among the listed

factors a defendant's statements about his intent or other factors directly establishing subjective intent." (*Ibid.*) Consequently, the Court concluded that the term "primarily intended... for use," "*is to be understood objectively and refers generally to an item's likely use.*" (*Id.* at p. 6843, emph. added.)

Recapitulating its holding the Court explained:

> ...we conclude that a defendant must act knowingly in order to be liable under section 857. Requiring that a seller of drug paraphernalia act with the "purpose" that the items be used with illegal drugs would be inappropriate. The purpose of a seller of drug paraphernalia is to sell his product; the seller is indifferent as to whether that product ultimately is to be used in connection with illegal drugs or otherwise. If section 857 required a purpose that the items be used with illegal drugs, individuals could avoid liability for selling bongs and cocaine freebase kits simply by establishing that they lacked the "conscious object" that the items be used with illegal drugs. Further, we do not think that the knowledge standard in this context requires knowledge on the defendant's part that a particular customer actually will use an item of drug paraphernalia with illegal drugs. It is sufficient that the defendant be aware that customers in general are likely to use the merchandise with drugs. Therefore, the Government must establish that the defendant knew that the items at issue are likely to be used with illegal drugs. [Cf. *United States v. United States Gypsum Co.*, (1978) 438 US 422, 444 (knowledge of "probable consequences" sufficient for conviction).] A conviction under section 857(a)(1), then, requires the Government to prove that the defendant knowingly made use of an interstate conveyance as part of a scheme to sell items that he knew were likely to be used with illegal drugs. Finally, although the Government must establish that the defendant knew that the items at issue are likely to be used with illegal drugs, it need not prove specific knowledge that the items are "drug paraphernalia" within the meaning of the statute. Cf. *Hamling v. United States* (1974) 418 U.S. 87, 123 (statute prohibiting mailing of obscene materials does not require proof that defendant knew the materials at issue met the legal definition of "obscenity"). As in *Hamling*, it is sufficient for the Government to show that the defendant "knew the character and nature of the materials" with which he dealt. (*Id.* at p. 6843.)

Comments:

The *Posters* decision causes me a great deal of worry for the future of companies selling magic mushroom spores or growing kits. Practically speaking, the *Posters* decision greatly increases the probability that law-enforcement will attempt a crackdown on spore distributors. To my mind there is a distinction between spore prints and the human-made apparatus that are enumerated under section 863 and tacitly targeted by the section. Developing that distinction might form the basis for a defense that section 863 is not applicable to living substances which are essentially immature forms of life that develop into objects embodying substances the government has declared illegal. A spore print is not an adjunct drug delivery system in the same way that bongs and carburetor pipes are. The problem is that subdivision (d) includes as drug paraphernalia, "any...material of any kind which is primarily intended...for use in manufacturing, compounding converting...[or] producing...a controlled substance," and hence is not limited to drug delivery systems. More thoughts on this as they occur or become necessary.

End Notes:

1. In 1990, Congress repealed section 857 and replaced it with 21 U.S.C. sec. 863; (see Crime Control Act of 1990, Pub. L. 101-647, sec. 2401, 104 Stat. 4858.) 21 U.S.C. sec 863 is identical to former section 857 except in the general description of the offense.

21 U.S.C. sec. 863, as currently enacted provides:

Drug paraphernalia

(a) In general

It is unlawful for any persson: (1) to sell or offer for sale drug paraphernalia;(2) to use the mails or any other facility of interstate commerce to transport drug paraphernalia; or (3) to import or export drug paraphernalia.

(b) Penalties

Anyone convicted of an offense under subsection (a) of this section shall be imprisoned for not more than three years and fined under title 18.

(c) Seizure and forfeiture

Any drug paraphernalia involved in any violation of subsection (a) of this section shall be subject to seizure and forfeiture upon the conviction of a person for such violation. Any such paraphernalia shall be delivered to the Administrator of General Services,

General Services Administration, who may order such paraphernalia destroyed or may authorize its use for law enforcement or educational purposes by Federal, State, or local authorities.

(d) 'Drug paraphernalia' defined

The term 'drug paraphernalia' means any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance, possession of which is unlawful under this subchapter. It includes items primarily intended or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, hashish oil, PCP, or amphetamines into the human body, such as -

(1) metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads or punctured metal bowls;

(2) water pipes;

(3) carburetion tubes and devices;

(4) smoking and carburetion masks;

(5) roach clips: meaning objects used to hold burning material, such as a marihuana cigarette, that has become too small or too short to be held in the hand;

(6) miniature spoons with level capacities of one-tenth cubic centimeter or less;

(7) chamber pipes;

(8) carburetor pipes;

(9) electric pipes;

(10) air-driven pipes;

(11) chillums;

(12) bongs;

(13) ice pipes or chillers;

(14) wired cigarette papers; or

(15) cocaine freebase kits.

(e) Matters considered in determination of what constitutes drug paraphernalia

In determining whether an item constitutes drug paraphernalia, in addition to all other logically relevant factors, the following may be considered:

(1) instructions, oral or written, provided with the item concerning its use;

(2) descriptive materials accompanying the item which explain or depict its use;

(3) national and local advertising concerning its use;

(4) the manner in which the item is displayed for sale;

(5) whether the owner, or anyone in control of the item, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;

(6) direct or circumstantial evidence of the ratio of sales of the item(s) to the total sales of the business enterprise;

(7) the existence and scope of legitimate uses of the item in the community; and

(8) expert testimony concerning its use.

(f) Exemptions

This section shall not apply to: (1) any person authorized by local, State, or Federal law to manufacture, possess, or distribute such items; or (2) any item that, in the normal lawful course of business, is imported, exported, transported, or sold through the mail or by any other means, and traditionally intended for use with tobacco products, including any pipe, paper, or accessory.

New Case on Mail Searches

United States v. Taghizadeh (9th Cir. March 28, 1994) No. 92-50518, 94 DAR 3973

The Ninth Circuit Court of Appeals has held that customs officials may open mail coming from a drug source country and addressed to a post office box! Under 19 U.S.C. sec. 482, customs officials must have reasonable cause to suspect that letters contain contraband or dutiable merchandise before opening them. In this case, however, customs officials opened a package after noticing it was mailed from Turkey and addressed to a post office box. Inside they found 75 sticks of opium. When Mr. Taghizadeh picked up the package, law enforcement agents followed him home and subsequently arrested him.

In a pretrial hearing, Mr. Taghizadeh moved to suppress the opium, arguing that the custom officials violated 19 U.S.C. sec. 482 by searching his mail without reasonable cause that it contained contraband. The District Court, agreed with Mr. Taghizadeh and granted his motion. The government then appealed to the Ninth Circuit.

The Ninth Circuit reversed the District Court. The Ninth Circuit explained that the mail search was legal because the parcel came from Turkey, a "common source of drugs," and was addressed to a post office box, a "common destination for narcotics." These two factors, said the Ninth Circuit, are

(Continued on p. 24.)

Mail Search (Cont.'d)

sufficient to establish reasonable cause that the package contained contraband:

> If a package comes from a drug source country, only a little more is needed. Here, we have the fact that Taghizadeh's package was addressed to a post office box. It is true, as defendant contends, that mail addressed to a post office box is not particularly sinister; in fact, this factor is unlikely to establish reasonable cause by itself. But where suspicions have been properly awakened, an otherwise innocent fact can intensify them. So it is here. As the government notes, post office boxes are commonly used in drug operations; they are, after all, relatively anonymous and secure. When we pair this fact with the package's origin in a [drug] source country, things look mighty suspicious. And that's more than [19 U.S.C. sec. 482] requires.

The court noted in passing that Columbia and Thailand are two other judicially recognized "drug source countries."

Magic Mushroom Law (Cont.'d from p. 19)

example, California has several code sections exclusively devoted to "mushrooms" wherein the legislature explicitly outlawed "cultivat[ing] any spores or mycelium capable of producing mushrooms or other material which contains ... a controlled substance" (Health & Safety Code sec. 11390) as well as "transporting, importing, selling, furnishing or giving away [such] spores or mycelium." (Health & Saf. sec. 11391.) In a future issue of TELR, the state statutes will be surveyed.

End Notes

1. To say that the substances were declared illegal is a short-hand way of saying that (unless you are registered manufacturer or select scientific researcher) it is a criminal offense to possess, transport, sell, or manufacture the substance. Under federal and state law, a substance is not itself declared illegal, rather it is placed in one of five schedules based on the government's determination of the substance's: abuse potential, accepted medical use, and potential for physical or psychological dependence. The substances psilocybin and psilocin were placed in Schedule I, which is subject to the strictest controls and harshest criminal punishment for violating those controls.

2. The state of Washington is unique in fashioning anti-drug laws that essentially impose strict liability for unauthorized possession of controlled substances. (See *State v. Cleppe* (Wash. 1981) 635 P.2d 435, *cert. denied*, 456 U.S. 1006, 102 S.Ct. 2296, 73 L.Ed.2d 1300, [holding that the statute forbidding possession of a controlled substance does not require proof of guilty knowing.] The *Cleppe* court, however, left open the use of an *affirmative defense* of "unwitting possession." (*Cleppe*, 635 P.2d at p. 435; see also, *State v. Hundley* (Wash App. 1994) 866 P.2d 56 [reversal of drug conviction based on affirmative defense of "unwitting possession."]

Power Products Raid (cont.'d)

In an unfortunate twist, approximately three months before the raid, the proprietor of Power Products was arrested after receiving marijuana in the mail, which he was importing to aid a friend suffering from AIDS. (The friend has since died, but his statement under oath, that the marijuana was to relieve the symptoms of his disease, was captured on videotape.) The marijuana case was set for trial when the Power Products raid occurred.

The District Attorney handling the marijuana case threatened to introduce evidence related to the Power Products raid in an effort to paint the proprietor as a major "drug dealer" thereby negating his defense that the marijuana was solely intended for the man's ailing friend. The District Attorney also threatened to charge the proprietor with multiple felony counts arising from the Power Products raid, including: psilocybin distribution[1], aiding and abetting misconduct related to a controlled substance, and contributing to the delinquency of a minor. Feeling the pressure of these threats, the proprietor of Power Products agreed to settle both cases by pleading guilty to a single count of misconduct involving a controlled substance in the fourth degree. (Alaska Stat. Sec. 11.71.040.) In exchange for the plea, the District Attorney agreed not to prosecute on any charges that could arise from the Power Products raid.

The proprietor of Power Products is set for sentencing on August 8, 1994. Under Alaska law, the crime of misconduct involving a controlled substance in the fourth degree is a class C felony carrying a maximum sentence of five years in state prison and a maximum fine of $50,000. (Alaska Stat. Secs. 12.55.125; 12.55.035 (2).)

(Continued on p. 25.)

Power Products Raid (cont.'d)

It appears that Power Product advertisements appeared in *High Times* magazine as well as *Psychedelic Illuminations*. The Alaska authorities, at the very least, now have the names of perhaps as many as 600 people who wrote to, or ordered products from, Power Products.

I believe this is the first arrest of a commercial seller of mushroom spores, so it is difficult to predict what, if anything, law enforcement authorities are likely to do with the 600 names. There have, however, been instances in the past where authorities have obtained the order lists of companies selling hydroponic growing equipment through advertisements in *High Times*. In several such reported cases, the authorities used the order information to trigger investigations into the people who placed orders.[2] Often the first step in such an investigation is to run all the names through a network law enforcement computer system to see if any of the people have a prior conviction for a drug offense. If a "hit" is made, the authorities will sometimes show up unannounced to search the person and his home under the authority of a search and seizure waiver that is a common condition to probation or parole on a drug case.

In almost all circumstances, however, simply placing an order from a company such a Power Products, will not -- by itself -- give the authorities probable cause to search the home of the person who made the order. Additional factors reasonably indicating that the person is *currently* engaging in criminal conduct are almost always necessary before an officer can obtain a valid search warrant for the home of a person who made an order.

Regarding seized letters which might detail mycological activities of the writer, the marijuana/hydroponic equipment cases teach that the authorities will often use such documents as the first tip to begin investigating the letter writer. The depth of the investigation depends a lot on the contents of the letter. Recently dated letters mentioning an ongoing growing operation seem to prompt the most attention. The corollary to this is that most people who wrote letters to, or purchased supplies from, such a company would not have anything to worry about, especially if the letters where several months old. Those most at risk would be those who placed orders and received shipments in the several weeks before the raid.

Updates on the Power Products case, including the punishment imposed at sentencing, will appear in the next issue of TELR.

End Notes:

1. Though the spores of *Psilocybe cubensis* are reported to contain no controlled substances, the District Attorney apparently threatened he could still gain a conviction because the Alaska anti-drug laws allegedly prohibit possessing or selling "an immediate precursor" of a controlled substance. My quick scan of the Alaska statutes did not locate this code section.

2. See, *State v. Diamond* (ME. 1993) 628 A.2d 1032, where the opinion notes that Maine's Bureau of Intergovernmental Drug Enforcement, "learned from the federal Drug Enforcement Administration (DEA) that a confidential source of information had supplied information of suspected shipments of hydroponic growing equipment used for indoor marijuana cultivation and marijuana seeds. Information from this source has led to dozens of arrests of indoor growers of marijuana."

See also, *US v. Deaner* (3rd Cir. 1993) 1 F.3d 192 where the Third Circuit upheld the conviction of Mr. Deaner for possession with intent to manufacture or distribute marijuana in violation of federal law (21 USC sec 841 (a)(1)) The following information was revealed in the court's opinion:

> Deaner became a suspect after the DEA learned that he had made mail order purchases of 244 pounds of supplies from Wormsway Organic Indoor/ Outdoor Garden Supply (Wormsway) between May 1987 and April 1991. Andrasi [the investigating DEA agent] related in the affidavit that he learned "[t]hrough additional intelligence information" that Wormsway was a supplier of cultivation equipment seized in various indoor marijuana cultivation operations, and that Wormsway was an advertiser in Hightimes Magazine, a publication devoted to promoting the growth and use of marijuana.... Andrasi cited a copy of an affidavit written by another DEA special agent as the source of his knowledge. That affidavit had been used to obtain a search warrant for Wormsway in October 1989. Andrasi also stated that undercover agents had discussed marijuana cultivation with Wormsway's owner and at least one of its employees "on numerous occasions,"...and that the agents had purchased equipment from Wormsway after telling its owner that the purchase would be entirely used in marijuana cultivation. Andrasi reviewed UPS shipping records which indicated that Deaner had received five packages from Wormsway at regular intervals over an eight month period. Andrasi said this regular flow of packages from Wormsway supported his belief that Deaner was cultivating marijuana.

STAY INFORMED !

The Entheogen Law Reporter is published seasonally. A one year subscription for individuals is 25 in the U.S.A., 30 to all other destinations. *Please make check or money order payable to Richard Glen Boire.*

Statement of Purpose

Since time immemorial, humankind has made use of entheogenic substances as powerful tools for achieving spiritual insight and understanding. In the twentieth century, however, these most powerful of religious and epistemological tools were declared illegal and their users decreed criminals. The Shaman has been outlawed. It is the purpose of this newsletter to provide the latest information and commentary on the intersection of entheogenic substances and the law.

How To Contact The Entheogen Law Reporter

Please address all correspondence to Richard Glen Boire, The Entheogen Law Reporter, Post Office Box 73481, Davis, California, 95617-3481. Contact can also be made (and is preferred) via Internet e-mail to RGBoire@ACO.COM.

Confidentiality

Subscriber information is strictly confidential. The subscriber list is not released to anyone for any reason. Issues are mailed with a plain cover using only the newsletter's acronym, "TELR," and its address.

Kopyright & License

Disclaimer

The Entheogen Law Reporter is not engaged in rendering legal or other professional advice, and assumes no responsibility for the statements and opinions advanced by any of its writers or contributors. The information herein is subject to change without notice, and is not intended to be, nor should it be considered, a substitute for individualized legal advice rendered by a competent attorney. If legal service or other expert assistance is required, the advice of a competent attorney or other professional should be obtained.

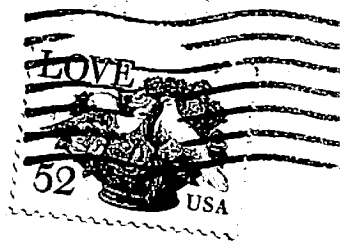
Article Note:

Accommodating Religious Users of Controlled Substances: A Model Amendment to the Controlled Substances Act. By Richard Glen Boire. *The Journal of Drug Issues* 24(3), 463-481, 1994. (Photocopies available via TELR for $4.00.)

Abstract:

The relationship between religious experience and alternative states of consciousness is as old as humanity itself. From time immemorial, visionary states have been entered through the ritual use of mind-changing substances. Despite the uncontroverted fact that particular substances have been used for thousands of years to achieve religious experience and insight, the federal drug laws fail to accommodate religiously motivated users. The purpose of this article is to present a model from which a nonsectarian accommodation may be developed, while retaining the federal scheme for the strict control of drugs.

TELR
Post Office Box 73481
Davis, California 95617-3481



SOMA GRAPHICS
2225 H Street
SACRAMENTO, CA 95816-4023

ATTN: Requested review Materials