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DRUG PARAPHERNALIA
Federal Prosecution Manual

September 1991

Prepared by:

Narcotic and Dangerous Drug Section
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Criminal Division

FOREWORD

Drug Paraphernalia: Federal Prosecution Manual was prepared by David Bybee and Danielle DeFranco, attorneys in the Narcotic and Dangerous Drug Section, Mary Lee Warren, Chief.

Assistant United States Attorney Hal McDonough, Middle District of Tennessee, Geoffrey Brigham, attorney in the Appellate Section, Criminal Division, and Barry Rhodes, paralegal in the Narcotic and Dangerous Drug Section, assisted in the preparation of the Manual.

This publication is intended for use by federal prosecutors and other law enforcement personnel. The opinions and advice expressed in this publication are informal discussions of policy and law. Nothing in this publication is intended to be a directive or a statement of policy of the Department of Justice or any of its components. This publication is not intended to confer any rights, privileges, or benefits upon actual or prospective witnesses or defendants. See, United States v. Caceres, 440 U.S. 741 (1979).

Drug Paraphernalia: Federal Prosecution Manual has been published in a loose-leaf format for ease of duplication in your office for staff attorneys and other law enforcement personnel. Updated revisions to the Manual will be prepared and distributed as the need arises.

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Chapter One

HISTORICAL BACKGROUND

I. Model Act

Prior to the enactment of any federal drug paraphernalia law, many states passed laws that were designed to prohibit or regulate the sale of drug paraphernalia. This was usually done either by an outright ban on the sale of such items or by some regulatory scheme that required certain records to be kept and imposed fines for non-compliance. See, e.g.,Casbah, Inc. v. Thone, 651 F.2d 551 (8th Cir.), cert. denied, 455 U.S. 1005 (1981); and Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982). Many of these state drug paraphernalia statutes were held unconstitutional.[1]

The Drug Enforcement Administration (DEA) drafted the Model Drug Paraphernalia Act (hereinafter Model Act) principally to assist the states in passing legislation that would withstand constitutional attack. Mail Order Drug Paraphernalia Control Act: Hearings on H.R. 1625 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 99th Cong., 2nd Sess. 15 (1986)(statement of Rep. Levine) (hereinafter cited as Hearings p.__). In a prefatory note to the Model Act, the DEA noted that "[o]ther state laws aimed at controlling Drug Paraphernalia are often too vaguely worded and too limited in coverage to withstand constitutional attack or to be very effective." Model Act, Prefatory Note. (See Appendix A for complete text of Model Act). The note further states that the Model Act "was drafted at the request of state authorities, to enable states and local jurisdictions to cope with the paraphernalia problem." Id.

Federal legislation was not pushed by the Department of Justice primarily because it was not thought to represent the most efficient or sensible allocation of federal drug enforcement resources. Statement by Irvin B. Nathan, Deputy Assistant Attorney General, Criminal Division, given before the Select Committee on Narcotic and Drug Abuse Control, U.S. House of Representatives (Nov. 1, 1979). Since 1979, the Model Act, which bans the manufacture, advertisement, sale, and possession of drug paraphernalia and provides for its confiscation, has been passed by the majority of states and the District of Columbia. Slight variations of the Model Act have been passed by many other states.

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[1] See, e.g., Geiger v. Eagan, 618 F.2d 26 (8th Cir. 1980); Record Head Corp. v. Sachen, 498 F. Supp. 88 (E.D. Wis. 1980); Magnani v. Ames, 493 F. Supp. 1003 (S.D. Iowa 1980); Music Stop, Inc. v. Ferndale, 488 F. Supp. 390 (E.D. Mich. 1980); Knoedler v. Roxbury Township, 485 F. Supp. 990 (D. N.J. 1980); Record Museum v. Lawrence Township, 481 F. Supp. 768 (D. N.J. 1979); Bambu Sales, Inc. v. Gibson, 474 F. Supp. 1297 (D. N.J. 1979).

Since most constitutional attacks have been aimed at vaguely worded definitions, the statutory language of the Model Act and its accompanying commentary set out to define clearly "drug paraphernalia" and to clarify the intent necessary under the Model Act:

> To insure [sic] that innocently possessed objects are not classified as drug paraphernalia, Article I makes the knowledge or criminal intent of the person in control of an object a key element of the definition. Needless to say, inanimate objects are neither 'good' nor 'bad,' neither 'lawful' nor 'unlawful.' Inanimate objects do not commit crimes. But, when an object is controlled by people who use it illegally, or who intend to use it illegally, or who design or adapt it for illegal use, the object can be subject to control and the people to prosecution. Article I requires, therefore, that an object be used, intended for use, or designed for use in connection with illicit drugs before it can be controlled as drug paraphernalia.
>
> .....
>
> Actual use of an object to produce, package, store, test or use illicit drugs need not always be shown. An object is considered to be drug paraphernalia whenever the person in control intends it for use with illicit drugs. This intent may be a generalized one, not necessarily pinpointing a specific time and place of future use. See Palmer v. State, 14 Md. App. 159, 286 A.2d 572 (1972). It can be proved directly such as [b]y admissions of the person in control, or indirectly through circumstantial evidence. It should be noted that the person in immediate control of an object need not intend to use it personally in connection with drugs. It is enough if he holds the object with the intent to make it available to persons whom he knows will use it illegally. See U.S. v. 2265 One-Gallon Paraffined Tin Cans, 260 F.2d 105 (5th Cir. 1958).
>
> Objects whose sole, or at least dominant purpose is to produce, package, store, test or use illicit drugs are considered to be "designed" for such use. A rebuttable presumption exists that these objects are intended for use for the purpose for which they are designed. See Israel v. U.S., 63 F.2d 345 (3d Cir. 1933). As such, they are presumed to be drug paraphernalia. Isomerization devices designed for use in increasing the THC content of marihuana provide a good example.

Model Act, Comment (Article I).

From the preceding commentary, it is clear that the drafters of the Model Act contemplated both a subjective test in determining whether an item is drug paraphernalia and also an objective test based on the inherent characteristics of the item. This is further underscored by the testimony of Harry Myers, then

Associate Chief Counsel of the DEA, and one of the principal drafters of the Model Act:

> The model act is intended to go after items that are designed for use with drugs, like this [displaying bong]. It was also intended to go after items that are multipurpose items, if they were marketed or promoted for an illicit use, if they were intended for an illicit use by the person who was marketing them or selling them. And most of the confusion in understanding the statute, the question of whose intent we are talking about, and transferred intent, stems from the failure to distinguish between two kinds of paraphernalia.

Hearings p. 68. (Statement by Harry Myers).

II. The 1986 Act

While state laws patterned on the Model Act were largely effective in combatting intrastate sales, the availability of drug paraphernalia became widespread by use of the mails or by private package services such as UPS. Remarks of Rep. Mel Levine on the House Floor, 131 Cong. Rec. 5932 (Mar. 20, 1985). In 1986, Congress passed the Anti-Drug Abuse Act of 1986 which included Subtitle O cited as the "Mail Order Drug Paraphernalia Control Act", Pub. L. No. 99-570, §§ 1822-23, 100 Stat. 3207-51 (codified at 21 U.S.C. § 857)(hereinafter 1986 Act). It was patterned after the Model Act and became effective 90 days after its enactment on October 27, 1986. (See Appendix B for text of "Mail Order Drug Paraphernalia Act" as passed in 1986). It was principally drafted to close the loophole of interstate sales of drug paraphernalia that the Model Act failed to address. Statement by Rep. Gilman, Hearings p. 74.

Although the 1986 Act retained much of the language of the Model Act, there are important differences. The drug definition section of the 1986 Act is more restrictive in its reach. For example, equipment used primarily for "planting, propagating, cultivating, growing, harvesting...analyzing, packaging, [and] repackaging" are not expressly included in the 1986 Act's definition of drug paraphernalia. Likewise, the first 11 specific examples of drug paraphernalia in the Model Act were omitted from the 1986 Act's definition of drug paraphernalia.

Of the 14 factors stated by the Model Act to be relevant in determining what constitutes drug paraphernalia, the 1986 Act only retains factors seven through fourteen.

The offenses section is completely original to the 1986 Act. In contrast to the intrastate emphasis of the Model Act, the 1986 Act prohibits interstate sales and the importing or exporting of drug paraphernalia.

The civil forfeiture provision of the Model Act was omitted entirely from the 1986 Act. However, a criminal forfeiture provision was included.

The 1986 Act also added an exemption provision for tobacco products and authorized individuals. There is no correlative section in the Model Act.

III. The 1988 Amendments

In 1988, the 1986 Act was amended with two rather technical changes designed to clarify subsections (d)(definition of drug paraphernalia) and (f)(exemptions). Subsection (d) of the 1986 Act read in pertinent part:

> 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 in violation of the Controlled Substances Act (title II of Public Law 91-513).

Pub. L. No. 99-570, § 1822, 100 Stat. 3207-51 (1986). The Anti-Drug Abuse Act of 1988 amended the underlined language above to read in pertinent part:

> 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 the Controlled Substances Act (title II of Public Law 91-513).

Pub. L. No. 100-690, § 6485, 102 Stat. 4384 (1988).

Subsection (f)(2) of the 1986 Act read in pertinent part: "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 primarily intended for use with tobacco products, including any pipe, paper, or accessory." Pub. L. No. 99-570, § 1822, 100 Stat. 3207-51 (1986). The 1988 Amendments changed subsection (f)(2) to read as follows: "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." Pub. L. No. 100-690, § 6485, 102 Stat. 4384 (1988). (See Appendix C for text of amendments.)

IV. The 1990 Amendments

The Crime Control Act of 1990 further amended the 1986 Act effective November 29, 1990. Pub. L. No. 101-647, § 2401, 104 Stat. 4859 (1990)(See Appendix D for text of amendments). The 1990 Amendments "eliminate wording which limits effectiveness in prosecuting sales of such materials." H.R. Rep. No. 101-681(1), 101 Cong., 2d Sess., reprinted in 1990 U.S. Code Cong. & Admin. News Vol. 10F p. 6476. The 1986 Act together with the 1988 and 1990 Amendments have now been redesignated as 21 U.S.C. § 863. Section 857 has been repealed.

The 1990 Amendments reword subsections (a)(1) and (a)(2) which state the offense. The new language reads: (a) It is unlawful for any person (1) to sell or offer for sale drug paraphernalia; (2) to use the mails or any other facility of interstate commerce to transport drug paraphernalia. Subsection (a)(3) remains unchanged. The House Report accompanying these amendments provides the rationale for the changes:

> The current drug paraphernalia law (21 U.S.C. 857) is worded such that the only prosecutions possible under it are those cases where it can be shown that (1) the defendant is using the United States Postal Service or other form of interstate conveyance as part of a scheme to sell the paraphernalia; (2) the paraphernalia is imported or exported; or (3) the paraphernalia is offered for sale and transportation in interstate commerce (emphasis added). As amended, the statute eliminates the requirement that there be a scheme to sell the paraphernalia. The new section also makes it clear that the statute reaches both inter- and intra-state sales of such paraphernalia.

Id. at 6512-13.

Subsection (b)(penalties) was amended by striking "not more than $100,000" and inserting "under title 18, United States Code."

Subsection (f)(exemptions) was amended by striking "This subtitle" and inserting "This section."

Although located in Title 21, section 857 was never part of the Controlled Substances Act. The 1990 Amendments, however, added the redesignated 21 U.S.C. § 863, as amended, to the Controlled Substances Act. "This transfer is to make clear the intention of the Committee that drug paraphernalia provisions be enforced by the Department of Justice and the DEA on the same basis that other provisions of the Controlled Substances Act are enforced." Id. at 6513.

Chapter Two

STATUTORY SCHEME

I. Elements of the Offense

Under § 857, it is unlawful for any person (after January 27, 1987):

1. to make use of the services of the Postal Service or other interstate conveyance as part of a scheme to sell drug paraphernalia;[2]

2. to offer for sale and transportation in interstate or foreign commerce drug paraphernalia; or

3. to import or export drug paraphernalia.

Under § 863 (effective November 29, 1990), it is unlawful:

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.

[Editors' note: For the sake of clarity, the text of the monograph will retain the use of 21 U.S.C. § 857 to refer to the Mail Order Drug Paraphernalia Control Act where it is cited in cases since all federal case law to date refers to § 857. 21 U.S.C. § 863 (the redesignation) will be used elsewhere unless to do so would be confusing.]

II. Definition of Drug Paraphernalia

21 U.S.C. § 863(d) defines drug paraphernalia as:

> any equipment, product, or material of any kind which is

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[2] No reported case has interpreted "scheme" in the context of the federal drug paraphernalia statute; however, many federal statutes contain the same or similar language. See e.g. , 15 U.S.C. § 77q (fraudulent interstate transactions); 15 U.S.C. § 80b-6 (prohibited transactions by investment advisors); 18 U.S.C. § 224 (bribery in sporting contests); 18 U.S.C. § 1301 (importing or transporting lottery tickets); 18 U.S.C. § 1343 (fraud by wire, radio or television); 18 U.S.C. § 2314 (transportation of stolen goods, securities, moneys, fraudulent state tax stamps, or articles used in counterfeiting).

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) wire cigarette papers; or

(15) cocaine freebase kits.

A. Scienter ("primarily intended or designed for use")

Although there is no mention of a scienter requirement in 21 U.S.C. § 863(a), Congress included a scienter requirement by incorporating by reference the definition of drug paraphernalia set out in § 863(d). Under that section an item is determined to be drug paraphernalia if either it is subjectively intended to be drug paraphernalia by the defendant, or it is designed for use as drug paraphernalia given the objective characteristics of the item and other factors as set out in the statute. As of the date of this manual, two district courts have so construed the statute: U.S. v. Main Street Distribution, Inc., 700 F. Supp. 655 (E.D. N.Y. 1988), and U.S. v. Dyer, 750 F. Supp. 1278 (E.D. Va. 1990).

1. *Subjective Standard*

The defendant in Main Street argued that "primarily intended or designed for use":

> can be read to refer to the intent of some third party, for example, the manufacturer of a product who designed it with the intent that it be used in conjunction with drugs, or a user who purchases a product intending to use it with drugs. In short, he contends that his own intent is not a specific element of the offense, and that he risks prosecution and conviction based on the transferred intent of another.

700 F. Supp. at 664. The court in Main Street rejected this theory, holding that the government must prove the subjective intent of the defendant. The Main Street approach is that "intended for use" means that items become drug paraphernalia when the defendant intends them to be used as such.

> [Section] 857 is not concerned with whether an ultimate purchaser will in fact use an item in conjunction with drugs and whether a defendant knows this. Its focus is simply on a defendant's use of the mails, or foreign or interstate commerce, to facilitate transactions involving items that a defendant has designed or intends for use as drug paraphernalia.
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> .....
>
> [T]he government will therefore be required to prove at trial that [the defendant] either designed the items listed in the indictment for use with controlled substances or intended them to be for drug use.

Id. at 666.

The Main Street interpretation of "primarily intended or designed for use" as meaning the subjective intent of the defendant is also reflected in many court decisions interpreting state laws based on the same or similar language. These decisions are set out below, but given the Dyer decision discussed infra, their value in interpreting the definition section of 21 U.S.C. § 863 is questionable.

First Circuit

New England Accessories Trade Assoc. v. Nashua, 679 F.2d 1 (1st Cir. 1982); New England Accessories Trade Assoc. v. Tierney, 691 F.2d 35 (1st Cir. 1982).

Second Circuit

Brache v. County of Westchester, 658 F.2d 47 (2d Cir. 1981), cert. denied, 455 U.S. 1005 (1982)

Third Circuit

Delaware Accessories Trade Assoc. v. Gebelein, 497 F. Supp. 289 (D. Del. 1980); Pennsylvania Accessories Trade Assoc. v. Thornburgh, 565 F. Supp. 1568 (M.D. Pa. 1983).

Fourth Circuit

Mid-Atlantic Accessories Trade Assoc. v. Maryland, 500 F. Supp. 834 (D. Md. 1980).

Fifth Circuit

Tobacco Accessories & Novelty Craftsmen Merchants Assoc. v. Treen, 681 F.2d 378 (5th Cir. 1982); Windfaire, Inc. v. Busbee, 523 F. Supp. 868 (N.D. Ga. 1981).

Sixth Circuit

Record Revolution No. 6, Inc. v. Parma, 492 F. Supp. 1157 (N.D. Ohio 1980), rev'd, 638 F.2d 916 (6th Cir. 1980), vacated, Parma v. Record Revolution, No. 6, Inc., 451 U.S. 1013 (1981), and vacated, Parma v. Record Revolution, No. 6, Inc., 456 U.S. 968 (1982), on remand, Record Revolution No. 6, Inc. v. Parma, 709 F.2d 534 (6th Cir. 1983).

Seventh Circuit

Camille Corp. v. Phares, 705 F.2d 223 (7th Cir. 1983). Nova Records, Inc. v. Sendak, 706 F.2d 782 (7th Cir. 1983) (The "primarily"

requirement of intent ensures that the defendant can be convicted only if his intent with respect to the illegal use predominates over a legal use.).

Eighth Circuit

Casbah, Inc. v. Thone, 651 F.2d 551 (8th Cir. 1981), cert. denied, 455 U.S. 1005 (1982).

Ninth Circuit

Stoianoff v. Montana, 695 F.2d 1214 (9th Cir. 1983).

Tenth Circuit

Hejira Corp. v. MacFarlane, 660 F.2d 1356 (10th Cir. 1981); General Stores, Inc. v. Bingaman, 695 F.2d 502 (10th Cir. 1982); Weiler v. Carpenter, 695 F.2d 1348 (10th Cir. 1982); Lady Ann's Oddities, Inc. v. Macy, 519 F. Supp. 1140 (W.D. Okla. 1981); Kansas Retail Trade Coop. v. Stephan, 522 F. Supp. 632 (D. Kan. 1981), aff'd in part and rev'd in part on other grounds, 695 F.2d 1343 (10th Cir. 1982); Murphy v. Matheson, 742 F.2d 564 (10th Cir. 1984).

Eleventh Circuit

High Ol' Times, Inc. v. Busbee, 673 F.2d 1225 (11th Cir. 1982). See also Florida Businessmen for Free Enterprise v. City of Hollywood, 673 F.2d 1213, 1219 (11th Cir. 1982) ("use," "intended for use," and "designed for use" requires proof of general criminal intent).

There is some legislative history to support the subjective intent view. See Appendix E for pertinent history. But see U.S. v. Dyer, 750 F. Supp. 1278, 1288 (E.D. Va. 1990), concluding that "Mr. Levine's remarks are not sufficient to overcome the plain language of the statute, for '[s]tray comments by individual legislators, not otherwise supported by statutory language or committee reports cannot be attributed to the full body that voted on the bill'" (citations omitted).

2. *Objective Standard*

U.S. v. Dyer, 750 F. Supp. 1278 (E.D. Va. 1990), uses an objective approach that omits reference to the defendant's subjective intent.

This approach defines an item as drug paraphernalia if "by virtue of its physical characteristics and/or surrounding circumstances, it is apparent that the item is primarily intended or designed for illegal drug use." Id. at 1283. The court in Dyer, after an extensive analysis of the statute, held that:

> [the] language, structure and purpose compel the conclusion that the statute incorporates an objective scienter standard with respect to the definition of "drug paraphernalia." The government may win a conviction without proof that a defendant subjectively designed or intended the charged items to be used with illicit drugs. It is enough that the government, on this element of the offense, prove beyond a reasonable doubt that the charged items, by virtue of their objective characteristics, manner of sale, advertising and the like, are § 857 drug paraphernalia and that defendant was aware of the general character and nature of the items. Under an objective standard, a jury would be instructed, inter alia, that it need not find that a defendant subjectively intended that a charged item be used with illegal drugs in order to convict.

Id. at 1293.

The court in U.S. v. 57,261 Items of Drug Paraphernalia, 705 F. Supp. 1256 (M.D. Tenn. 1988), aff'd, 869 F.2d 955 (6th Cir.), cert. denied, 110 S. Ct. 324 (1989), while acknowledging that intent of the defendant was required under 21 U.S.C. § 857, did not specifically address whether the defendant's intent could be ascertained by objective criteria. Nevertheless, the court used objective criteria in determining the defendant's intent, thereby giving implicit sanction to this approach. The court makes reference to expert testimony, physical characteristics of items, customs, and circumstances that raise inferences of guilty knowledge—all of which are objective criteria. Id. at 958. In U.S. v. Posters 'N Things, Ltd., No. 90-33, slip op. at 3 (S.D. Iowa Mar. 21, 1991) (see Appendix H), the court, relying on the language of § 857(a) and Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982), held that:

> the statute [21 U.S.C. § 857] provides objective, not subjective criteria, to define what is drug paraphernalia. Drug paraphernalia is defined by objective characteristics and by circumstances surrounding the intended use of the described items. The statute includes scienter as an element, requiring the government to establish that defendants 'knowingly' carried out the elements of the offense.

The Supreme Court in Hoffman interpreted a municipal ordinance that made it unlawful for any person to sell any item, effect, paraphernalia, accessory, or thing designed or marketed for use with illegal cannabis or drugs without obtaining a license to do so. Concerning the language "designed for use" the court held:

> [i]t is, therefore, plain that the standard encompasses at least an item that is principally used with illegal drugs by virtue of its objective features, i.e., features designed by the manufacturer. A business person of ordinary intelligence would understand that this term refers to the design of the manufacturer, not the intent of the retailer or customer.

Hoffman, 455 U.S. at 501.

Other courts have also interpreted "designed for use" to mean intent of the designer or manufacturer as manifested by the objective physical characteristics of the item. Garner v. White, 726 F.2d 1274, 1282 fn. 8 (8th Cir. 1984)("Convicting persons based on what they should have known about the manufacturer's or designer's intent as revealed by the structural characteristics of a particular object does not present a problem of transferred intent. The intent of the manufacturer or designer is embodied in the object itself and is apparent to all who perceive it. All that is required is for persons to open their eyes to the 'objective realities' of the items sold in their businesses."); High Ol' Times, Inc. v. Busbee, 673 F.2d 1225, 1230-1231 (11th Cir. 1982)(agreeing that "designed for use" meant "objective physical characteristics of the item"); Florida Businessmen for Free Enterprise v. City of Hollywood, 673 F.2d 1213, 1218-1219 (11th Cir. 1982)("designed for use" refers to structural features....and defendant must have "general criminal intent"); City of Whitehall v. Ferguson, 471 N.E.2d 838, 843 (Ohio App. 1984) ("Use of an objective, rather than a subjective, standard for determining the intended use of the drug paraphernalia is manifestly necessary with respect to possession of drug paraphernalia for sale.").

The phrase "primarily designed or intended for use" is also used in the statute that defines a gambling device (15 U.S.C. § 1171(a)), and the phrase has been given an objective interpretation in that context. See, e.g., U.S. v. 294 Various Gambling Devices, 718 F. Supp. 1236, 1242-46 (W.D. Pa. 1989); U.S. v. 16 Electronic Gambling Devices, 603 F. Supp. 32, 34 (D. Hawaii 1984).

B. Multiple Uses

Multiple use items are those not specifically enumerated in § 863(d) that may have a legitimate use along with use as drug paraphernalia. Probable cause has been found to classify the following items as drug paraphernalia despite alleged multiple use functions.

a. Short glass tubes were held to be drug paraphernalia as the "principal component of crack pipes." Main Street, 700 F. Supp. at 659. The following multiple uses for the short glass tubes were rejected—shot glass stirrers, for display purposes, for use in laboratories and for use in demonstrations. Main Street, 700 F. Supp. at 659-660.

b. Small plastic or glassine bags. Id. at 661. The court noted t hat "the definitional language of § 857 is quite broad.... On its face, the statute seems aimed at any paraphernalia intended for use in the chain of drug trafficking, from initial manufacture to ultimate ingestion." Id.

c. Small bowls with metal screens. (Factors indicating drug paraphernalia were the extremely small bowl, "carburetor holes," conical shape, and multiple holes.) U.S. v. 57.261 Items of Drug Paraphernalia, 869 F.2d at 955, 958 (6th Cir. 1989).

d. Onyx pipes were held to be drug paraphernalia because: (1) they were not desirable for smoking tobacco; (2) there were no onyx pipes in tobacco store catalogues; (3) no traditional pipes were as small; (4) an onyx pipe was not desirable because it did not absorb or dissipate heat, i.e., a hot pipe in mouth; (5) weight and bite were undesirable. Garzon v. Rudin, No. 87-C-1046, slip op. at 7 (E.D. Wis. Feb. 2, 1990) (Appendix F). Onyx pipes were practical as drug paraphernalia because the size was appropriate to marijuana, and the "hit and pass routi ne" made its heat characteristics irrelevant. Id. at 8. Agent had seized hundreds of onyx pipes from marijuana users. All contained marijuana residue while none contained tobacco residue. Id.

e. Scale is a "tool of the trade" in narcotics dealing. U.S. v. Adamo, 882 F.2d 1218, 1234 (7th Cir. 1989).

f. "Butane torches" were used for freebasing cocaine. Id. at 12 34.

g. Brillo pads were considered drug paraphernalia because small pieces of steel wool are often used as filters in pipes used to smoke crack. U.S. v. Lewin, 900 F.2d 145, 147 (8th Cir. 1990).

h. Articles employed to prepare heroin for distribution were rubber gloves, surgical face masks, large number of small plastic bags, chemicals used in preparing heroin, and devices used to prepare drug for sale. U.S. v. Gibbs, 904 F.2d 52, 59 (D.C. Cir. 1990).

i. At accident scene, police officers found "two hashish pipes containing marijuana." Meller v. Heil Co., 745 F.2d 1297, 1303 (10th Cir.), cert. denied, 467 U.S. 1206 (1984).

j. Two "water pipes" used to smoke cocaine were seized. U.S. v. La Guardia, 774 F.2d 317, 319 (8th Cir. 1985).

k. Three boxes of ziplock bags, rubber bands, rolling papers, and roach clips were characterized as drug trafficking paraphernalia. U.S. v. Harris, 903 F.2d 770, 773 (10th Cir. 1990).

l. Found with cocaine were strainer kits and heat sealers that were used in the handling and packaging of cocaine. U.S. v. McCrady, 774 F.2d 868, 875 (8th Cir. 1985).

m. "[N]umerous bongs, hash pipes, rolling papers and screens" characterized as drug paraphernalia. Jones v. Town of Seaford, 661 F. Supp. 864, 867-869 (D. Del. 1987).

n. Seized were rolling paper, glass tubes, wooden pipes, wood a nd brass pipes, stone pipes, water pipes, and double and triple chambers 6 1/2 inch to 17 1/2-inch high bongs. Id. at 869. Also seized were an alligator-shaped water pipe/bong, a water pipe/bong shaped like a man and a black rubber stopper connected to a red hose described as an integral part of a Syri an-type water pipe. Id.

o. Anything capable of adaptation for use with controlled danger ous substances is drug paraphernalia. Town Tobacconist v. Kimmelman, 462 A.2d 573, 592 (N.J. 1983). (Interpreting a New Jersey statute which defined drug paraphernalia as any item "used or intended for use...").

p. Syringes, bottle cap cooler, and cigarette filters were drug paraphernalia. Smith v. U.S., 522 A.2d 1274, 1275 (D.C. App. 1987).

III. Statutory Factors to be Considered

A. Instructions with Item

1. Bong contained instructions on inhaling. Cochran v. Commonwealth, 450 A.2d 756, 758 (Pa. 1982).

2. There were instructions accompanying a seized snorting device with attached spoon that showed how to use the device with cocaine. There were instructions for use w ith marijuana accompanying one bong and instructions accompanying another bong on its use with "miracle substance." A seed separator had with it instructions on

its use with marijuana. Instructions for a heat tester listed melting points for a wide variety of controlled substances and "cutting agents" (substances used to dilute or "cut" drugs). Shults v. State, 696 S.W.2d 126, 136 (Tex. App. 1985).

3. Directions for use written on a package of "cocaine snorters" stated it would cause a "shot-gun" effect. State v. Dunn, 662 P.2d 1286, 1298 (Kan. 1983).

4. The language "not intended for illegal use" is of no legal consequence. It is like marking a firecracker "not intended to explode." "Each such disclaimer would be equally ludicrous." Id. at 1300.

B. Descriptive Materials

1. Including descriptive material as a factor in determining drug paraphernalia has only an incidental effect on the right of free speech and "does not go beyond that which is essential to the furtherance of the governmental interest." General Stores, Inc. v. Bingaman, 695 F.2d 502, 504-505 (10th Cir. 1982).

2. Roach clip was adorned with a marijuana leaf representation. Cochran, 450 A.2d at 758.

3. Metal cocaine or "speed" tube had the word "cocaine" printed on it. Id.

4. Specially constructed marijuana sifter had leaf emblem of cannabis with the name "marygin" on the side. Id. at 758.

5. Products were sold under trade names incorporating slang identified with illegal drugs. People v. Ziegler, 488 N.E.2d 310 (Ill. App. 1986).

6. The word "shot gun" on package of "cocaine snorters" meant drawing out cocaine from bottle very quickly into the nose. State v. Dunn, 662 P.2d 1286, 1298 (Kan. 1983).

7. Books and magazines sold concerning drug use. Shults, 696 S.W.2d at 136.

8. Posters, belt buckles and T-shirts were sold that displayed drug related scenes. Id.

9. Books were sold recommending mannitol (a substance seized from the store) as cutting agent for cocaine. Id.

C. Advertising

1. Advertising by defendant of items capable of a particular illicit use is directly probative of defendant's intent. U.S. v. Main Street Distribution, Inc., 700 F. Supp. 655, 668 (E.D. N.Y. 1988).

2. Items imported by defendant based on supplier's advertisements have circumstantial relevance. Id.

3. Customer advertising may supply seller's intent provided seller was aware of this advertising at the time of sale. Id.; Garzon v. Rudin, No. 87-C-1046, slip op. at 5 (E.D. Wis. Feb. 2, 1990) (Appendix F).

4. A "High Times" magazine taken from the store explained the advantages of using scales to weigh drugs and the methods of using scales to weigh marijuana. Shults, 696 S.W.2d at 136.

5. A "marygin," like those introduced into evidence, was advertised as a "cannabis cleaner." Id.

6. Mannite (like that seized) was advertised as "cut" and "paraphernalia." Id.

7. Advertisements showed clips and spoons for use in smoking marijuana and snorting cocaine. Id.

8. An advertisement in "High Life" magazine showed how to use a "power hitter" with marijuana and gave the advantages of using it with marijuana. Id.

9. There were advertisements connecting bongs with marijuana use, recommending scales for use in weighing drugs, and showing how to use pipes (like some of those seized) with marijuana. Id.

D. Manner of Display

1. Drug paraphernalia is defined by the manner in which it is displayed. Licorice Pizza Records & Tapes, Inc. v. County of Los Angeles, 125 Cal. App. 3d 825, 827 (1981).

2. Sale of small clips and storage containers displayed with other clearly identifiable illegal items. People v. Ziegler, 488 N.E.2d 310, 312 (Ill. App. 1986).

3. Pocket mirror packaged with miniature spoon, vial, pocket scale and single-edged razor blade (cocaine kit). Id.; State v. Dunn, 662 P.2d 1286, 1298 (Kan. 1983).

4. It was evidence of knowledge where defendant was familiar with the nature of drug paraphernalia and admitted having previously sold certain items, which he removed from his shelves before the ordinance became effective. City of Whitehall v. Ferguson, 471 N.E.2d 838, 844 (Ohio App. 1984).

5. There was a marijuana leaf on the sign painted on the store's front window. Shults, 696 S.W.2d at 137.

6. Mirror set in store display case read "Cocaine." Id.

7. There were sifters in the display case. Id.

8. Burlap bags on the walls of the store read "marijuana". Id.

9. A "concert kit" was designed for smoking marijuana at concerts. It contained a small hashish pipe, screens, pipe cleaner, rolling papers, a plastic bag, roach clip and matches. State v. Dunn, 662 P.2d 1286, 1298 (Kan. 1983).

E. Legitimate Supplier of Tobacco

1. Statutory factor concerning "legitimate supplier of like or related items" will not lead to arbitrary and discriminatory enforcement. Lady Ann's Oddities, Inc. v. Macy, 519 F. Supp. 1140, 1151 (W.D. Okla. 1981).

2. "Legitimate supplier" factor favors discriminatory enforcement; however, appellant may raise this due

process claim only in post-enforcement proceedings. Florida Businessmen for Free Enterprise v. City of Hollywood, 673 F.2d 1213, 1220 (11th Cir. 1982).

3. The fact that defendant was not a distributor or dealer in tobacco was probative that items were drug paraphernalia. Jones v. Town of Seaford, 661 F. Supp. 864, 871 (D. Del. 1987).

F. Ratio of Sales

Direct or circumstantial evidence concerning "ratio of sales of object to total sales of business" is a valid issue for the trier of fact on the issue of intent. Lady Ann's, 519 F. Supp. at 1152.

G. Legitimate Uses in Community

1. Statutory factor concerning "legitimate use of object in community" will not lead to arbitrary and discriminatory enforcement. Lady Ann's, at 1152.

2. Millions of extremely small plastic bags have a very limited legitimate use. Main Street, 700 F. Supp. at 660.

H. Expert Testimony

1. The term "stems" was known to Customs agent as the common street term for a crack pipe. Id. at 660.

2. The routine use of small glassine or plastic bags in the retail distribution of narcotics is something with which virtually every judicial officer in the New York metropolitan area is familiar. Id. at 660.

3. An expert's opinion on the frequency with which various items are used in conjunction with drugs would be of some relevance to a determination of a defendant's intent to deal in narcotics paraphernalia. Id. at 669.

4. Tobacco expert testified that he would not sell onyx pipes in his store since his customers would not buy them. Garzon, slip op. at 5 (Appendix F).

5. Scale is a "tool of the trade" for narcotics dealers. U.S. v. Adamo, 882 F.2d 1218, 1234 (7th Cir. 1989).

6. Butane torches are used for freebasing cocaine. Id.

7. Expert testimony that Brillo pads could be used as wire screens in hashish pipes. U.S. v. Lewin, 900 F.2d 145, 147 (8th Cir. 1990).

8. Expert testimony that "deluxe seed separator" was suitable only for marijuana seeds. Cochran, 450 A.2d at 758.

9. Expert testimony that items taken collectively were used for snorting cocaine. Id.

10. Apogee bong and wooden pipe with screens were drug paraphernalia and were not suitable for smoking tobacco. City of Whitehall v. Ferguson, 471 N.E.2d 838, 840-41 (Ohio App. 1984).

11. Wooden pipe was suitable for smoking tobacco but not with metal screen sold with it. Id. at 841.

12. Expert testimony that, by design of the pipe, it is particularly adapted for smoking marijuana or hashish. Id. at 843.

13. Cocaine kit was used in storing, cutting and inhaling cocaine. State v. Dunn, 662 P.2d 1286, 1298 (Kan. 1983).

14. Roach clips were not used to hold tobacco cigarettes but to hold marijuana cigarettes. Id.

15. Expert in Shults v. State, 696 S.W.2d 126, 137 (Tex. App. 1985), testified that pipes were unsuitable for smoking tobacco for the following reasons:

    a) The bits on the pipes were not flat, thus, the pipe smoker could not comfortably hold the pipe in his mouth.

    b) The pipes had no filters, thus the smoke would be extremely harsh.

    c) The bowls were too small to hold enough tobacco.

16. Expert testified that pipe's "small-sized bowl" was usually used with the slower burning hashish. State v. Dunn, 662 P.2d 1286, 1297 (Kan. 1983).

17. Pipes had an extra small hole in them, commonly referred to as a "supercharger." Supercharger works by placing a finger over the hole to cut off the supply of fresh air, so that a higher concentration of smoke can be inhaled from the pipe. Id at 1298.

18. Small mesh-like screens in pipes were common to marijuana pipes and prevented ashes from being inhaled through the pipe. Id.

19. "Shotgun" effect refers to the situation where cocaine is drawn out of the bottle and into the nose very quickly. Id.

IV. Exemptions

Section 863(f) provides:

> 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.

In 1988, Congress amended subsection (2) to substitute the phrase "traditionally intended for use with," for the original language "primarily intended for use with."

Although it can be anticipated that the defense will call witnesses who are experts in the field of tobacco and pipe usage to testify that the items in question can be used for tobacco, the substitution of the "traditionally intended" language indicates a clear intention by Congress that reference is to be made to the past practice and history of tobacco usage in determining whether this exemption is met, rather than whether the device could be used for tobacco.

This inquiry into the history of tobacco usage should be limited to the American culture, as opposed to an examination of international practices. U.S. v. 57,261 Items of Drug Paraphernalia, 705 F. Supp. 1256 (M.D. Tenn. 1988), aff'd, 869 F.2d 955 (6th Cir), cert. denied, 110 S. Ct. 324 (1989). Limiting the inquiry to American culture is important because some items such as water pipes, which are specifically listed as examples of drug paraphernalia in § 863(d)(2), are and have been traditionally used with tobacco in other countries, although not in

this country. In addition, the inquiry should be restricted to traditional use in contemporary society. Id. at 1264. (Defense failed to refute government's contention that in "today's" society products were used for inhaling controlled substances. Court found proof that primary use "in this community,....").

If the defense uses expert testimony regarding tobacco usage, the prosecutor may want to make use of a tobacco usage expert in rebuttal. A good choice for rebuttal to the "professional" defense witness on tobacco usage, who is usually from out of town, would be a knowledgeable tobacco and pipe store proprietor living in the community where the prosecution is occurring. The expert must be qualified under Rule 702 of the Federal Rules of Evidence as an expert in the area of tobacco usage because of his "knowledge, skill, experience, training, or education." He can then testify that the items are not traditionally used for tobacco and also can explain why they are not suited for tobacco.

The following cases interpret the exemption provision.

1. An object capable of both burning a combustive and of being smoked does not per se fall within the exemption of 21 U.S.C. § 863 (f)(2). Ryers Creek Corp. v. MacMartin, No. Civ-89-157T, slip op. at 7 (W.D. N.Y. Apr. 20, 1989)(See Appendix G).

2. Any pipe that may be used to smoke tobacco is not perforce a "traditional tobacco pipe." Ryers, slip op. at 10.

3. That a particular pipe can be used to smoke tobacco does not make it "primarily intended for use with tobacco products." Garzon v. Rudin, No. 87-C-1046, slip op. at 9 (E.D. Wis. Feb. 2, 1990)(Appendix F).

4. That onyx pipes were used hundreds of years ago for smoking tobacco does not make them primarily used or intended to be used with tobacco products. Id. at 10.

5. The exemptions do not shift the burden of proof. Main Street, 700 F. Supp. at 669.

6. Catalog disclaimer that product was intended only for use with tobacco held not persuasive. People v. Ziegler, 488 N.E.2d 310, 312 (Ill. App. 1986).

Chapter Three

CONSTITUTIONALITY

I. Vagueness

The doctrine of vagueness is embodied in the due process clause of the Fifth and Fourteenth Amendments of the U.S. Constitution . "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its applications, violates the first essential of due process of law." Connally v. General Construction Co., 269 U.S. 385 (1926).

Due process has two requirements: that the laws provide notice to the ordinary person of what is prohibited, and that they provide standards to law enforcement officials to prevent arbitrary and discriminatory enforcement. Lady Ann's Oddities, Inc. v. Macy, 519 F. Supp. 1140, 1145 (W.D. Okla. 1981); Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972).

In applying these principles, there is a rebuttable presumption that legislative enactments are valid unless it is shown that the statute or ordinance is violative of rights secured by the U.S. Constitution. Lady Ann's, 519 F. Supp. at 1146; U.S. v. Kiffer, 477 F.2d 349 (2d Cir. 1973), cert. denied sub nom. Harmash v. U.S., 414 U.S. 831. (1973).

In the landmark case of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982), the Supreme Court rejected arguments of vagueness and overbreadth in upholding an Illinois paraphernalia licensing statute. The village ordinance, which was not patterned after the Model Act, required a business to obtain a license if it sold any items that were "designed or marketed for use with illegal cannabis or drugs." Id. at 491. Appellee, which sold a variety of merchandise in its store, challenged the ordinance as unconstitutionally vague and overbroad. The District Court upheld the ordinance. The Court of Appeals reversed on the ground that the ordinance was unconstitutionally vague on its face. The United States Supreme Court reversed.

With respect to the facial vagueness challenge, the Court set out the relevant issues: "In a facial challenge to the overbreadth and vagueness of an enactment, a Court must first determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, the overbreadth challenge must fail. The Court should then examine the facial vagueness challenge and should uphold such challenge only if the enactment is impermissibly vague in all of its applications." Id. at 494-495.

The Supreme Court held that the ordinance was not facially overbroad or vague, since the vendor of the merchandise did not show that the ordinance was impermissibly vague in all of its applications.

The Court said that the ordinance's language 'designed ... for use' was not unconstitutionally vague on its face, since it was clear that such standard encompassed at least an item that was principally used with illegal drugs by virtue of its objective features, i.e., features designed by the manufacturer. Thus, the Court said, the 'designed for use' standard is sufficiently clear to cover at least some of the items that appellee sold, such as 'roach clips' and the specially designed pipes. As to the 'marketed for use' standard, the Court found that the guidelines referred to the proximity of covered items to otherwise uncovered items, and thus the standard required scienter on the part of the retailer.

See Id. at 499-503.

Hoffman strengthened the argument that drug paraphernalia laws based on the Model Act were constitutional on their face. In reversing its previous decision, the 6th Circuit in Record Revolution No. 6, Inc. v. Parma, 709 F.2d 534 (6th Cir. 1983), commented on post-Hoffman decisions concerning the constitutionality of paraphernalia ordinances. Parma noted that post-Hoffman cases had almost uniformly concluded that under the guidelines set out by Hoffman, facial challenges to the constitutionality of ordinances patterned after the Model Act must fail.

A vague "head shop" law may also be saved from a constitutional challenge by a mens rea requirement, usually in the definition of "paraphernalia." Hoffman, 455 U.S. at 499. (Scienter requirement may mitigate the law's vagueness, especially with respect to the adequacy of notice to the complainant that the conduct is proscribed); World Imports, Inc. v. Woodbridge Township, 493 F. Supp. 428 (D. N.J. 1980). (Ordinance contained requirements of intent and knowledge of illegal use of the proscribed items in order to distinguish between an innocent and noninnocent use.)

Two federal courts have specifically held that § 857 is not unconstitutionally vague on its face or as applied. After a detailed analysis of the statutory scheme, the court in U.S. v. Main Street Distribution, Inc., 700 F. Supp. 655 (E.D. N.Y. 1988), held that § 857 "provide[d] reasonable objective factors for enforcement sufficient to defeat the charge of vagueness." Id. at 669. The court in U.S. v. Dyer, 750 F. Supp. 1278 (E.D. Va. 1990), cited U.S. v. 57,261 Items of Drug Paraphernalia with approval, and after rejecting several "vagueness" arguments, concluded that § 857's "structure and detail provide[d] adequate safeguards against the risks of arbitrary enforcement." Dyer, 750 F. Supp. at 1297. "There is little doubt that the statute, as a whole, provides reasonable and 'ascertainable standards of guilt.'" Id. at 1295. (Citation omitted.)

II. Overbreadth

A statute is overbroad only if it reaches a "substantial amount of constitutionally protected conduct". Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 (1982). In Hoffman, the ordinance was challenged as overbroad because it inhibited the First Amendment rights of other parties. The Court concluded that the ordinance did not infringe upon noncommercial speech of the retailer or other persons, and the overbreadth doctrine was irrelevant since it did not apply to commercial speech. Id. at 494-497.

The Court also rejected the argument that the ordinance was overbroad because it denied substantive due process rights. It held that a "retailer's right to sell smoking accessories, and a purchaser's right to buy and use them, are entitled only to minimal due process protection [sic]." Id. at 497 n.9. See also World Imports, Inc. v. Woodbridge Township, 493 F. Supp. 428 (D.N.J. 1980) (drug paraphernalia ordinance was not unconstitutional because of overbreadth and did not violate due process clause); Mid-Atlantic Accessories Trade Assoc. v. Maryland, 500 F. Supp. 834 (D. Md. 1980) (state drug paraphernalia act did not ban conduct protected by First Amendment); Pennsylvania Accessories Trade Assoc. v. Thornburgh, 565 F. Supp. 1568 (M.D. Pa. 1983) (state drug paraphernalia statute that was verbatim adoption of Model Act was not overbroad).

Neither Dyer nor Main Street specifically mentions overbreadth as a constitutional challenge; but in view of the holding in Hoffman, there is little doubt that § 863 will withstand an overbreadth challenge.

III. Other Constitutional Arguments

Courts have almost uniformly struck down challenges to the constitutionality of head shop laws based on the following arguments:

Equal Protection

Delaware Accessories Trade Assoc. v. Gebelein, 497 F. Supp. 289 (D. Del. 1980); Mid-Atlantic Accessories Trade Assoc. v. Maryland, 500 F. Supp. 834 (D. Md. 1980); Atkins v. Clements, 529 F. Supp. 735 (N.D. Tex. 1981); Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982). (Although Hoffman did not specifically discuss equal protection, the Court held that the language of the ordinance was sufficiently clear that the speculative danger of arbitrary enforcement did not render the ordinance void for vagueness.)

The Commerce Clause

World Imports, Inc. v. Woodbridge Township, 493 F. Supp. 428 (D.N.J. 1980); Delaware Accessories Trade Assoc. v. Gebelein, 497 F. Supp. 289 (D. Del. 1980); Pennsylvania Accessories Trade Assoc. v. Thornburgh, 565 F. Supp. 1568 (M.D. Pa. 1983).

Free Speech

Hoffman, 455 U.S. at 497; Mid-Atlantic Accessories Trade Assoc. v. Maryland, 500 F. Supp. 834 (D. Md. 1980); New England Accessories Trade Assoc. v. Nashua, 679 F.2d 1 (1st Cir. 1982); Nova Records, Inc. v. Sendak, 706 F.2d 782 (7th Cir. 1983); General Stores, Inc. v. Bingaman, 695 F.2d 502 (10th Cir. 1982); Lady Ann's Oddities, Inc. v. Macy, 519 F. Supp. 1140 (W.D. Okla. 1981).

Right to Privacy

Challenges alleging a violation of the right to privacy have generally been rejected by the courts based on the plaintiff's lack of standing to assert that issue. See Delaware Accessories Trade Assoc. v. Gebelein, 497 F. Supp. 289 (D. Del. 1980); Mid-Atlantic Accessories Trade Assoc. v. Maryland, 500 F. Supp. 834 (D. Md. 1980); Lady Ann's Oddities, Inc. v. Macy, 519 F. Supp. 1140 (W.D. Okla. 1981).

Cruel and Unusual Punishment.

Courts have rejected claims based upon the assertion that paraphernalia laws violate the constitutional proscription against cruel and unusual punishment. See Mid-Atlantic Accessories Trade Assoc. v. Maryland, 500 F. Supp. 834 (D. Md. 1980); Nova Records, Inc. v. Sendak, 504 F. Supp. 938 (S.D. Ind. 1980), aff'd, 706 F.2d 782 (7th Cir. 1983).

Chapter Four

LITIGATION CONCERNS

I. Drafting an Indictment

A. Selection of Offenses

In addition to charging violations of 21 U.S.C. § 863, consideration should be given to charging violations of other statutes within Title 21 and Title 18. Many of these other sections carry more severe penalties than § 863.

Since the targets of drug paraphernalia indictments are usually businesses with substantial cash flow, "money laundering" violations under 18 U.S.C. §§ 1956 and 1957 may be charged since 21 U.S.C. § 863 violations qualify as a "specified unlawful activity" under 18 U.S.C. § 1956.

When proceeds from a violation of 21 U.S.C. § 863 are used to acquire an interest in or to establish or operate an enterprise engaged in or affecting interstate commerce, a violation of 21 U.S.C. § 854 (Investment of Illicit Drug Profits) may be charged if the violation occurred after the effective date of the 1990 Amendments.

The indictment can also be drafted to include conspiracy counts using 21 U.S.C. § 846, if the objects of the conspiracy charged include offenses in Title 21. A conspiracy count based on 18 U.S.C. § 371 may be utilized if the objects of the conspiracy charged include offenses in Title 18 in addition to those in Title 21.

Indictments for drug paraphernalia businesses should usually include counts for forfeiture of property. Since 21 U.S.C. § 863 provides for the forfeiture of drug paraphernalia "upon the conviction of person for such violation," forfeiture of the paraphernalia under § 863 is a criminal forfeiture and must be alleged in the indictment. Property derived from or constituting proceeds from the violation of 21 U.S.C. § 863, such as the profits from the sale of drug paraphernalia, or property such as real estate used to commit or to facilitate the violation of 21 U.S.C. § 863, are subject to forfeiture under 21 U.S.C. § 853, which is also a criminal forfeiture statute. Any forfeiture of property pursuant to 21 U.S.C. § 863 should also be alleged as a separate count in the indictment. Similarly, property involved in violations of 18 U.S.C. §§ 1956 and 1957, for which the defendant has been convicted, is forfeitable under 18 U.S.C. § 982 and should be

alleged in a separate forfeiture count in the indictment.[3] Both criminal and civil forfeitures are considered in Section V, infra.

B. Venue

Because the provisions of 18 U.S.C. § 2 provide that anyone who "commands," "procures," or "causes" an offense is punishable as a principal, and the provisions of 18 U.S.C. § 3237(a) provide that if an offense is committed in more than one district it may be prosecuted in any district in which the offense was begun, continued or completed, prosecution may be brought against a drug paraphernalia business in virtually any district in which it has a business connection.

The subject of an investigation involving the operation of a drug paraphernalia business may be prosecuted in the district where it maintains its business, does its manufacturing, assembling or shipping, or in the district where it distributes its advertising. It may also be prosecuted in those districts into or through which it ships its goods or sends its advertising material.

C. Multiplicity

In drafting the indictment in a drug paraphernalia case, care should be taken to avoid multiplicity, which is the charging of a single offense in several counts in the indictment. This is particularly true if the violation charged is under the "offer for sale" clause of § 863(a)(1). Often the targets in drug paraphernalia prosecutions will be businesses engaged in ongoing manufacturing and retailing. Extensive use is made by these businesses of catalogues, brochures, advertisements, and other publications from which buyers often make repetitive purchases. The defense could argue that each shipment of goods does not represent a separate offer, but rather the issuance of the catalogues and advertising material represents one offer for sale under § 863(a)(1), regardless of the number of orders placed by the various customers.

Multiplicity does not exist if each count in the indictment requires proof of facts that the other counts do not require. Lovgren v. Byrne, 787 F.2d 857 (3d Cir. 1986); U.S. v. Kennedy, 726 F.2d 546 (9th Cir.) (citing Blockburger v. U.S., 284 U.S. 299 (1932)), cert. denied, 469 U.S. 965 (1984).

A review of the legislative history suggests a desire by Congress to punish each offer of sale of drug paraphernalia and each use of the mails or other interstate conveyance. See generally, 132 Cong. Rec. S 13779 (Sept. 26, 1986)

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[3]For drug paraphernalia offenses occurring before the effective date of the 1990 Amendments, arguably 21 U.S.C. §§ 846, 854, and 853 could not be used for forfeiture purposes since 21 U.S.C. § 863 was not made a part of the Controlled Substances Act until the 1990 Amendments.

and 132 Cong. Rec. S 13463 (Sept. 23, 1986) (emphasizing the prohibition on sales of drug paraphernalia). This interpretation was upheld in U.S. v. Dyer, 750 F. Supp. 1278, 1298 (E.D. Va. 1990).

To avoid the problem of multiplicity, each shipment should be viewed as a separate offer and acceptance. Emphasis should be placed on the different dates of shipments and the differences between the individual items shipped and the price of each item.

D. Specific Intent

Since a violation of 21 U.S.C. § 863 does not require specific intent, U.S. v. Dyer, 750 F. Supp. 1278 (E.D. Va. 1990), an indictment charging a violation of 21 U.S.C. § 863 should not include the word "willfully." This is consistent with Dyer's holding that the issue of intent should be measured by an objective rather than a subjective standard. But see, U.S. v. Main Street Distribution, Inc., 700 F. Supp. 655, 666 (E.D.N.Y. 1988),(government must prove that defendant "either designed the items listed in the indictment for use with controlled substances or intended them to be for drug use.").

Also, since a violation of 21 U.S.C. § 863 is arguably not a specific intent crime, the defendant is not entitled to a jury instruction on the advice-of-counsel defense because that defense is available only where the crime charged involves willful or specific intent. U.S. v. Powell, 513 F.2d 1249, 1251 (8th Cir.), cert. denied, 423 U.S. 853 (1975); U.S. v. Wood, 446 F.2d 505 (9th Cir. 1971); Devitt & Blackmar, Federal Jury Practice & Instructions § 14.12 (2d ed. 1970).

II. Anticipated Defenses

A. Advice-of-Counsel

Defendants may try to invoke the advice-of-counsel defense at trial. The general rule is that "advice-of-counsel is no excuse for violation of the law." Miller v. United States, 277 F. 721, 726 (4th Cir. 1921). And, when the defense is available, a defendant may rely on it only if he or she can establish the elements of the defense. The defendant must show that he or she (1) honestly and in good faith sought the advice of a lawyer as to what he or she may lawfully do; (2) fully and honestly laid all the facts before his or her lawyer; and (3) in good faith honestly followed such advice, relying upon it and believing it to be correct. Williamson v. U.S., 207 U.S. 425, 453 (1908). See also U.S. v. Miller, 658 F.2d 235, 237 (4th Cir. 1981); U.S. v. Painter, 314 F.2d 939, 943 (4th Cir.), cert. denied, 374 U.S. 831 (1963). Even then, the defense "does not automatically insulate [the] defendant from liability." U.S. v. Traitz, 871 F.2d 368, 382 n.9 (3rd Cir.), cert. denied, 110 S.Ct. 78 (1989); see also Linden v. U.S., 254 F.2d 560, 568 (4th Cir. 1958). It simply becomes "a matter to be considered by the jury in determining [the Defendant's] guilt." Traitz, 871 F.2d

at 382 n.9.

The advice-of-counsel defense is available only when specific intent -- that is, knowledge of the law or a legal duty[4] -- is an element of the offense. See U.S. v. Lord, 710 F. Supp. 615, 617 (E.D. Va 1989) (since statute did not require proof of specific intent, defendant was not entitled to instruction on defense).[5] While "reliance on an opinion of counsel may constitute a defense, when the crime requires specific intent, it cannot be employed if only knowledge of the facts is required." U.S. v. Hill, 298 F. Supp. 1221 (D. Conn. 1969). As the courts have recognized, the advice-of-counsel defense is appropriate only where a substantial legal problem is present, and the defendant requires legal advice in resolving that problem. See U.S. v. Poludniak, 657 F.2d 948, 959 n.9 (8th Cir. 1981), cert. denied, 455 U.S. 940 (1982) (quoting Devitt & Blackmar, Federal Jury Practice and Instructions § 14.12 (3d ed. 1977)) (dicta); Powell, 513 F.2d at 1251 (advice-of-counsel instruction "is appropriate only in a limited class of cases, in which willful action is an essential element, and legal problems are present") (quotation omitted); U.S. v. Pollmann, 364 F. Supp. 995, 1003 (D. Mont. 1973) (in evaluating defense, court considers presence of "substantial legal question"). See also H. Brill, Cyclopedia of Criminal Law § 179, at 328 (1922)

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[4] "A specific intent crime is one in which the defendant must not only intend the act charged, but also intend to violate the law." U.S. v. Birkenstock, 823 F.2d 1026, 1028 (7th Cir. 1987). See also U.S. v. Pomponio, 429 U.S. 10, 12 (1976); U.S. v. Sterley, 764 F.2d 530, 532 (8th Cir.), cert. denied, 474 U.S. 1013 (1985); U.S. v. Jerde, 841 F.2d 818, 821 (8th Cir. 1988); U.S. v. Udofot, 711 F.2d 831, 835-36 (8th Cir.), cert. denied, 464 U.S. 896 (1983); E. Devitt and C. Blackmar, Federal Jury Practice and Instructions § 14.03 (3d ed. 1977)(to "establish specific intent the government must prove that the defendant knowingly did an act which the law forbids...purposely intended to violate the law"); 1 L. Sand, J. Siffert, W. Loughlin & S. Reiss, Modern Federal Jury Instructions, Instruction 3A-3 (1989)("'willfully' means to act knowingly and purposely, with an intent to do something the law forbids, that is to say with the bad purpose to disobey or to disregard the law"); Id. (comment)("specific intent is interpreted to mean an intentional violation of a known duty.").

The phrase "specific intent" has received a number of interpretations. Liparota v. U.S., 471 U.S. 419, 433 n.16 (1985); U.S. v. Bailey, 444 U.S. 394, 403-404 (1980). For example, it could denote "purpose or an intent to do [a] thing at a particular time and place" without any particular knowledge of the law. Id. at 403 (quotation omitted). In the context of the advice of counsel defense, however, the specific intent incorporates a knowing violation of the law or legal duty. See U.S. v. Powell, 513 F.2d 1249, 1251 (8th Cir.), cert. denied, 423 U.S. 853 (1975) (in context of defense, court addresses "[s]pecific intent or knowledge of the defendant that he is violating the law"); E. Devitt and C. Blackmar, Federal Jury Practice and Instructions § 14.12 ("[D]efendant is entitled to this instruction only if his proposed conduct presents substantial legal problems so that he requires legal advice in resolving it.").

[5] See also U.S. v. Jackson, 818 F.2d 345, 246 & n.2 (5th Cir. 1987)(dicta); U.S. v. Locke, 542 F.2d 800, 801 (9th Cir. 1976); Powell, 513 F.2d at 1251; U.S. v. Bristol, 473 F.2d 439, 443 (5th Cir. 1973); U.S. v. Wood, 446 F.2d 505, 507 (9th Cir. 1971); U.S. v. Gulf Oil Corp., 408 F. Supp. 450, 463 (W.D. Pa. 1975).

("to be a defense in any case, the advice must have been with respect to a matter of law").

Although § 863 may necessitate proof of the defendant's knowledge of the underlying facts constituting the offense (U.S. v. Wilson, 884 F.2d 174, 178 (5th Cir. 1989) (quotation, citation, edits omitted)), it does not require proof that the defendant knew that his or her actions were unlawful. The government need only prove defendant's knowledge that he or she made "use of the mails or other facility of interstate commerce to transport drug paraphernalia" or that he or she "sold or offered for sale drug paraphernalia." 21 U.S.C. § 863(a)(1),(2). (See 21 U.S.C. § 857 for cases charging violations before November 29, 1990).

In U.S. v. Dyer, 750 F. Supp. 1278 (E.D. Va. 1990), the court squarely addressed the advice-of-counsel defense in the drug paraphernalia context. The Dyer court held that:

> an advice-of-counsel defense applies only where the violation requires proof of specific intent, that is, proof that a defendant has actual knowledge that his conduct is illegal. Section 857, contrary to defendants' contention, requires no such proof. Instead, the statute's objective scienter requirement permits the government to prove by objective evidence that an item is proscribed drug paraphernalia. Under § 857, the jury need not find that a defendant specifically knew that the item was drug paraphernalia. In these circumstances, advice-of-counsel that the item was not drug paraphernalia is no defense.

Id. at 1293-94 (emphasis added).

Although the definition of "drug paraphernalia" in § 863(d) requires the government to prove that the item is "primarily intended or designed" for drug use, that is not a question presenting the "substantial legal problem[s]" (Poludniak, 657 F.2d at 959 n.9) that the advice-of-counsel defense was meant to address. To render the advice-of-counsel defense applicable, "the advice must pertain to a question of law which is outside the scope of the advisee's competence." Note, Reliance on Advice-of-Counsel, 70 Yale L.J. 978, 985 (1961).

An attorney does not have any special skill that rises above that of the average person to determine whether an item constitutes drug paraphernalia. Defendants, however, are usually in the business of selling these items and, therefore, have a better expertise than their attorneys in understanding the

primary intent and design of their own commercial products.[6] The decision whether particular items are "primarily intended or designed" for drug use, therefore, does not fall within the domain of legal advice. A pretrial motion in limine should always include this issue.

Should the government receive an adverse ruling on this issue, defendants, who carry the burden of production, should have to demonstrate that the predicates of the defense have been met before raising it in their opening statements and presenting evidence. If "an affirmative defense consists of several elements and testimony supporting one element is insufficient to sustain it even if believed, the trial court and jury need not be burdened with testimony supporting other elements of the defense." Bailey, 444 U.S. at 416. For this reason, courts have repeatedly used pretrial hearings and offers of proof to review the merits of a defense, and have disallowed presentation of the defense when a defendant failed to make some pretrial showing of all its elements. U.S. v. Komisaruk, 885 F.2d 490, 493 (9th Cir. 1989); U.S. v. Alicea, 837 F.2d 103, 106-107 (2d Cir.), cert. denied, 488 U.S. 832 (1988); U.S. v. Dorrell, 758 F.2d 427, 430 (9th Cir. 1985); U.S. v. Montgomery, 772 F.2d 733, 736-737 (11th Cir. 1985); U.S. v. Bifield, 702 F.2d 342, 343, 345-346 (2d Cir.), cert. denied, 461 U.S. 931 (1983); U.S. v. Polytarides, 584 F.2d 1350, 1352-1353 (4th Cir. 1978).

Without a hearing or proffer on the advice-of-counsel defense, defendants would be allowed to argue and present evidence on the defense, even though they may not be able to establish the legal underpinnings of that defense during trial. Such premature argument and evidence may greatly impair the government's right to a fair trial. It may put before the jury irrelevant and prejudicial evidence that defendants cannot, as a matter of law, properly present to the jury. See Bailey, 444 U.S. at 417.

For these reasons, with respect to each defendant who intends to invoke the advice-of-counsel defense, the Assistant United States Attorney (AUSA) should request the court to hold a hearing or require a proffer to show that the defendants presented the drug paraphernalia charged in the indictment to their counsel for review. The hearing or proffer should include the time, place, and manner of the presentation to counsel. It should demonstrate defendant's full disclosure to the attorney of other items sold by the defendant, as well as the defendant's advertising and sales practices -- information that could demonstrate defendant's criminal intent under § 863. See 21 U.S.C. § 863(e). Finally, the hearing or proffer should establish that the defendant followed the advice-of-

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[6] See also Sinclair v. U.S., 279 U.S. 263, 299 (1929) (mistaken view of law no defense even if "[i]ntentional violation is sufficient to constitute guilt"); U.S. v. Pomponio, 563 F.2d 659, 662 (4th Cir. 1977), cert. denied, 435 U.S. 942 (1978) ("While there may be instances in which an accountant's interpretation of the tax laws can justifiably be relied upon by a taxpayer, even if erroneous...certainly these cannot include cases where the only real question bearing on the correctness of the returns, as here, is one of the taxpayer's own intent.").

counsel. The advising attorney should be called as a witness even if that attorney is now the trial counsel.

If a defendant can satisfy the burden of production with respect to invoking the defense, the AUSA should request the court to preclude the defendant from arguing that the advice-of-counsel defense is an absolute defense. The advice-of-counsel defense does not automatically insulate a defendant from liability. Linden v. U.S., 254 F.2d 560, 568 (4th Cir. 1958); Poludniak, 657 F.2d at 959; U.S. v. Finance Committee to Re-Elect the President, 507 F.2d 1194, 1198 (D.C. Cir. 1974). "No man can willfully and knowingly violate the law, and excuse himself from the consequences thereof by pleading that he followed the advice-of-counsel." Williamson, 207 U.S. at 453. Where the advice-of-counsel defense is properly invoked, it becomes a "matter to be considered by the jury in determining the [defendant's] guilt." Traitz, 871 F.2d at 382 n.9 (quotation omitted). Any representation to the contrary would be improper.

B. The ITC Report

In September 1989, the United States International Trade Commission (ITC) published a report entitled "Importation of Certain Drug Paraphernalia into the United States". The report describes § 857 as having "inherent weaknesses" and having an "ambiguous" and "nebulous" definition of drug paraphernalia. ITC Report at v-vi. In re Grand Jury 89-2, 728 F. Supp. 1269 (E.D. Va. 1990), the defendants moved to have the report disclosed to the grand jury. The court denied the motion stating that the ITC Report "is nothing more than a report on the scope of illicit drug paraphernalia imports and the Act's efficiency in this context." Id. at 1274. The court went on to state that there was "no reason to conclude that the [r]eport would ever be admissible at trial." Id. See also, Garzon v. Rudin, No. 87-C-1046, slip op. at 12 (E.D. Wis. Feb. 2, 1990)(Appendix F).

C. Federal Patents

The defense may try to introduce evidence that the United States Patent and Trademark Office (PTO) issued a patent for a certain item charged as drug paraphernalia in the indictment. A defendant then might contend that the patent somehow demonstrates that the patented object is not illegal as drug paraphernalia. Such argument and evidence should be excluded under Fed. R. Evid. 401 and 403.

To claim that a patent demonstrates that the patented item is not drug paraphernalia improperly undermines the fact-finding responsibility of the jury. Such argument and evidence force the jury to defer to a nonadversarial administrative process in which a patent examiner passes on questions of patentability completely different from any questions presented at the criminal trial. Cf. U.S. v. Kail, 804 F.2d 441, 446 (8th Cir. 1986)("We believe that it is implicit in a situation in which an administrative decision is submitted as an

exhibit to the jury that the jury would be forced to decide legal rather than factual questions."). No law requires patent examiners to monitor criminal laws, and any assumption that patent examiners -- who are often not lawyers -- might be familiar with a recent criminal statute like § 863 is unreasonable.

The introduction of patents may also confuse the jury because the standard for determining patentability is fundamentally different from that for defining drug paraphernalia under § 863. A patent may not issue unless, among other things, the invention is "useful" (35 U.S.C. § 101), that is, "capable of performing some beneficial function claimed for it." (1 Lipscombs Walker on Patents § 5:4, at 491 (3d ed. 1984)(footnote omitted) [hereinafter Walker on Patents]). See also Technitrol, Inc. v. Control Data Corp., 550 F.2d 992, 997 (4th Cir.), cert. denied, 434 U.S. 822 (1977); Tights, Inc. v. Acme-McCrary Corp., 541 F.2d 1047, 1053 (4th Cir.), cert. denied sub nom. Kayser-Roth Corp. v. Tights, Inc., 429 U.S. 980 (1976). In "the event that an invention possesses any measure of utility, however slight, it is considered useful." Walker on Patents § 5:5, at 495.[7] And, in determining the usefulness of an invention claimed in a patent application, PTO usually applies a "rule that an invention is presumed operable as disclosed." 1 D. Chisum, Patents § 4.04[1], at 4-25 (1990)[hereinafter Chisum, Patents]. In light of this minimal requirement of legal utility, any suggestion that the issuance of a patent implies legality with respect to patented devices is without basis.

An invention incapable of a legal use lacks utility. Walker on Patents §§ 5:12, 5:13.[8] But the degree of legal use to satisfy the requirement of patentable utility is minimal: an invention satisfies the "usefulness" test if it has any disclosed legitimate use or application, even though the primary and most efficient use of the invention is improper or illegal. See Walker on Patents § 5:12, at 535-536; In re Anthony, 414 F.2d 1383, 1395 n.12 (C.C.P.A. 1969); Fuller v. Berger, 120 F. 274, 275-276 (7th Cir. 1903), cert. denied, 193 U.S.

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[7] In reviewing gambling machines and fraud devices, courts have said that utility would be lacking if an invention was "frivolous or injurious to the well-being, good policy, or sound morals of society." See Chisum, Patents § 4.03, at 4-17. Many courts rejecting patents or applications on those grounds did so in the 19th century and first part of this century. See Chisum, Patents § 4.03. In light of more recent opinions, however, one noted authority wrote that "it seems clear that the Patent Office will no longer be concerned with deciding what inventions might or might not be injurious to one's morals or health." Walker on Patents § 5:13, at 539; see also Ex parte Drulard, 223 U.S.P.Q. 364, 366 (Bd. App. 1983); Ex parte Murphy, 200 U.S.P.Q. 801, 802-803 (Bd. App. 1977). Indeed, we cannot find a federal decision published within the last 30 years in which a court upheld a patent rejection on those grounds.

[8] A design patent -- as opposed to a utility patent discussed above -- may be granted for a "new, original and ornamental design." 35 U.S.C. § 171; see also Walker on Patents § 16:1. The usefulness standard does not apply to design patents. In re Finch, 535 F.2d 70, 71 (C.C.P.A. 1976). For that reason, any attempt by defendants to rely on design patents as some official recognition of usefulness would be improper under Fed. R. Evid. 401 and 403.

668 (1904); Ex parte Murphy, 200 U.S.P.Q. 801, 802 (Bd. App. 1977).

In contrast to the standards for patentability, § 863 does not define drug paraphernalia as items "intended or designed" for drug use in all its applications: An item need only be "primarily intended" or "primarily....designed" for such use. Accordingly, a bong or waterpipe that has a secondary and less effective application for smoking tobacco but a primary and more efficient use for smoking marijuana would pass the test of patentability utility and qualify as drug paraphernalia under § 863.

The introduction of the patent to show government approval of the invention would unfairly prejudice and confuse the jury by introducing a standard of patentability that provides no insight on whether a patented invention would constitute drug paraphernalia under § 863.

Even if a patent were somehow a statement of legality for purposes of § 863, any patent issued before the effective date of the Mail Order Drug Paraphernalia Control Act certainly is not. Before January 1987, no federal criminal statute prohibited the shipment or offer for sale of drug paraphernalia. Thus, the issuance of a patent before that date could not possibly represent some sort of government decision on the legality of the item under § 863. [9]

The introduction of a patent would also result in undue delay and a waste of time. To discredit the patent defense, for example, the government would need to call an expert witness to explain the administrative nature of the patent application process, the minimal requirements for legal utility, and the small number of patent rejections by PTO on grounds of illegality. The witness would also need to expound on the minimal, if any, review that patent examiners give to criminal statutes and the limited, if any, training such examiners receive in this area.

In sum, the introduction of patents to show that certain inventions are not drug paraphernalia improperly robs the jury of its fact-finding duties. It would confuse the jury and result in an unnecessary and time-consuming presentation of evidence on a collateral and irrelevant point.

III. Experts

Section 863(e)(8) provides that one of the determining factors that may be considered in deciding whether an item is drug paraphernalia is "expert testimony concerning its use." The best expert on drug paraphernalia will probably be a state or local police officer who has had extensive experience at the consumer

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[9]PTO does not review issued patents for illegality after enactment of subsequent criminal statutes.

level of the narcotics chain. He or she is more likely to be qualified to testify concerning the use of the items in question for the ingestion of controlled substances as opposed to federal agents who may have less experience with the paraphernalia of drug users.

Although at least one court has restricted the area of inquiry to the use of drug paraphernalia in this country, see U.S. v. 57,261 Items of Drug Paraphernalia, 705 F. Supp. 1256 (M.D. Tenn. 1988) aff'd, 869 F.2d 955 (6th Cir), cert. denied, 110 S. Ct. 324 (1989), it is not clear whether the inquiry as to usage is to be restricted to a national or to a local point of view. Sections 863(e)(5) and (7) refer to legitimate uses in the community, while § 863(e)(3) directs the inquiry toward "national and local advertising concerning its use." The safe practice might be to use an expert in the usage of narcotics and paraphernalia who has a national point of view, as well as a local law enforcement expert.

IV. Sentencing Considerations

The base offense level for a violation of 21 U.S.C. § 863 is 12 under § 2D1.7 of the Sentencing Guidelines. Since the targeted persons are often engaged in manufacturing and/or sales and usually employ numerous people, they may be subject to a four-level adjustment increase pursuant to § 3B1.1.

By contrast, under section 2S1.1, individuals convicted of money laundering under 18 U.S.C. § 1956(a)(1)(A) or (a)(2)(A), have a base offense level of twenty-three, and if the value of the funds laundered is over one hundred thousand dollars, the base offense level increases according to the value of the funds involved.

Likewise, under section 2S1.2, a violation of 18 U.S.C. § 1957 has a base offense level of 17, with an increase of two levels if the defendant knew the funds were proceeds of a specified unlawful activity, such as 21 U.S.C. § 863. The guideline for 18 U.S.C.§ 1957 also carries proportional increases if the value of the funds involved exceeds one hundred thousand dollars.

No guideline has been promulgated for a violation of 21 U.S.C. § 854. Under section 2X5.1, reference must be made to the guideline for the most analogous offense, or if no such analogous offense exists, the defendant is to be sentenced pursuant to the provisions of 18 U.S.C. § 3553(b).

Because of the large differences in sentencing exposure for violations of 21 U.S.C. § 863 and the money laundering statutes, serious consideration should be given to charging violations of the money laundering statutes in Title 18, in addition to the main drug paraphernalia counts if warranted.

Chapter Five

SEIZURE AND FORFEITURE

I. Search Warrants

Section 863(c) provides that "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." Under this statute, seizure prior to conviction can be achieved by obtaining a search warrant pursuant to Rule 41 of the Fed. R. Crim. P. if criminal prosecution is anticipated. Rule 41(b) provides:

> A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or other things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense; or (4) person for whose arrest there is probable cause, or who is unlawfully restrained.

However, civil seizure under 21 U.S.C. 881(a)(10) is not precluded even if there is a concurrent criminal prosecution. The property may also be civilly seized under 19 U.S.C. 1595a(c), if the items are imported contrary to law, e.g. are in violation of § 863. 19 U.S.C. § 1595a(c) provides: "Any merchandise that is introduced or attempted to be introduced into the United States contrary to law (other than in violation of § 1592 of this title) may be seized and forfeited." It is important to note that this is a civil action separate and distinct from the retention of goods for evidence or for criminal forfeiture. Both civil and criminal forfeitures are discussed more fully in subsection B, infra.

A. The Affidavit

In the affidavit for a search warrant, the opinion of law enforcement officers with expertise in the field of drug paraphernalia concerning which items are drug paraphernalia can be an important factor in establishing probable cause. U.S. v. Main Street Distribution, Inc., 700 F. Supp. 655, 659 (E.D. N.Y 1988). U.S. v. Glass Menagerie, Inc., 721 F. Supp. 54 (S.D. N.Y. 1989).

The AUSA should consult the agents who will execute the search warrant and set out guidelines to be followed by the agents in determining what items they will seize as paraphernalia and what items will be left behind. Care should be taken to document how each item in the store or warehouse is displayed. The agents should be warned against indicating to the business or property owner that items not seized are not drug paraphernalia, and thus put the government's "stamp of approval" on the sale of the non-confiscated items.

Affidavits for search warrants of businesses engaged in the sale and distribution of drug paraphernalia will not likely be subject to attacks for staleness because of the ongoing nature of the business. Inventory and business records are items that are much more likely to remain on the premises in order to provide a ready supply to customers. Since these records, like inventory, are maintained on a continuing basis, probable cause would still exist to believe that the items, which are the object of the search warrant, could still be found on the premises even though there may be a lengthy time lapse between the information in the affidavit and the search. U.S. v. Glass Menagerie, Inc., 721 F. Supp. at 58-59 (one-half month delay upheld); U.S. v. Main Street, 700 F. Supp. at 657-659 (information in warrant between one and eight months old).

The following should be included in the affidavit for a search warrant for drug paraphernalia:

1. The affiant should set out in detail his or her experience with the general use of narcotics paraphernalia. Refere nce should be made to the number of arrests he or she has conducted for narcotics violations where drugs were found with drug paraphernalia, or other experiences with drug paraphernalia. The affiant should describe the ext ent of his or her experiences with people ingesting drugs while using narcotics paraphernalia in his or her presen ce. Agent should refer to any discussions he/she has had with narcotics users about how they ingest, package, conceal or enhance their drugs with narcotics paraphernalia.

2. The affiant should detail conversations with legitimate tobacconists and any trade journals (High Times, etc.) consulted.

3. A description of the site to be searched (both interior and exterior).

4. A list of the paraphernalia items purchased by undercover agents--a good cross section if possible. In the warrant itself, do not limit search or seizure to only those items purchased by undercover agents. Other items of drug paraphernalia may also be seized. Generic terms that do not track the language of the statute are to be avoided. But see U.S. v. Hinds, 856 F.2d 438 (1st Cir. 1988) (finding the term "cocaine paraphernalia" in a search warrant was sufficient to allow seizure of cutting agents, scales, strainer, metal discharge and pulverizer and plastic bags with cocaine residue). Photographs should also be

attached where they exist. See Appendix J for sample warrant.

5. Laboratory analysis of any illegal drugs purchased in connection with the drug paraphernalia.

6. Any efforts made to refute disclaimers.

7. An explanation of why items are drug paraphernalia and are not items with a legitimate use. A description of the design of the items, as well as the implications of the design features and the context in which they were marketed, should be included.

8. Statements by experts or transcripts of incriminating conversations between investigators and the targets.

9. Business records should be included as items to be seized. These records are of value not only in establishing who is responsible for keeping the store's stock, but also in showing what percentage of legitimate versus illegitimate business the store conducts. Sales receipts are also help ful in this regard.

National Institute of Justice, State and Local Experience with Drug Paraphernalia Laws, by Kerry Murphy Healey (February 1988), p. 35-36.

Investigation and Prosecution of Drug Paraphernalia Cases, Office of the District Attorney, County of Ventura, California (1983), p. 34-37.

B. Probable Cause

The following factors contribute to a finding of probable cause in support of a search warrant:

1. Customs records showed that Freedom Imports had imp orted into the United States from Taiwan 200,000 4-inch glass tubes, described on Customs documents as "stirrer s." U.S. v. Main Street Distribution, Inc., 700 F. Supp. 655, 659-660 (E.D.N.Y. 1988).

2. Four-inch glass tubes are the basic element of pipes used to smoke the cocaine derivative "crack." Id.

3. Only heat sink screens need be inserted in the glass pipes for street use. Id.

4. Customs records further indicated that six months later, Freedom Imports had imported another 500,000 4-inch glass tubes, which tubes were seized as possible drug paraphernalia. Id.

5. Customs agent successfully obtained over the telephone from Freedom Imports price quotations for "stems," the common expression for glass crack pipes, and the screens to be used in them. Id.

6. Agent was later told in person that three references were necessary before he could purchase any stems or screens. Id.

7. Letter from defendant to Freedom Imports confirmed Main Street Distributors' purchase of an unspecified number of 4-inch glass tubes and its knowledge that the items were imported from Taiwan. Id.

8. Customs records show that Main Street Distributors had imported into the U.S. .1 millimeter gauge stainless steel mesh screens from Japan. Id.

9. Customs records show that Main Street imported from Taiwan 500,000 3/4-inch by 2-inch polyethylene bags. Id.

10. One month later 15,000,000 more bags were imported. Id.

11. In the agent's experience, bags were used to store small quantities of heroin. Id.

12. According to drug enforcement experts, such tubes are the principal component of "crack" pipes. Id.

13. Innocent explanations consistent with facts alleged do not negate probable cause. Id. at 660

14. The court could consider unorthodox business dealings. Id. at 660.

15. There was a limited legitimate use for an item. Id.

16. Items were routinely used in drug trade. Id.

17. Agent does not have to aver that he is an expert in drug paraphernalia. U.S. v. Glass Menagerie, Inc., 721 F. Supp. 54, 58 (S.D. N.Y. 1989) (Experience supported inference of expertise).

18. Invoice numbers matched pictures in catalogue. Id at 59.

19. Particularity--warrant directed agents to seize specific described items. Id. at 60

20. Where the seizure went beyond the terms of the warrant, factual dispute does not void the warrant or seizure. Id.

21. Affiant had significant training and experience in drug-related enforcement and investigation. Jones v. Town of Seaford, 661 F. Supp. 864, 871 (D. Del. 1987).

22. A prior search revealed drug paraphernalia at the location to be searched. Id.

23. Items of drug paraphernalia were viewed "only a few days" before the warrant was executed. Id.

24. That defendant was not a distributor or dealer of tobacco products was probative of the officers' contention that the items for sale in the store were, in fact, drug paraphernalia. Id.

II. Forfeiture

A. Exclusivity of Remedy

21 U.S.C. § 863(c) provides that "[a]ny 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." However, civil actions for forfeiture of drug paraphernalia have been successfully maintained under 19 U.S.C. § 1595a(c), which provides that "[a]ny merchandise that is introduced or attempted to be introduced into the United States contrary to law (other than in violation of § 1592 of this title) may be seized and forfeited."

Whether 21 U.S.C. § 863(c) provides the exclusive remedy for forfeiture of drug paraphernalia was addressed in U.S. v. 57,261 Items of Drug Paraphernalia, 869 F.2d 955 (6th Cir. 1989). The court held that the two statutory forfeiture remedies were not mutually exclusive. The use of the Customs civil forfeiture statute, in conjunction with forfeitures of drug paraphernalia, was specifically approved in Garzon v. Rudin, No. 87-C-1046, slip op. (E.D. Wis. Feb. 2, 1990)

(Appendix F); see also, Ryers Creek Corp. v. MacMartin, No. Cir-89-157T, slip op. (W.D. N.Y. Apr. 20, 1989) (Appendix G)(Seizure by search warrant does not implicate criminal seizure and forfeiture of § 857(c)[863(c)]). In any event with the addition of 21 U.S.C. 881(a)(10), Congress has clearly provided for dual remedies.

B. Criminal Forfeiture

If criminal forfeiture of drug paraphernalia is sought under 21 U.S.C. § 863, or if the criminal forfeiture of assets is sought pursuant to 18 U.S.C. § 982 or 21 U.S.C. § 853, forfeiture counts must comply with the requirement of Rule 7(c)(2) of the Federal Rules of Criminal Procedure that, "No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information shall allege the extent of the interest or property subject to forfeiture"; and must be included in the charging instrument. Furthermore, a special verdict as to any forfeiture count must be returned pursuant to Rule 31(e) of the Federal Rules of Criminal Procedure.

In a criminal forfeiture proceeding, the government must prove that the items are drug paraphernalia and that they were involved in the violation of 21 U.S.C. § 863(a)(1),(2), or (3) and that the property is forfeitable under 18 U.S.C. § 982 or 21 U.S.C. § 853. Three jurisdictions have concluded that the standard of proof is a preponderance of the evidence. U.S. v. Sandini, 816 F.2d 869 (3d Cir. 1987); U.S. v. Herrero, 893 F.2d 1512 (7th Cir. 1990); U.S. v. Hernandez-Escarsega, 886 F.2d 1560 (9th Cir. 1990); but see U.S. v. Elgersma, 929 F.2d 1538 (11th Cir. 1991)(holding that Government's burden of proof under § 853 is beyond a reasonable doubt).

Since only the interests in the property of the defendant who has been tried and convicted have been determined as forfeited to the government, ancillary proceedings must be commenced to determine the interests of any third-party claimants. Section 863(c) makes no reference to 21 U.S.C. § 853; however, the procedures set out in § 853 are the preferred vehicle for determining all claims to property subject to forfeiture. The ancillary process to determine third-party interests is commenced by the publication of notice of the order of forfeiture and the government's intent to dispose of the property. Personal service and written notice to parties known to have alleged an interest in the property should be made. 21 U.S.C. § 853(n)(1).

Any third party having an interest in the property may petition the court that decided the criminal case for a hearing concerning its interest in the property. If no third-party claim is made or the claims of any third-party claimants have been denied, the United States will be given title to the property by an order amending the court's original order of forfeiture to include the forfeiture of all interest in the property to the United States.

C. Civil Forfeiture

The 1990 Amendments to the Mail Order Drug Paraphernalia Control Act included the addition of drug paraphernalia to 21 U.S.C. § 881 as items that may be civilly forfeited. 21 U.S.C. 881(a)(10). If the items of drug paraphernalia are imported or exported, then a civil forfeiture action may also be commenced pursuant to 19 U.S.C. § 1595a(c) or 22 U.S.C. 401. For procedures on civil forfeiture, see e.g., Forms for Civil Forfeiture, Asset Forfeiture Litigation Manual, U.S. Department of Justice, July 1989; Compilation of Selected Federal Asset Forfeiture Statutes, U.S. Department of Justice, April 1991.

Since a violation of 21 U.S.C. § 863 qualifies as "specified unlawful activity" under 18 U.S.C. 1956, civil forfeitures under 18 U.S.C. 981 are not limited to "drug paraphernalia" as they are for actions brought under 21 U.S.C. 881(a)(10). 18 U.S.C. 981 allows the forfeiture of "any property traceable to such property." Assuming all the elements of 18 U.S.C. § 1956 or § 1957 can be met, all the assets of a drug paraphernalia business can be forfeited if the purchase of those assets came from money "involved in" the money laundering transaction. This may also include property (real and personal) not so tainted if the property in some way facilitates the money laundering offense such as providing "cover" for illegal activity. U.S. v. All Monies ($477,048.62) in Acct. No. 90-3617-3, 754 F. Supp. 1467 (D. Hawaii 1991); U.S. v. Rivera, 884 F.2d 544 (11th Cir. 1989).

D. Burden of Proof

21 U.S.C. § 885(a)(1), applicable to all statutory exemptions in Subchapter I of the Controlled Substances Act, states that:

> It shall not be necessary for the United States to negative any exemption or exception set forth in this subchapter in any complaint, information, indictment, or other pleading or in any trial, hearing, or other proceeding under this subchapter, and the burden of going forward with the evidence with respect to any such exemption or exception shall be upon the person claiming its benefit.

Since the Mail Order Drug Paraphernalia Control Act is now a part of the Controlled Substances Act, 21 U.S.C. § 863(f) qualifies as an exemption "set forth in this subchapter." 21 U.S.C. § 885(a)(1) is therefore applicable to actions brought under 21 U.S.C. § 863.

At the trial of the civil forfeiture action, the government must prove only that there is probable cause to believe that the items in question are drug paraphernalia subject to forfeiture. The burden then shifts to the plaintiff to prove that the items are not subject to forfeiture. U.S. v. 57,261 Items of Drug Paraphernalia, 705 F. Supp. 1256, 1263, (M.D. Tenn. 1988).

For forfeitures made under 19 U.S.C. § 1595a, the court in Ryers Creek Corp. v. MacMartin, No. Civ-89-157T, slip op. (W.D.N.Y. Apr. 20, 1989) (Appendix G), described the burdens of proof as follows:

> I find that it is most appropriate for present purposes to establish a separate burden of proof for each statute, rather than a single burden of proof for the whole hearing, as the parties contend. This is the case because two separate conclusions must be reached by the court in this evidentiary hearing. First, the court must determine, pursuant to 21 U.S.C. § 857, whether the pipes are drug paraphernalia. It is only upon a finding that the items are drug paraphernalia that the court must determine whether the pipes meet the evidentiary standard for forfeiture pursuant to 19 U.S.C. § 1595a. The court is aware that there is substantial overlap in the burdens of proof each party respectively bears with regard to each statute. Nevertheless, proceeding step by step makes for the clearest analysis.
>
> The United States bears the burden of proving by a preponderance of evidence that the pipes are drug paraphernalia as defined by 21 U.S.C. § 857. The [claimants] have the burden of proving by a preponderance of evidence that their pipes fall within the 'primarily intended for use with tobacco products' exception to 21 U.S.C. § 857(f). If the United States meets its burden and the [claimants] do not meet theirs, the court must determine whether civil forfeiture is appropriate pursuant to 19 U.S.C. § 1595a.

Under 19 U.S.C. § 1595a, the government must prove that there is probable cause to believe that the items in question are subject to forfeiture pursuant to 19 U.S.C.

> § 1595a. (citing Main Street).... The burden then shifts to the claimant who must prove by a preponderance that the items are not subject to forfeiture.

Id. at 13-14 (Appendix G). See also, Garzon v. Rudin, No. 87-C-1046, slip op. at p.14 (E.D. Wis. Feb. 2, 1990)(Appendix F) (Defendant has the burden of proving by a preponderance of evidence that the pipes fall within the exception.).

In the context of a suppression hearing, § 857(f) [863(f)] does not impermissibly shift the burden of proof. U.S. v. Main Street Distribution, Inc., 700 F. Supp. 655, 699 (E.D. N.Y. 1988).

APPENDIX A

MODEL DRUG PARAPHERNALIA ACT

Model Drug Paraphernalia Act

Drafted by the
Drug Enforcement Administration
of the
United States
Department of Justice

Model Drug Paraphernalia Act

(Drafted by the Drug Enforcement Administration of the U.S. Department of Justice, August 1979, With Prefatory Note and Comments)

Prefatory Note

The Uniformed Controlled Substances Act, drafted by the National Conference of Commissioners on Uniform State Laws, has been enacted by all but a handful of states. The Uniform Act does not control the manufacture, advertisement, sale or use of so-called "Drug Paraphernalia." Other state laws aimed at controlling Drug Paraphernalia are often too vaguely worded and too limited in coverage to withstand constitutional attack or to be very effective. As a result, the availability of Drug Paraphernalia has reached epidemic levels. An entire industry has developed which promotes, even glamorizes, the illegal use of drugs by adults and children alike. Sales of Drug Paraphernalia are reported as high as three billion dollars a year. What was a small phenomenon at the time the Uniform Act was drafted has now mushroomed into an industry so well-entrenched that it has its own trade magazines and associations.

This Model Act was drafted, at the request of state authorities, to enable states and local jurisdictions to cope with the paraphernalia problem. The Act takes the form of suggested amendments to the Uniform Controlled Substances Act. The Uniform Act is extremely well-organized. It contains a definitional section, an offenses and penalties section, a civil forfeiture section, as well as miscellaneous sections on administration and enforcement. Instead of creating separate, independent paraphernalia laws, it seems desirable to control Drug Paraphernalia by amending existing sections of the Uniform Controlled Substances Act.

Article I provides a comprehensive definition of the term "Drug Paraphernalia" and includes particular descriptions of the most common forms of paraphernalia. Article I also outlines the more relevant factors a court or other authority should consider in determining whether an object comes within the definition.

Article II sets out four criminal offenses intended to prohibit the manufacture, advertisement, delivery or use of Drug Paraphernalia. The delivery of paraphernalia to a minor is made a special offense. Article II clearly defines what conduct is prohibited, and it specifies what criminal state of mind must accompany such conduct.

Article I

(DEFINITIONS)

Section (insert designation of definitional section) of the Controlled Substances Act of this State is amended by adding the following after paragraph (insert designation of last definition in section):

"( ) The term 'Drug Paraphernalia' means all equipment, products and materials of any kind which are used, intended for use, or designed for use, in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing concealing, injecting, ingesting, inhaling or otherwise introducing into the human body a controlled substance in violation of this Act (meaning the Controlled Susbtances Act of this State). It includes, but is not limited to:

(1) Kits used, intended for use, or designed for use in planting, propagating, cultivating, growing or harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived;

(2) Kits used, intended for use, or designed for use in manufacturing, compounding, converting, producing, processing, or preparing controlled substances;

(3) Isomerization devices used, intended for use, or designed for use in increasing the potency of any species of plant which is a controlled substance;

(4) Testing equipment used, intended for use, or designed for use in identifying, or in analyzing the strength, effectiveness or purity of controlled substances;

(5) Scales and balances used, intended for use, or designed for use in weighing or measuring controlled substances;

(6) Diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose and lactose, used, intended for use, or designed for use in cutting controlled substances;

(7) Separation gins and sifters used, intended for use, or designed for use in removing twigs and seeds from, or in otherwise cleaning or refining, marihuana;

(8) Blenders, bowls, containers, spoons and mixing devices used, intended for use, or designed for use in compounding controlled substances;

(9) Capsules, balloons, envelopes and other containers used, intended for use, or designed for use in packaging small quantities of controlled substances;

(10) Containers and other objects used, intended for use, or designed for use in parenterally injecting controlled substances into the human body;

(11) Hypodermic syringes, needles and other objects used, intended for use, or designed for use in parenterally injecting controlled substances into the human body;

(12) Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing marihuana, cocaine, hashish, or hashish oil into the human body, such as:

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

(b) Water pipes;

(c) Carburetion tubes and devices;

(b) Water pipes;

(d) Smoking and carburetion masks;

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

(f) Miniature cocaine spoons, and cocaine vials;

(g) Chamber pipes;

(h) Carburetor pipes;

(i) Electric pipes;

(j) Air-driven pipes;

(k) Chillums;

(l) Bongs;

(m) Ice pipes or chillers;

"In determining whether an object is Drug paraphernalia, a court or other authority should consider, in addition to all other logically relevant factors, the following:

(1) Statements by an owner or by anyone in control of the object concerning its use;

(2) Prior convictions, if any, of an owner, or of anyone in control of the object, under any State or Federal law relating to any controlled substance;

(3) The proximity of the object, in time and space, to a direct violation of this Act;

(4) The proximity of the object to controlled substances;

(5) The existence of any residue of controlled substances on the object;

(6) Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to persons whom he knows, or should reasonably know, intend to use the object to facilitate a violation of this Act; the innocence of an owner, or of anyone in control of the object, as to a direct violation of this Act shall not prevent a finding that the object is intended for use, or designed for use as Drug paraphernalia;

(7) Instructions, oral or written, provided with the object concerning its use;

(8) Descriptive materials accompanying the object which explain or depict its use;

(9) National and local advertising concerning its use;

(10) The manner in which the object is displayed for sale;

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

(12) Direct or circumstantial evidence of the ratio of sales of the object(s) to the total sales of the business enterprise;

(13) The existence and scope of legitimate uses for the object in the community;

(14) Expert testimony concerning its use."

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ARTICLE II

(OFFENSES AND PENALTIES)

SECTION (designation of offenses and penalties section) of the Controlled Substances Act of this State is amended by adding the following after (designation of last substantive offense):

"SECTION (A) (POSSESSION OF DRUG PARAPHERNALIA)

It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this Act. Any 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."

"SECTION (B) (MANUFACTURE OR DELIVERY OF DRUG PARAPHERNALIA)

It is unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver, drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this Act. Any 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."

"SECTION (C) (DELIVERY OF DRUG PARAPHERNALIA TO A MINOR)

Any person 18 years of age or over who violates Section (B) by delivering drug paraphernalia to a person under 18 years of age who is at least 3 years his junior is guilty of a special offense and upon conviction may be imprisoned for not more than ( ), fined not more than ( ), or both."

"SECTION (D) (ADVERTISEMENT OF DRUG PARAPHERNALIA)

It is unlawful for any person to place in any newspaper, magazine, handbill, or other publication any advertisement, knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia. Any 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."

ARTICLE III

(CIVIL FORFEITURE)

SECTION (insert designation of civil forfeiture section) of the Controlled Substances Act of this State is amended to provide for the civil seizure and forfeiture of drug paraphernalia by adding the following after paragraph (insert designation of last category of forfeitable property):

"( ) all drug paraphernalia as defined by Section ( ) of this Act."

ARTICLE IV

(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.

COMMENT (ARTICLE I)

Drug paraphernalia laws are most often attacked because they are too vaguely worded. They seldom explain what is meant by the term paraphernalia. They do not indicate whether it is the use, or the possession, or the sale of paraphernalia that is prohibited. Moreover, they are usually silent on the criminal state of mind that must accompany the prohibited conduct. This deprives an individual of fair warning as to what the law forbids. It also vests too much discretion in authorities to determine what property and what activities are controlled.

Definition of drug paraphernalia

Article I of the Model Act, in contrast, defines "drug paraphernalia" as equipment, products, and materials used, intended for use, or designed for use, essentially, to produce, package, store, test or use illicit drugs. The words "equipment, products and materials" should be interpreted according to their ordinary or dictionary meanings. They can apply to many forms of movable, tangible property. Real property, conveyances, monies, documents and intangible property are, on the other hand, not meant to be included within these terms.

Although this definition may appear too general in its wording, or too broad in its scope, there are so many forms of drug paraphernalia that any attempt to define the term in more specific language would guarantee major loopholes in the Act's coverage. The courts have repeatedly recognized that there are practical limitations in drafting legislation. Where the subject matter of a statute does not lend itself to exact description, the use of general language does not make the statute unconstitutionally vague. *United States* v. *Petrillo*, 332 U.S. 1, 67 S.Ct. 1538 (1947). And see *United States* v. *Ryan*, 284 U.S. 167, 52 S.Ct. 65 (1931).

To insure that innocently possessed objects are not classified as drug paraphernalia, Article I makes the knowledge or criminal intent of the person in control of an object a key element of the definition. Needless to say, inanimate objects are neither "good" nor "bad," neither "lawful" nor "unlawful." Inanimate objects do not commit crimes. But, when an object is controlled by people who use it illegally, or who intend to use it illegally, or who design or adapt it for illegal use, the object can be subject to control and the people subjected to prosecution.

Article I requires, therefore, that an object be used, intended for use, or designed for use in connection with illicit drugs before it can be controlled as drug paraphernalia.

Hinging the definition of drug paraphernalia on a specific intent to violate, or to facilitate a violation of, the drug laws also provides "fair warning" to persons in possession of property potentially subject to this Act. A statute is not unconstitutionally vague, if it embodies a specific intent to violate the law. *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337, 72 S.Ct. 329 (1952); *Screws* v. *United States*, 325 U.S. 91, 65 S.Ct. 1031 (1945).

Consider the application of Article I to a spoon, a hypodermic syringe, and a length of surgical tubing. Each object has legitimate uses in the community. None is specifically designed for illegal use. Thus, when these objects are manufactured, delivered and possessed in lawful commerce, they are not considered paraphernalia. But, if these same objects are assembled and used by an addict to illegally melt heroin and inject it into his body, they become drug paraphernalia. As such they become forfeitable under Article III, and the addict becomes subject to prosecution under Section A of Article II.

Actual use of an object to produce, package, store, test or use illicit drugs need not always be shown. An object is considered to be drug paraphernalia whenever the person in control intends it for use with illicit drugs. This intent may be a generalized one, not necessarily pinpointing a specific time and place of future use. See *Palmer* v. *State*, 14 Md.App. 159, 286 A.2d 572 (1972). It can be proved directly such as my admissions of the person in control, or indirectly through circumstantial evidence. It should be noted that the person in immediate control of an object need not intend to use it personally in connection with drugs. It is enough if he holds the object with the intent to make it available to persons whom he knows will use it illegally. See *United States* v. *2,265 One-Gallon Paraffined Tin Cans*, 260 F.2d 105 (5th Cir. 1958).

Objects whose sole, or at least dominant purpose is to produce, package, store, test or use illicit drugs are considered to be "designed" for such use. A rebuttable presumption exists that these objects are intended for use for the purpose for which they are designed. See *Israel* v. *United States*, 63 F.2d 345 (3rd Cir. 1933). As such, they are presumed to be drug paraphernalia. Isomerization devices designed for use in increasing the THC content of marihuana provide a good example.

Common forms of drug paraphernalia

Article I includes a detailed description of common forms of property that can fall within the definition of drug paraphernalia if used, intended for use, or designed for use to violate the drug laws. This list is not intended to be inclusive. Several of these descriptions, such as "chilluma" and "bongs," may seem foreign to the lay reader. Nevertheless, these terms are part of the jargon of the drug culture and are understood by both users and merchants of drug paraphernalia. They are not unconstitutionally vague. See *Hydgrade Provision Co.* v. *Sherman*, 266 U.S. 497, 45 S.Ct. 141 (1925).

Relevant factors in classifying paraphernalia

In addition to defining drug paraphernalia and describing the common forms, Article I sets out some of the more relevant factors to consider in determining whether an object is paraphernalia. The listing of these factors in the Model Act is not intended to be preemptory; a court or other authority is not obligated to hear evidence on, or to consider, every listed factory. Rather, the factors have been included to guide law enforcement officers, judges, and juries in their determination of what is controlled. Providing guidance on the practical application of the Act minimizes the risk of arbitrary and discriminatory enforcement, sometimes associated with even the most carefully drafted statutes. See *Interstate Circuit, Inc.* v. *City of Dallas*, 390 U.S. 676, 88 S.Ct. 1298 (1968).

Conversely, the listing of these factors is not meant to be inclusive. Any logically relevant factor may be considered.

COMMENT [ARTICLE II]

Possession of drug paraphernalia

Section A makes it a crime to: (i) possess an object; (ii) classifiable as drug paraphernalia; (iii) with the intent to use that object, essentially, to produce, package, store, test or use illicit drugs in violation of the Controlled Substances Act of the State. Section A does not make the mere possession of an object capable of use as drug paraphernalia a crime. Section A does not make the mere intent to violate the drug laws a crime. It is the possession of drug paraphernalia accompanied by an intent to use it to violate the drug laws that Section A forbids. Innocent citizens have nothing to fear from Section A.

Manufacture or delivery of drug paraphernalia

Suppliers who furnish goods or services knowing they will be used to facilitate a crime are not immune from liability. There are no legal obstacles to punishing suppliers who knowingly or recklessly aid their customers to commit crimes. This is true whether the objects or services are restricted, or peculiarly suited for illegal use, such as a still, a gun, morphine or stolen goods. See *Direct Sales Company* v. *United States*, 319 U.S. 703, 63 S.Ct. 1265 (1943); *Backun* v. *United States*, 112 F.2d 635 (4th Cir. 1940); *Israel* v. *United States*, 63 F.2d 345 (3rd Cir. 1933); *Weinstein* v. *United States*, 293 F. 388 (1 Cir. 1923); and *Commonwealth* v. *Stout*, 356 Mass. 287, 249 N. E. 2d 12 (1969).

It is also true when the objects or services have widespread legitimate uses in the community, such as sugar, rye, yeast, grapejuice, rubbing alcohol or a telephone answering service. See *United States* v. *Ragland*, 306 F.2d 782 (4th Cir. 1962); *Chapman* v. *United States*, 271 F.2d 598 (5th Cir. 1959); *United Cigar Whelan Stores Corp.* v. *United States*, 28 F.2d 666 (9th Cir. 1928); *United States* v. *Burnett*, 53 F.2d 219 (W.D. Mo. 1931); and *People* v. *Lauria*, 251 Cal. App. 2d 471 (1967).

The reasonableness of this rule is clearly expressed in *Backun* v. *United States:*

"To say that the sale of goods is a normally lawful transaction is beside the point. The seller may not ignore the purpose for which the purchase is made if he is advised of that purpose, or wash his hands of the aid that he has given the perpetrator of a felony by the plea that he has merely made a sale of merchandise. One who sells a gun to another knowing that he is buying it to commit a murder, would hardly escape conviction as an accessory to the murder by showing that he received full price for the gun; and no difference in principle can be drawn between such a case and any other case of a seller who knows that the purchaser intends to use the goods which he is purchasing in the commission of a felony. In any such case, not only does the act of the seller assist in the commission of the felony, but his will assents to its commission, since he could refuse to give the assistance by refusing to make the sale" 112 F.2d 635 (4th Cir. (1940).

There are courts which have hesitated to hold a supplier guilty of conspiracy with, or aiding and abetting a buyer. See *United States* v. *Falcone*, 311 U.S. 205, 61 S.Ct. 204 (1940); and *United States* v. *Peoni*, 100 F.2d 401 (2 Cir. 1938). A careful reading of these decisions makes clear that they were based upon the court's unwillingness to hold a supplier *equally* responsible with a buyer based simply upon the supplier's knowledge that the buyer intended to commit a crime. At common law, the punishment is the same for the co-conspirator and the aider and abetter as it is for the actual perpetrator. Nothing in these cases suggests, however, that a supplier enjoys complete immunity from punishment, or that a state cannot make the conduct of the supplier a separate offense. See Note, *Falcone Revisited: The Criminality of Sales to an Illegal Enterprise*, 54 Columbia Law Rev. 228 (1953).

Section B makes it a crime to: (i) deliver, possess with intent to deliver, or manufacture with intent to deliver an object; (ii) classifiable as drug paraphernalia, (iii) knowing, or under circumstances where one reasonably should know, that it will be used, essentially, to produce, package, store, test or use illicit drugs in violation of the Controlled Substances Act of the State. The term "deliver" has the same basic meaning attributed to it by the Uniform Controlled Substances Act; namely, the actual, constructive, or attempted transfer from one person to another, whether or not there is an agency relationship. The term "manufacture," appearing in the phrase "manufacture with intent to deliver," is used in a general sense to express the entire process by which an object is made ready for sale in open commerce, including designing, fabricating, assembling, packaging and labeling. See *Danovits* v. *United States*, 281 U.S. 389, 50 S.Ct. 344 (1930).

The knowledge requirement of Section B is satisfied when a supplier: (i) has actual knowledge an object will be used as drug paraphernalia; (ii) is aware of a high probability an object will be used as drug paraphernalia; or (iii) is aware of facts and circumstances from which he should reasonably conclude there is a high probability an object will be used as drug paraphernalia. Section B requries a supplier of potential paraphernalia to exercise a reasonable amount of care.

He need not undertake an investigation into the intentions of every buyer, but he is not free to ignore the circumstances of a transaction. Suppliers of objects capable of use as paraphernalia may not deliver them indiscriminately. Since each element of Section B must be proven beyond a reasonable doubt, legitimate, prudent suppliers will not be affected by this section.

Advertisement of drug paraphernalia

Section D makes it a crime to: (i) advertise an object; (ii) classifiable as drug paraphernalia; (iii) knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement is to promote the sale of the object for use, essentially, to produce, package, store, test or use illicit drugs.

Only printed advertisements promoting the sale of objects for use as paraphernalia are prohibited. The non-printed media, including radio and television, is not affected. Printed matter criticising the drug laws, glorifying the drug culture, glamorizing the use of drugs, or providing information or instructions on illicit drugs is not affected. The target of this Section is commercial advertising.

Unlike so-called "printer's ink" statutes, which exempt printers and publishers from their coverage, Section D contains no exemptions. It applies to anyone who prints or publishes paraphernalia advertisements, and to anyone who causes these advertisements to be printed or published. For this reason, it uses the general terms "any person" and "to place."

The knowledge requirement of Section D is satisfied when the person placing the advertisement: (i) has actual knowledge it is promoting the sale of objects for use as drug paraphernalia; (ii) is aware of a high probability it is promoting the sale of objects for use as drug paraphernalia; or (iii) is aware of facts and circumstances from which he should reasonably conclude there is a high probability the advertisement is promoting the sale of objects for use as drug paraphernalia. Whether an advertisement promotes the sale of objects for use as paraphernalia is to be determined from its content. Under Section D, one need not look beyond the face of the advertisement.

Section D does not compromise First Amendment rights. The sale of objects for use as drug paraphernalia is made illegal by Section B, and Section D simply prohibits advertisements promoting these sales. Commercial solicitation of illegal activities is not protected speech. *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Rights*, 413 U.S. 376, 93 S.Ct. 2553 (1973); and see *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S.Ct. 1817 (1976).

COMMENT [ARTICLE III]

Civil forfeiture actions are directed against property and are totally independent of any criminal proceedings against individuals. Section 505 of the Uniform Controlled Substances Act provides for the seizure and civil forfeiture of: (1) illicit drugs; (2) equipment and materials used to make, deliver, import or export illicit drugs; (3) containers used to store illicit drugs; (4) conveyances involved in transporting illicit drugs; and (5) books, records and research connected with illicit drugs. States that have adopted Section 505 can seize these objects without making any compensation to the owners. The legality of civil forfeiture statutes, similar to 505, and their usefulness in helping deter crime, have been repeatedly recognized by virtually every state and federal court, including the Supreme Court of the United States. *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 94 S.Ct. 2080 (1974).

Article III extends the civil forfeiture section of the Uniform Act to include drug paraphernalia. This allows states to keep and destroy drug paraphernalia, rather than returning it after criminal proceedings have ended. It also allows states to keep drug paraphernalia seized during an investigation, in cases where criminal proceedings are not initiated. Finally, since the standard of proof in a civil forfeiture action is simply "probable cause," or "reasonable cause," rather than "proof beyond a reasonable doubt," Article III permits states to seize and forfeit drug paraphernalia in circumstances where an arrest might not seem justified. For example, an officer who encounters a minor in possession of a hypodermic syringe, or in possession of a bong (a device especially designed for smoking marihuana), has reasonable cause to believe these objects are intended for use to introduce illicit drugs into the human body. Subjecting drug paraphernalia to civil forfeiture permits the officer to seize these objects, though he decides not to arrest the minor.

Civil forfeiture can also be an effective deterrent to commercial suppliers. See *Utley Wholesale Company* v. *United States*, 308 F.2d 157 (5th Cir. 1962); *United States* v. *2265 One-Gallon Paraffined Tin Cans*, 260 F.2d 105 (5th Cir. 1958); *United States* v. *1,922 Assorted Firearms, Etc.*, 330 F.Supp. 635 (ED Mo. 1971); *United States* v. *600 Bags of Southcoast Jurbinado Brand Sugar*, 225 F.Supp. 705 (WD La. 1964); *Vinto Products Co.* v. *Goddard*, 48 F.2d 899 (Minn., 1930); and *United States* v. *Rottman*, 36 F.2d 86 (ND Ill. 1929).

APPENDIX B

MAIL ORDER DRUG PARAPHERNALIA CONTROL ACT (1986)

Mail Order Drug Paraphernalia Control Act.

Subtitle O—Prohibition on the Interstate Sale and Transportation of Drug Paraphernalia

21 USC 801 note.

SEC. 1821. SHORT TITLE.

This subtitle may be cited as the "Mail Order Drug Paraphernalia Control Act".

21 USC 857.

SEC. 1822. OFFENSE.

(a) It is unlawful for any person—

(1) to make use of the services of the Postal Service or other interstate conveyance as part of a scheme to sell drug paraphernalia;

(2) to offer for sale and transportation in interstate or foreign commerce drug paraphernalia; or

(3) to import or export drug paraphernalia.

(b) Anyone convicted of an offense under subsection (a) of this section shall be imprisoned for not more than three years and fined not more than $100,000.

(c) 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) 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 in violation of the Controlled Substances Act (title II of Public Law 91-513). 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—

21 USC 802.

(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) 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) This subtitle 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 primarily intended for use with tobacco products, including any pipe, paper, or accessory.

SEC. 1823. EFFECTIVE DATE. 21 USC 857 note.

This subtitle shall become effective 90 days after the date of enactment of this Act.

APPENDIX C

1988 AMENDMENTS

International agreements.

International agreements.

SEC. 6485. CLARIFICATIONS REGARDING DRUG PARAPHERNALIA.

Section 1822 of the Anti-Drug Abuse Act of 1986 (Public Law 99-570; 21 U.S.C. 857) is amended—

(1) in subsection (d), by striking out "in violation of the Controlled Substances Act" and inserting ", possession of which is unlawful under the Controlled Substances Act"; and

(2) in subsection (f)(2) by striking out "primarily intended for use with" and inserting "traditionally intended for use with".

APPENDIX D

1990 AMENDMENTS

TITLE XXIV—DRUG PARAPHERNALIA

SEC. 2401. DRUG PARAPHERNALIA.

(a) IN GENERAL.—The Controlled Substances Act is amended by adding at the end of part D the following:

"DRUG PARAPHERNALIA

"SEC. 422. (a) It is unlawful for any person—

"(1) to sell or offer for sale drug paraphernalia;

"(2) to use the mails or any other facility of interstate commerce to transport drug paraphernalia; or

"(3) to import or export drug paraphernalia.".

(b) TRANSFER OF REMAINING EXISTING PROVISIONS RELATING TO DRUG PARAPHERNALIA.—Subsections (b) through (f) of section 1822 of the Anti-Drug Abuse Act of 1986 (21 U.S.C. 857) are transferred to appear as subsections (b) through (f) of the section 422 added to the Controlled Substances Act by this section.

(c) TECHNICAL CORRECTIONS TO TRANSFERRED PROVISIONS.—The provisions of law transferred by subsection (b) are amended—

(1) in subsection (b), by striking "not more than $100,000" and inserting "under title 18, United States Code"; and

(2) in subsection (f), by striking "This subtitle" and inserting "This section".

(d) CONFORMING REPEAL.—Subtitle O of title I of the Anti-Drug Abuse Act of 1986 is repealed.

APPENDIX E

Selected Legislative History

Selected Legislative History

The legislative history with respect to whether an objective or subjective standard was intended is somewhat unclear. This appendix summarizes the pertinent statements of the 1986 Act's principal sponsors and Harry Myers the principal drafter of the model legislation on which the federal act was based.

Senator Wilson: In addition to "kiddie paraphernalia", many other forms of paraphernalia are sold through the mail order and catalog method. These items include "bongs," which are long cylindrical devices designed for inhaling marijuana deep into the lungs; various types of pipes (chillums), which are designed solely for marijuana smoking; and roach clips, which allow a marijuana cigarette to be smoked after it has burned close to a smoker's fingers. There are also numerous products for the cocaine user: cocaine kits, complete with straw, mirror, and razor blade, and kits for testing the quality of cocaine. No list of paraphernalia is totally inclusive because the variety of drug paraphernalia expands proportionately to the imagination of the paraphernalia manufacturer.

131 Cong. Rec. 5932 (March 20, 1985).

....

Senator Wilson: This legislation contains as one of its important points the fact that it was very closely adapted to the model act adopted by the Drug Enforcement Administration, a mail order drug paraphernalia control act, which will outlaw the sale and shipment of drug paraphernalia, those items which will enhance or aid in the use of dangerous controlled substances.

132 Cong. Rec. S13758 (Sept. 26, 1986)

Congressman McCollum: I am concerned about the meaning. I would assume court cases and States that have used this language have interpreted that and, of course, you as an original author have some idea as what you mean. But I am concerned to whom this is applied.

For example, it seems very clear the word "designed," that would be very narrow, I don't have a real problem with that....But what isn't clear is the fact that you have got another word in there "primarily intended for the use."

Do you mean to say that "intended", even though it was designed for multiple uses, that at the time, the seller, the particular seller of this drug paraphernalia sold it, that it was his intent in selling it that it be used for the purposes described? Is that the intent that the prosecutor would have to prove, the intent of the seller, or just what have you got in mind?

Congressman Levine: The purpose of the language in this section both in the model act, and in my legislation is to identify as clearly as possible the intent of manufacturer and the seller to market a particular item as drug paraphernalia, subject to the interpretation of a trial court.

McCollum: An intent on the part of whom; on the part of the seller?

Levine: Well, it would depend on who is being prosecuted. If it was the seller, it would be the intent on the part of the seller. It would be the defendant. It would be the intent on the part of the defendant in a particular trial.

My principal concerns in this area have always been with regard to sellers and manufacturers, but it would be the application with regard to whomever the defendant would be under the provisions of this act.
Hearings P.47-48.

[But see U.S. v. Dyer's criticism that "Mr. Levine's conclusory remarks are themselves not free from ambiguity. Not directly addressed, for example, is whether a guilty verdict must be based on a jury finding that defendant subjectively intended or designed an item for use with drugs. In any event, Mr. Levine's remarks are not sufficient to overcome the plain language of the statute, for '[s]tray comments by individual legislators, not otherwise supported by statutory language or committee reports, cannot be attributed to the full body that voted on the bill.'" 750 F.Supp. at 1288 (citations omitted)]

Harry Myers: I thought I would bring in, or at least display something that is definitely drug paraphernalia. And this is drug paraphernalia without regard to who is holding it, or what my intent is; this is drug paraphernalia strictly because of its design, the hard core drug paraphernalia that Mr. Knapp is alluding to.

....

Mr. William J. Hughes: If you can't argue that it does not have any other use, why shouldn't we make that illegal.

Myers: Well, you could find a contrived use for this, Congressman. You could fill this with water and put in a flower or anything. But actually this is hard core drug paraphernalia. You don't have to refer to the merchant's intent, or the manufacturer's intent, or the guy-this item is designed for use to smoke marijuana.

....

The model act is intended to go after items that are designed for use with drugs, like this [displaying bong]. It was also intended to go after items that are multipurpose items, if they were marketed or promoted for an illicit use, if they were intended for an illicit use by the person who was marketing them or selling them. And most of the confusion in understanding the

statue [sic] the question of whose intent we are talking about, and transferred intent, stems from the failure to distinguish between two kinds of paraphernalia.

A single-edged razor blade is not designed for use with drugs, but it certainly is capable of doing certain things with cocaine. Miniaturized spoons are not designed for use to snort cocaine, in most instances, but they certainly can be used to snort cocaine.

Those types of items that don't have inherent design characteristics, that say that they are intended for use with drugs, you call derivative drug paraphernalia, they can only be controlled by the lawmakers if the person who is charged with an offense can be shown to have intended that item for an unlawful use.

It is not necessary to show that intent for someone who is selling something that is designed for use with drugs. You could place the burden on manufacturers and place a burden on merchants to know what it is they are selling. And if they begin to sell an item like this and simply shrug their shoulders and say, "I don't know what it is used for when a person leaves the store; I don't even know what it does, all I do is sell them," you could prohibit that as well.

Hearings P. 66-68.

APPENDIX F

Garzon v. Rudin, No. 87-c-1046, slip op. (E.D. Wis. Feb. 2, 1990).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

MARCO A. GARZON and
PENNY S. GARZON,

Plaintiff,

vs. Case No. 87-C-1046

RICHARD A. RUDIN, et al.,

Defendants.

UNITED STATES OF AMERICA,

Plaintiff,

vs. Case No. 88-C-1396

DRUG PARAPHERNALIA, INCLUDING
12,960 SMALL ONYX PIPES, and
498 ONYX SLEEVES,

Defendant.

ORDER

On November 17, 1989 the court held a day-long evidentiary hearing on the issue of whether certain onyx pipes seized by United States Customs are drug paraphernalia within the terms of 21 U.S.C. § 857. A finding that the pipes are drug paraphernalia would require that the pipes be forfeited pursuant to 19 U.S.C. § 1595a. The court heard testimony from six government witnesses and three claimant witnesses. The following are the court's findings of fact and conclusions of law.

I. FINDINGS OF FACT

1. On July 14, 1987 an importation shipment consisting of 12,960 onyx pipes, 498 onyx sleeves and a small number of onyx animal figurines was delivered to the Port of Milwaukee in Milwaukee, Wisconsin. The shipment was scheduled for entry and release to Garzonyx Imports, Inc. The company is owned by Marco and Penny Garzon, who are residents of Walworth County in the Eastern District of Wisconsin.

2. Upon arrival at the Port of Milwaukee, the onyx items were examined and seized by United States Customs as drug paraphernalia. The items remain in the custody of the United States and are currently held in the Eastern District of Wisconsin. No party other than the Garzons has filed any claim to the items. The government offered no evidence on the use of the onyx sleeves or animal figurines as drug paraphernalia. Accordingly, these items will be ordered returned to the Garzons.

3. The Garzons intended to sell the onyx pipes to customers in the United States who were generally engaged in retail distribution. The evidence at the hearing demonstrated that Garzonyx's customers were largely engaged in retail distribution. Special Agents Magno and Hodess testified that they visited a number of Garzonyx customers and that these were primarily retail establishments. Such retail establishments as they visited would include Record Head, Tobacco Road, Off The Wall and Starship in Milwaukee, Wisconsin.[1]

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[1] Garzonyx also sold pipes to larger distributors, including Fine Line Products in Milwaukee and Adams Apple in Chicago.

4. Prior to the seizure of pipes on July 14, 1987, the Garzons had notice that their customers sold drug paraphernalia. The Garzons received such notice, among other ways, through correspondence from their customers, and the obvious implication of the names used by their customers. The Garzons clearly had notice from the suggestive names of their customers' establishments that such establishments were "head shops." The Garzons' customer list (Exhibit 5) lists customers with names such as "Berkeley Pipeline," "The Pipefitter," "High On The Hill," "Fine Line Products," "Choice Supply," "Gold Tokens," "The Head Shop," "Good Time Smoke and Gift Distributing," "High Society Distributors," "Forbidden Fruit Distributors," "Grass Company," "Record Head," and "Pipe Dream Products." In the court's view, such names are more than suggestive of head shops rather than of legitimate pipe and tobacco stores.

The court also notes, to a lesser degree, certain correspondence between Garzonyx and its customers as evidence of Garzonyx's notice and guilty knowledge. For example, prior to the seizure of Garzonyx's wares, Pipe Dream Products sent its vendors, including Garzonyx, a letter informing the vendors that Pipe Dream had been raided again by the Los Angeles Police Department (Exhibit 13). The letter stated that four truck loads of what the Los Angeles Police Department "termed 'drug paraphernalia'" was seized. The letter also sought donations to Pipe Dream's legal defense fund on the ground that they would be testing the California drug paraphernalia law.

Another letter gives the same "head shop" impression. The letterhead of this foreign Garzonyx customer, called The Head Shop (Exhibit

16), states that they are "wholesalers and retailers in paraphernalia," among other things.

5. Prior to the seizure of pipes on July 14, 1987 and continuing until the present, the Garzons' customers have been engaged in distributing drug paraphernalia. As stated above, the evidence amply shows that customers to whom Garzonyx actually sold substantial numbers of onyx pipes are "head shops" primarily distributing drug paraphernalia and exotica. The testimony of Special Agents Magno and Hodess go far in illustrating the nature of the retail operations operated by Garzonyx's clientele. The agents testified to visiting various Milwaukee area Garzonyx customers such as Record Head, Tobacco Road, Off The Wall and Starship. Each of these stores displayed what the agents in their training and experience considered to be items used in the ingestion of drugs.[2] This paraphernalia included small wooden pipes, bongs, waterpipes and coke spoons. Two other Garzonyx customers, Adams Apple and Fine Line Products, were raided by United States Customs agents including Agents Hodess and Magno respectively. Both raids yielded items which, according to Hodess and Magno, were used in the ingestion of drugs.

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[2] Both agents have received training in the indentification of drug paraphernalia. Agent Hodess also has ten years of practical experience, including a tour on airport detail where she confiscated many drug pipes. Agent Magno has only been with Customs for about a year. Nevertheless, the court is satisfied that his training, street experience, and the knowledge imparted from experienced agents give him ample basis to identify drug paraphernalia.

The nature of the wares sold by Garzonyx customers is also shown by the Adams Apple catalog in evidence (Exhibit 19). While no onyx pipes are shown in the catalog, it is very likely that many (if not all) items advertised are drug paraphernalia. The advertising copy is also highly suggestive of the illicit use of the items.[3]

Furthermore, the Garzons proof does not suggest, much less establish, that legitimate tobacco shops sell Garzonyx pipes. The claimants produced no tobacco shop owner to testify that his shop sold such items, or that his tobacco-smoking customers would purchase the onyx pipes. And indeed James Steinbock, the owner of Uhle's Pipe and Tobacco Shop in Milwaukee, testified that he would not sell onyx pipes in his store, since his customers would not buy them.

6. The court finds that the onyx pipes at issue are not desirable for smoking tobacco. James Steinbock of Uhle's Pipe and Tobacco produced a wholesale distribution catalog (Exhibit 7) which he said was representative of his company's merchandise. The catalog is sent to other tobacco stores. Beside selling bulk tobacco and cigars, the catalog shows a selection of tobacco pipes on pages 4 through 17. None of the pipes there bear resemblance to the Garzonyx pipes. The pipes in the catalog were predominately made of briar with a few meerschaum pipes also included. Significantly, there were no onyx pipes. The pipes in

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[3] For example, item JB-12 is a "JoBong Bongo Water Pipe." The copy reads: "Chambers of pleasure for all tastes. All bongs come with one hit and party bowls, plus removable stem and base for quick and easy cleaning." Similarly, item 603 is listed as "Hash or Grass Pipe, Medium Bowl with Hash/Stash Cap." The copy for item RA-33 reads "Combination key ring, roach clip, and carburetor pipe, convenient and handy."

the catalog varied in size of bowl, length of stem and overall size. But no pipe in the catalog is depicted with a bowl as small, a stem as short, and an overall size as diminutive as that characteristic of the Garzonyx pipes.

Mr. Steinbock also testified that, in his experience as a pipe retailer and long-time pipe smoker, the Garzonyx pipes have a bowl size which is extremely small in the spectrum of large to small pipes and would be inconvenient for smoking tobacco.[4] The Garzonyx pipe bowls have insufficient capacity to sustain more than a few minutes of tobacco smoking without refilling and relighting the pipe. Similarly, Mr. Steinbock testified that onyx stone is not a desirable smoking material since it does not absorb and dissipate heat, and that leads to a hot pipe in the mouth of the smoker. Because a tobacco smoker will often hold the pipe in the mouth for extended periods, the hot stone would be particularly uncomfortable for tobacco smokers.1[5]

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[4] The court does not find that Exhibit 106 alters this conclusion. This meerschaum pipe, the bowl of which is carved in the shape of a man's head, is roughly the same size as the Garzonyx pipes (but even the bowl of Exhibit 106 has a larger capacity). This pipe was described by Mr. Steinbock as a novelty item. He said its size was probably due to the small size of a particular piece of meerschaum.

[5] Another problem would be holding a Garzonyx pipe in the mouth at all. *Unlike* conventional pipes the onyx pipes do not have a "bit" to facilitate holding the pipe in the mouth. Rather, the onyx pipes have a larger bulky diameter at the stem end which would hinder the pipe from being held in the teeth without hands. Moreover, the weight of the stone would make such a pipe uncomfortable even if holding in the mouth was possible.

Exhibit 104, introduced by the defense, does nothing to alter this conclusion. Exhibit 104 is an onyx pipe, but formed in the traditional "billiard" shape. First, Exhibit 104 does not share the size and shape

(Footnote Continued)

Mr. Steinbock's testimony was corroborated by the testimony of Ralph Conte of United States Customs. Mr. Conte has been employed for the past 18 years as a National Import Specialist charged with maintaining uniformity in Customs' rulings on tobacco products importations. Mr. Conte reiterated Mr. Steinbock's conclusion that the Garzonyx pipes were impractical for use with tobacco, primarily because of the small bowl. Additionally, Mr. Conte testified that over his years of reviewing tobacco products importations, he has not seen pipes such as those manufactured by Garzonyx imported by tobacco products distributors.

7. The court finds the Garzonyx pipes would be desirable for smoking marijuana and hashish. Judging from Exhibits 1 and 2, the Garzonyx pipes would be easily concealed from law enforcement personnel in a hand, pocket, purse, or car ash tray. Also, the bowls of these pipes are of a size appropriate to the small amounts of marijuana and hashish used by marijuana and hashish smokers. Detective Ernest Meress is a 20-year veteran of the Milwaukee police force, and has spent the last 7 years on the vice squad, primarily dealing with narcotics cases. He testified that in speaking with marijuana smokers and observing their

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(Footnote Continued)

characteristics of the seized Garzonyx pipes, making it somewhat irrelevant to the present case. Second, Exhibit 104, being made of onyx stone, is significantly heavier than a briar billiard shape pipe (e.g. Exhibit 100) which would make Exhibit 104 heavy and hard to hold in the teeth. Third, the physical characteristics of the onyx material would still make for a hot pipe. The court would imagine that these are some of the reasons no onyx billiard shaped pipes are seen in the pipe catalog (Exhibit 21) and tobacco wholesaler catalog (Exhibit 7) in evidence. The court is left to infer from Exhibit 104 that while onyx can be manufactured into traditional pipe shapes, no legitimate tobacco retailer would buy them.

smoking habits, such persons need only a small amount of marijuana, a "hit" or two to feel "high." Marijuana pipes are passed from user to user, each taking a "hit" from the same bowl. This hit and pass routine would make the heat characteristics of the onyx material more or less irrelevant. It would also render the unwieldily weight and balance properties of the Garzonyx pipes irrelevant, since the smoker would not be attempting to hold the pipe in the mouth for any extended period.

8. The Garzonyx pipes are of a similar size and shape (and to some extent material) as those recovered daily by law enforcement personnel. Detective Meress testified that he has extensive experience in identifying and confiscating marijuana and hashish paraphernalia. Detective Meress, using his common sense definition that drug paraphernalia are those items commonly used to ingest drugs, stated that he has seized hundreds of similar pipes from marijuana users. He stated that of the hundreds of similar pipes he has seen, all contained marijuana residue; none was ever found to contain tobacco residue. Based on the size, shape and material of the Garzonyx pipes, Detective Meress found them to be marijuana/hashish pipes.

Similarly, Special Agent Louise Hodess, a 10-year veteran of United States Customs, testified that she was assigned to airport detail for a year and one-half. In that capacity, Special Agent Hodess regularly confiscated pipes similar in size and shape to the Garzonyx pipes. In her experience, too, such pipes always tested positive for marijuana residue.

9. Discussion of the defense witnesses and evidence. While defense counsel certainly made the best of such evidence as was

available, their evidence was on the whole unpersuasive. The Garzons' chief witness was Benjamin Rappaport, an expert on tobacco lore. In a nutshell, his testimony was that all pipes are "smoking devices," and given their capacity to hold marijuana as well as tobacco, a person could not say whether a certain pipe was used primarily for one or the other. Moreover, in his long experience as an Army officer, Mr. Rappaport found that a drug user would use anything they could get their hands on, including hardware, toilet paper rolls, aluminum foil or any pipe with a bowl to ingest drugs. He testified that he caught one soldier in a parking lot smoking marijuana with a traditional briar pipe. He also stated that he has observed people smoking pipes like those manufactured by Garzonyx with tobacco.

It is quite a leap, however, from Mr. Rappaport's testimony to the conclusion that the Garzonyx pipes are "primarily intended for use with tobacco products." In the first place, that an aficionado of tobacco lore (who presumably frequents on occasion with people of similar interest) has seen persons smoking from Garzonyx-style pipes is not surprising. To the court's mind, if anyone would be smoking tobacco in a Garzonyx pipe, it would be persons interested in tobacco smoking devices. But that does not make the Garzonyx pipes primarily intended for use with tobacco, especially not when similar pipes are seized by law enforcement on a daily basis with marijuana residue in them.

Secondly, that Mr. Rappaport caught one soldier smoking marijuana with a traditional briar pipe does not lead to the conclusion that Garzonyx pipes are primarily intended for use with tobacco. His statement may support the proposition that anything can be used to ingest marijuana,

but that certainly does not lead to the conclusion that Garzonyx pipes are primarily used with tobacco either. And he certainly cannot be alleging that traditional briar pipes are primarily used with anything but tobacco.

The Garzons also called Professor Charles Stanish. Judging from his education, experience and position, Professor Stanish is unquestionably an expert in archeology, and was so certified by the court. He is an Assistant Curator of the Chicago Field Museum of Natural History. He also works as a consultant to United States Customs in Chicago, at their request, in the areas of authentication and classification of antiquities, including tobacco pipes.

Professor Stanish testified he has pipes in his museum made of onyx. He also testified that the Garzonyx pipes in Exhibits 1 and 2 are similar in size and shape to pipes in his museum. But that similar pipes, eons old, are museum quality pieces does not qualify the Garzonyx pipes as museum quality. The Garzonyx pipes are cheaply made for mass distribution. Simply put, the court finds it hard to believe that the Garzons manufacture their pipes as museum pieces or art objects. But even if their pipes belonged in a museum, the fact remains that they are not primarily used or intended to be used with tobacco products.

Professor Stanish also testified that he has seen onyx pipes used with tobacco in other parts of the world. This too misses the point. The issue is whether such pipes are primarily used in the United States with tobacco. Professor Stanish's testimony is not helpful on this issue.

Finally, the Garzons called Donald Heinz as a witness. Mr. Heinz is president of Hyco, Inc., a local marketing research firm. Hyco designed and performed a survey for the Garzons on pipe use and

preference in the Milwaukee area (Exhibit 17). The essence of the survey results are found in question 7, which asked of those who used onyx pipes, what they normally used onyx for smoking. The choices and their respective percentages were: tobacco (30%); "natural herbs" (66%); "dried flowers" (9%); and "other" (13%). Really the survey speaks for itself. Only 30% smoked tobacco from an onyx pipe. Thirty percent does not support a finding of "primarily" used with tobacco, especially when 66% smoked "natural herbs" from the onyx.

The Garzons also introduced, by stipulation, testimony of John Esau before the International Trade Commission. Mr. Esau is Director of the Commercial Fraud Enforcement Center, United States Customs. The essence of his testimony was that the Mail Order Drug Paraphernalia Act, 21 U.S.C. § 857, makes it hard to exactly define what is drug paraphernalia. However, he noted that the Act "allows a definition of an item as 'drug paraphernalia' based on logically relevant factors."

The court finds that Mr. Esau's testimony is not especially relevant for purposes of this hearing to the extent that the Garzons use it to infer that the Act is vague. Constitutional issues such as the vagueness of the statute will be taken up after the entry of findings from the evidentiary hearing. Also, as Mr. Esau notes, while it may be "extraordinarily difficult to get a definition of what is drug paraphernalia," the court may find the pipes to be paraphernalia based upon specified "logically relevant factors." Since the court already knew that the statute on its face allows use of the logically relevant factors in reaching its findings, Mr. Esau's testimony does not carry much weight insofar as the evidentiary hearing is concerned.

The Garzons also submitted an official report of the United States International Trade Commission on the importation of drug paraphernalia. The essence of this report is that the Act gives an ambiguous definition of what constitutes drug paraphernalia. This too seems to be more probative for purposes of a constitutional challenge than for this evidentiary hearing. On the basis of the evidence before me and the statute as published, the court has no difficulty applying the facts to the law and reaching a conclusion. The broader constitutional issues of vagueness, notice and the like will be taken up later.

Some brief comments are in order regarding Exhibits 3 and 4. Exhibit 3 is a letter written on behalf of Garzonyx Imports to United States Customs regarding whether Garzonyx pipes ran afoul of United States paraphernalia laws. The Customs service sent the letter back with a notation which states in part: "This merchandise is prohibited [for] importation under the Mail Order Drug Paraphernalia Act." A year and a half later, the Garzons wrote a letter (Exhibit 4) to United States Customs Import Specialist Vincent Michaelson inquiring as to the appropriate tariff schedules for certain "fully finished onyx giftwares." The letter states that the Garzons included samples of the wares, including seven "tobacco pipes." Mr. Michaelson noted the appropriate tariff schedules but said nothing about the pipes being considered paraphernalia.

Based on the content and context of the two letters, I reject the Garzon's argument that they should be allowed to rely on Mr. Michaelson's lack of indication of the pipes' illegality. The first letter specifically sought a ruling on the pipes' legality. The Garzons were told in no uncertain terms that the pipes would violate the Mail Order Drug

Paraphernalia Act. The second letter does not seek a ruling on the legality of the pipes. As written, Exhibit 4 seems designed to "slide one by" the Customs service.

Finally, the court must address the issue of whether the government has established that the 30 pipes in Exhibits 1 and 2 were a representative sample of the 12,930 pipes seized. There was no testimony presented that any government witness examined the entire shipment. Nevertheless, I find it hard to believe that Exhibits 1 and 2 were submitted to the court as representative samples when in reality they are not. In order to insure a complete record, I will direct the government to examine the shipment of pipes to determine whether Exhibits 1 and 2 are, in fact, representative samples. The government should file an appropriate affidavit in this regard. If the claimants object to the contents of the affidavit, the court will hold a short hearing to resolve the matter.

II. CONCLUSIONS OF LAW

The court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. §§ 1345 and 1355. Venue is proper in the Eastern District of Wisconsin pursuant to 28 U.S.C. § 1395. This is a civil action for forfeiture in rem brought under 18 U.S.C. § 1595a and 21 U.S.C. § 857.

I find that it is most appropriate for present purposes to establish a separate burden of proof for each statute, rather than a single burden of proof for the whole hearing, as the parties contend. This is the case because two separate conclusions must be reached by the court in this evidentiary hearing. First, the court must determine, pursuant to 21 U.S.C. § 857, whether the pipes are drug paraphernalia. It is only upon a finding that the items are drug paraphernalia that the court must

determine whether the pipes meet the evidentiary standard for forfeiture pursuant to 19 U.S.C. § 1595a. The court is aware that there is substantial overlap in the burdens of proof each party respectively bears with regard to each statute. Nevertheless, proceeding step-by-step makes for the clearest analysis.

The United States bears the burden of proving by a preponderance of evidence that the pipes are drug paraphernalia as defined by 21 U.S.C. § 857. The Garzons have the burden of proving by a preponderance of evidence that their pipes fall within the "primarily" "intended for use with tobacco products" exception of 21 U.S.C. § 857(f). If the United States meets its burden and the Garzons conversely do not meet theirs, the court must determine whether civil forfeiture is appropriate pursuant to 19 U.S.C. § 1595a.

Under 19 U.S.C. § 1595a, the government must prove that there is probable cause to believe that the items in question are subject to forfeiture pursuant to 19 U.S.C. § 1595a. United States v. 57,261 Items of Drug Paraphernalia, 705 F. Supp. 1256, 1263 (M.D. Tenn. 1988) citing United States v. "Monkey", 725 F. Supp. 1007, 1010 (5th Cir. 1984). A showing of probable cause is made if there is a reasonable ground, supported by less than prima facie evidence but more than mere suspicion, for the belief that the items are subject to forfeiture. Id. The burden then shifts to the claimant who must prove by a preponderance that the items are not subject to forfeiture.

Turning first to the Mail Order Drug Paraphernalia Act, 21 U.S.C. § 857(d) defines drug paraphernalia as "any equipment, product, or material of any kind which is primarily intended or designed for use

in . . . injecting, ingesting, inhaling or otherwise introducing into the human body a controlled substance" such as marijuana or hashish. The next subsection, 21 U.S.C. § 857(e), supplies a number of "[m]atters to be 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.

21 U.S.C. § 857(e). There was testimony concerning a number of these factors. For example, there was testimony from Special Agents Hodess and Magno concerning the manner in which Garzonyx pipes are displayed for sale. There was testimony from James Steinbock of Uhle's Pipe and Tobacco, a dealer in legitimate tobacco products, that he does not sell Garzonyx pipes. Similarly, Ralph Conte of Customs testified that no legitimate tobacco dealer he knows of sells Garzonyx style pipes. There was testimony from Detective Meress and Agent Hodess concerning the confiscation of similar size and shape pipes used to ingest controlled substances, as well as testimony from Mr. Steinbock of the impracticality of the Garzonyx pipes for smoking tobacco.

After due consideration of 21 U.S.C. § 857, as applied to the record made at the evidentiary hearing, I conclude that the government has proved by a preponderance of evidence that the Garzonyx pipes are primarily used to ingest controlled substances. I also conclude that the Garzons have not proved by a preponderance of evidence that the pipes are primarily intended for use with tobacco products.

Turning to 19 U.S.C. § 1595a, I conclude that there is much more than probable cause to believe the pipes are subject to forfeiture, since I have already concluded that the pipes are drug paraphernalia pursuant to 21 U.S.C. § 857. I also conclude that the Garzons have not proved by a preponderance that the pipes are not subject to forfeiture.

Accordingly,

IT IS ORDERED that the defendant Garzonyx pipes be and the same are hereby FORFEITED to the United States of America providing that the government can supply an affidavit testifying that Exhibits 1 and 2 are representative of the entire shipment of seized pipes. The court's ruling is held in abeyance pending the resolution of this issue; and

IT IS FURTHER ORDERED that within 30 days from the date of this order the government must file with the court an appropriate affidavit indicating whether Exhibits 1 and 2 are a representative cross-section of the entire shipment of pipes. Inability or failure to submit such an affidavit will result in the return of all pipes except those in Exhibits 1 and 2 to the Garzons; and,

IT IS FURTHER ORDERED that the Garzons shall have 15 days following receipt of the government's affidavit within which to file any objection to such affidavit.

Dated at Milwaukee, Wisconsin this 2nd day of February, 1990.

BY THE COURT:

J.P. Stadtmueller
U.S. District Judge

APPENDIX G

Ryers Creek Corp. v. MacMartin, No Civ.-89-157T, slip op. (W.D. N.Y. April 20, 1989)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

RYERS CREEK CORP., d/b/a/ THE MILL,

Plaintiff,

- vs - CIV-89-157T

STEVEN M. MacMARTIN, Individually and as an Agent of the U.S. CUSTOMS SERVICE, U.S. TREASURY DEPARTMENT, U.S. CUSTOMS SERVICE and UNITED STATES OF AMERICA,

Defendants.

Take notice of an Order, of which the within is a copy, duly granted in the within entitled action on the 20th day of April, 1989 and entered in the office of the Clerk of the United States District Court, Western District of New York, on the 20th day of April, 1989.

Dated: Rochester, New York

April 20, 1989

Clerk
United States District Court
Western District of New York
282 U.S. Courthouse
Rochester, New York 14614

TO: L. Andolina, Esq.
T. Duszkiewicz, AUSA

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

RYERS CREEK CORP., d/b/a THE MILL,

Plaintiff,

v.

CIV-89-157T

STEVEN M. MacMARTIN, Individually and as an Agent of the U.S. CUSTOMS SERVICE, U.S. TREASURY DEPARTMENT, U.S. CUSTOMS SERVICE and UNITED STATES OF AMERICA,

DECISION and ORDER

Defendants.

INTRODUCTION

Plaintiff, Ryers Creek Corporation, doing business as The Mill ("the Mill"), is a manufacturer and distributor of wooden smoking pipes. On January 19, 1989, agents of the United States Customs Service, in conjunction with other law enforcement officers, executed a search warrant upon the Mill's principal place of business and manufacturing facility in Corning, New York. Pursuant to the warrant, the agents seized all of the Mill's finished pipes and pipes in progress, as well as business records and some raw materials, as evidence of violation(s) of the Mail Order Drug Paraphernalia Control Act, 19 U.S.C. § 857 (the "Act"), which inter alia, makes unlawful the sale of drug paraphernalia in interstate or foreign commerce.

Neither the Mill nor its principals or employees have been charged with a violation of § 857 subsequent to the search.

The Mill commenced this action February 2, 1989, seeking declaratory and injunctive relief concerning the application of the Act to its manufacture of wooden pipes. In its complaint, and subsequent motion for a temporary restraining order and preliminary injunction, the plaintiff alleges that neither the search and seizure on January 19, 1989 nor any future search of the Mill's premises could be grounded on the Act because the Mill's pipes are traditionally intended for use with tobacco products and such items are expressly exempt from the Act pursuant to § 857(f).

The Court ordered a hearing on the motion for a preliminary injunction. At the close of the first day of testimony,[1] I ordered defendants to turn over all of the seized material to the Mill, basing that determinaton on the plain language of the seizure and forfeiture provision in the Mail Order Drug Paraphernalia Control Act, 21 U.S.C. § 857(c). Under that provision, seizure and forfeiture of drug paraphernalia is conditioned upon a prior conviction under § 857(a). Since neither the Mill, nor any of its principals or employees, had been so convicted (or even charged), I determined that the seizure of the Mill's property, purportedly pursuant to § 857, was improper, and accordingly ordered the property returned.

The Government subsequently moved for reconsideration of that determination, stating that the search and seizure of the Mill's property had been undertaken pursuant to a validly issued warrant, and in no way implicated the seizure and forfeiture provision in § 857. I thereupon reserved on the Government's

motion for reconsideration pending the conclusion of the evidentiary hearing.

The plaintiff called five witnesses in support of its case in chief, and one rebuttal witness. Defendants called three witnesses, including defendant MacMartin. Samples of every type of item seized from the Mill by the defendants were admitted into evidence, as well as samples of the Mill's own advertisements and advertising brochure and copies of catalogs in which Mill products are advertised by its distributors.

For the reasons discussed below, I find that defendants properly seized the property from the Mill pursuant to warrant. Such finding requires me to deny plaintiff's application for preliminary relief.

DISCUSSION

Pursuant to the Government's motion for reconsideration of my earlier order directing the Government to return to the Mill all of the items seized from the Mill on January 19, 1989, I find that such seizure is not controlled by 21 U.S.C. § 857(c). Accordingly, the lack of a conviction under § 857(a) does not necessarily determine that such seizure was improper. Rather, the Court must determine whether the seizure was proper pursuant to a pre-indictment search warrant.

In opposition to plaintiff's motion for a preliminary injunction, the Government argues that plaintiff's sole remedy lies in a motion for return of its property pursuant to Fed. R. Crim. P. 41(e).

Rule 41(e) expressly provides that an allegedly illegal search and seizure may be challenged by motion. It is within the district court's jurisdiction to entertain such a motion even before an underlying indictment has been filed. DiBella v. U.S., 369 U.S. 121, 82 S.Ct. 654, 7 L.Ed. 2d 614 (1962). This "anomalous" jurisdiction is to be exercised with great restraint and caution, since it rests upon the Court's supervisory powers over the actions of federal law enforcement officials. Fifth Avenue Peace Parade Committee v. Hoover, 327 F. Supp. 238, 242 (S.D.N.Y. 1971), aff'd., 480 F.2d 326, cert. denied, 415 U.S. 948 (1974).

A party aggrieved by an allegedly illegal search and seizure, who is the subject of neither a grand jury investigation nor a criminal action, however, is not limited to seeking relief by way of Rule 41. Whatever may be the "theoretical difficulties" involved in determining how to bring such a grievance before the Court, "if a federal prosecutor unlawfully seizes property for use in a criminal prosecution, then even before an indictment is returned, the party aggrieved has an independent action." Lord v. Kelley, 223 F. Supp. 684, 688 (D. Mass. 1963). Such an action is a civil matter and should be so docketed. U.S. v. Koenig, 290 F.2d 166, 169 (5th Cir. 1961).

Whether the procedure employed to bring the issue before the Court is Rule 41(e) or, as in this case, a suit in equity, the Court must consider three factors in determining whether to grant relief: whether there has been a clear showing of a search and

seizure in callous disregard of the Fourth Amendment or of some statutory provision; whether the movant/plaintiff would suffer irreparable injury if relief is not granted; and whether an adequate remedy at law exists. Pieper v. U.S., 604 F.2d 1131 (8th Cir. 1979); see also Richey v. Smith, 515 F.2d 1239, 1243 (5th Cir. 1975).

In this case, plaintiff has stated that, without the relief sought, it cannot proceed to manufacture its pipes without fear of future searches and seizures and of incurring criminal and/or civil liability. Plaintiff's counsel has informed the Court that, rather than run such risks, plaintiff has shut its doors pending the outcome of this case. This loss of a business itself cannot be characterized merely as a monetary loss, and I find that it constitutes the threat of irreparable harm.

Where, as here, the plaintiff has neither been indicted under § 857(a) nor made the subject of a grand jury investigation, see Standard Drywall, Inc. v. U.S., 668 F.2d 156 (2d Cir. 1982), plaintiff does not have exclusive recourse to Rule 41. Furthermore, the declaratory relief which plaintiff seeks is not available pursuant to Rule 41. Therefore, plaintiff is without an adequate remedy at law.

The remaining determination for the Court is whether the search and seizure of the Mill's property has been shown to be in callous disregard of plaintiff's Fourth Amendment rights or of its rights under any other statutory provision. I find that this determination, in turn, depends on whether the items seized are so

clearly exempt from the strictures of § 857(a) and (d), that the search warrant of the Mill's premises was improperly sought and executed.

In determining whether defendants had probable cause to believe that a search of the Mill's premises would yield evidence of a violation of 21 U.S.C. § 857(a), this Court looks first to the statute itself.

The Mail Order Drug Paraphernalia Control Act (the "Act") is codified at 19 U.S.C. § 857. The Act defines "drug paraphernalia" to mean

> Any equipment, product, or material of any kind which is primarily intended or designed for . . . introducing into the human body a controlled substance . . . . It includes . . .
>
> (1) metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls; . . .

§ 857(d) (emphasis added).

Thus, Congress expressly included smoking pipes in the definition of drug paraphernalia.

The statute provides an express exemption for, inter alia, items traditionally intended for use with tobacco products:

> This section shall not apply to --
> . . . (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.

§ 857(f).

Plaintiff's experts argue that, if an object is capable of both

burning a combustive and of being smoked, it is a pipe capable of being used with tobacco which is exempt from the statute pursuant to § 857(f)(2). An application of that reasoning to the statutory exemption would effectively vitiate the proscriptive provision found at subsection (d)(1). Thus, I reject it. The statute itself provides the means to harmonize § 857(d) and § 857(f).

Section 857(e) expressly provides that all logically relevant factors should be considered in determining whether an item constitutes drug paraphernalia, and contains a non-exclusive list of eight such factors:

> (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.

An application of these factors to the Mill's pipes substantiates that probable cause exists to believe that they are drug paraphernalia.

Advertising: There was extensive testimony concerning the Mill's advertising of its products; the Mill itself advertised its products only through Smokeshop Magazines, a periodical aimed at the traditional tobacco market, and its own glossy circulars, copies of which were mailed to, and confiscated at, various head shops in the Rochester area. Furthermore, Mill pipes are advertised in various catalogs which, given the totality of items advertised therein, can only be characterized as catalogs of drug paraphernalia.

Manner of Sale: The Mill's pipes are sold at both traditional tobacco stores and head shops. While the Mill does not hold itself out as a licensed distributor of tobacco products, its principals stated that the Mill is a manufacturer of tobacco-related products which sells its products to dealers of tobacco products. Notwithstanding this assertion, I find that substantial evidence in the record established that many of the Mill's major distributors deal in drug paraphernalia, and not merely in tobacco-related products.

Ratio of Sales: While Ms. Shapiro testified that many of the items confiscated from the Mill are no longer in its manufacturing line, I was not provided any samples of types of pipes manufactured by the Mill which were not confiscated. Consequently, on the record before me, it appears that virtually all of the Mill's sales are in the types of pipes which were confiscated.

Legitimate Uses: Notwithstanding their functional similarities, I find that the Mill's pipes are not like traditional tobacco pipes. To paraphrase current advertising rhetoric, this is not your grandfather's pipe. The pipes seized from the Mill are constructed of different and unusual woods. While they vary in design details (e.g., carved stems, wood inlays), they are generally of the same type: small-bowl (as small as 1/4" diameter), short stem (as short as 1-1/4") pipes; many with metal screens, some with hinged caps; some with carburator holes.

Expert Testimony: The Mill tendered expert testimony from three individuals with strong ties to the tobacco industry: Mr. Benjamin Rapaport, an expert on tobacco use and tobacco smoking devices; J. M. Boswell, the proprietor of a tobacco shop in Chambersburg, Pennsylvania; and L. Page MacCubbin, the proprietor of tobacco shops in Washington, D.C. and Rehoboth, Delaware. Predictably, the Mill attempted to establish through these witnesses that the items seized from the Mill are traditionally intended for use with tobacco and, therefore, exempt from the Mail Order Drug Paraphernalia Control Act.

I found unpersuasive plaintiff's expert testimony to the effect that the Mill pipes are traditionally intended for use with tobacco products. Much of the expert testimony, as given, amounted to mere speculation, including unsubstantiated assertions that more women are smoking pipes and that pipe smokers are driven by time constraints, and that both of these factors have resulted in an

increasing popularity of small tobacco pipes. Plaintiff's experts relied on the premise that there is no standard for the configuration of tobacco pipes and from this assertion reasoned that any pipe which may be used to smoke tobacco is, perforce, a traditional tobacco pipe. As already discussed, however, this reasoning is unacceptable because it conflicts with the plain language of § 857.

The Government relied chiefly on defendant MacMartin for its expert testimony. Mr. MacMartin has served nine years with the United States Customs Service. He spent approximately seven of those years as a Customs Inspector at the U.S.-Canadian border. In the course of his duties as a Customs Inspector, Mr. MacMartin regularly searched for, and confiscated, items of drug paraphernalia. For the past two years, Mr. MacMartin has been a Special Agent for the Customs Service, and in that capacity he has both received formal instruction concerning drug paraphernalia and investigated other cases of suspected violations of Customs law concerning drug paraphernalia. Agent MacMartin's testimony essentially expanded on his affidavit submitted in support of the application for the search warrant, as well as providing details of the actual search.

While MacMartin's testimony suffered from lack of detail -- he stated that he was advised by the Assistant United States Attorney that he need not make a record of the details of his background investigation of the Mill -- I find his testimony

credible: the pipes of choice of drug users differ from pipes traditionally used with tobacco products, and the pipes manufactured by the Mill and seized by Customs agents fall into the former category.[2]

Thus, an analysis of the pipes seized from the Mill pursuant to the factors outlined in § 857(e) supports the determination that probable cause existed to believe that the pipes constitute drug paraphernalia. This determination is not undercut by the testimony of the principals of the Mill.

I found the testimony of Lorraine Shapiro, who owns a half-interest in the Mill and is active in its management, rife with large and small inconsistencies, marked by a false naivete', and therefore essentially unreliable.[3] Ms. Shapiro testified that, in her capacity as a principal of the Mill, she traveled regularly to major trade shows in the tobacco product industry, and that she kept abreast of issues germaine to the industry, particularly through Smokeshop Magazine. Given the emergence of anti-drug paraphernalia laws throughout the country in the last 15 years, I find it hardly credible that she could be so uninformed about the distinctions between pipes which are traditional tobacco pipes and pipes which constitute drug paraphernalia. Ms. Shapiro's insistence that the advertisement of Mill pipes in the catalogs introduced into evidence, such as those distributed by Nalpac, Music City, Fine-Line, and Life Style Retailer, in no way implicated Mill pipes as drug paraphernalia, was similarly credible.

While the pipe smoker may ultimately decide whether a specific pipe will be used for legitimate or illegitimate purposes, the Mail Order Drug Paraphernalia Control Act is not limited in its application merely to end users of drug paraphernalia. It is intended to prevent any use of the mails, or of interstate commerce, in order to profit in any way from the sale of drug paraphernalia. See S. 2878, 99th Cong., 2d Sess., 132 Cong. Rec. S13758 (1986). Thus, § 857 applies to any party on the distribution chain - from manufacturer to end user - who has "knowledge that there is strong probability that [the items will be used illegally.]" U.S. v. 57,261 Items of Drug Paraphernalia, ___ F.2d ___, 1989 ___ WL 200915, at page 5 of 17 (6th Cir. 1989).

Having determined that the search and seizure were executed pursuant to probable cause, I further determine that plaintiff has failed to demonstrate either a likelihood of success on the merits of its underlying claims for declaratory relief and monetary damages or sufficiently serious questions going to the merits to make them a fair ground for litigation. Accordingly, I find that plaintiff is not entitled to preliminary injunctive relief. Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979) (per curiam); Deeper Life Christian Fellowship, Inc. v. Bd. of Education, 852 F.2d 676 (2d Cir. 1988).

WHEREFORE, plaintiff's motion for a preliminary injunction is denied. Plaintiff shall return to defendants the property

seized from the Mill's premises pursuant to search warrant on January 19, 1989.[4]

SO ORDERED.

MICHAEL A. TELESCA
United States District Judge

DATED: Rochester, New York
April 20, 1989

FOOTNOTES

1. The hearing on plaintiff's motion for a preliminary injunction took place February 24, March 22, 23 and 29. Following the first day of testimony, the matter was adjourned because of the Court's prior trial commitments.

2. The Court confirms its understanding, based on representations of the Government, that the Government seized items from the Mill in connection with a criminal investigation, see, U.S. v. Main Street Distributing, Inc., 700 F.Supp. 655 (E.D.N.Y. 1988) rather than in conection with a civil forfeiture pursuant to 19 U.S.C. § 1595(c), see, U.S. v. 57,261 Items of Drug Paraphernalia, (to be reported at 705 F.Supp. 1256)(M.D.Tenn. 1988), aff'd, ___ F.2d ___, 1989 WL 20195 (6th Cir. 1989), and that, in conformity with its representations at the hearing, the Government will commence timely formal proceedings in this criminal investigation.

3. As an example, a number of items which the Government characterized as "roach clips" were also seized from the Mill. Ms. Shapiro claimed that they were made from scrap pieces of exotic wood connected to metal alligator clips, designed with no particular use in mind other than to prevent the waste of scrap wood. (T. 166)

4. Plaintiff need not return those items which, at hearing, the parties agreed did not constitute drug paraphernalia.

APPENDIX H

U.S. v. Posters 'N Things, Ltd.,
No. 90-33, slip op.
(S.D. Iowa March 21, 1991).

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA, Plaintiff, vs. POSTERS 'N THINGS LTD., an Iowa Corporation, d/b/a WORLD WIDE IMPORTS, d/b/a FORBIDDEN FRUIT, d/b/a ACTY-MOORE GALLERY; GEORGE MICHAEL MOORE, a/k/a MIKE MOORE, d/b/a G. MICHAEL MOORE ENTERPRISES; and LANA CHRISTINE ACTY, a/k/a CHRIS ACTY, Defendants.	CRIMINAL NO. 90-33 RULING ON DEFENDANTS' MOTIONS FOR NEW TRIAL AND JUDGMENT OF ACQUITTAL

Jury trial in this case ended with verdicts returned by the jury on December 28, 1990, finding guilty the defendants charged in Counts 1 through 9 of the Second Superseding Indictment. (Not all counts charged both defendants with criminal conduct.) Before the court for ruling are the defendants' motions for new trial and judgment of acquittal notwithstanding the verdicts. The court concludes the motions are without merit. The motions are denied.

Before trial defendants challenged the charges in the indictment by filing motions to dismiss that were denied. During trial defendants challenged much of the government's evidence, presented evidence that was excluded, and excepted to the jury instructions and the court's failure to give their proposed jury instructions.

At the close of the government's case, and after all parties rested, the defendants moved for judgment of acquittal as to each of the nine counts of the indictment.

The court has now reviewed its rulings on evidentiary issues and confirms its previous rulings. The court has reviewed the jury instructions and concludes they were not flawed. The court overrules the motion for new trial to the extent that it is based on allegedly erroneous jury instructions and assigned errors in the receipt or exclusion of evidence. To the extent the motion for new trial raises the same issues that were previously presented before trial or during trial, the motion is denied for the reasons given for previous rulings.

The court submitted this case to the jury because it concluded the evidence was sufficient for reasonable jurors to find each defendant guilty as charged on the nine counts of the indictment. Because the evidence was sufficient, the court overrules the defendants' motion for judgment of acquittal notwithstanding the verdict. In making this ruling, the court applies the principles governing motions for directed verdict that were recently explained in United States v. Pace, decided by the Court of Appeals for the Eighth Circuit on December 18, 1990, at pages 7-8 of that opinion. Defendants argue that case supports their motion for judgment of acquittal, but the court finds Pace inapposite, sharing little in common with the facts in this case.

One additional issue presented in the defendants' motion for new trial deserves further comment. Defendants contend that

they were deprived of a fair jury trial because twelve persons on the petit jury panel as of December 7, 1990, were excused from further jury service after completing their service in the case of United States v. Goddard, Criminal No. 90-101. This court's record made in the Goddard case, and its order entered in that case on December 14, 1990, explain that the twelve jurors were excused from further service after being unable to reach a verdict in the Goddard case. The case would have been retried, and the court and counsel in that case thought it best that the jurors not be in the array of jurors for the retrial. Although the parties and counsel in the Goddard case were consulted before those twelve jurors were excused from further jury service, the court subsequently learned from consultation with Chief Judge Harold D. Vietor that a proper record had not been made. Consequently the undersigned judge entered the order of December 14, 1990 (Exhibit "A" attached to defendants' motions here), returning those jurors to the list of jurors available for further jury service in this case.

The undersigned judge acknowledged in the December 14 order its error in excusing the Goddard jurors without making a proper record. But the Goddard jurors were excused after the clerk of court had already selected the jury panel to report for this Posters 'N Things case. The Goddard jurors were not included in that panel. Because the jurors selected for participation in this case were selected before this court excused from further service the Goddard trial jurors, the defendants have failed to demonstrate that this court's order in the Goddard case adversely affected them

in any way. Passing the question whether defendants in this case properly and timely raised this objection (see 28 U.S.C. §§ 1866-67), the court concludes that defendants have failed to demonstrate they were deprived of a fair jury array or fair jury trial in this case. It is plain that none of the twelve jurors excused on December 7, 1990, would have been in the jury array even if the court had not excused them on that day.

For the reasons presented in ruling on previous motions, objections, and exceptions before and during the trial, the court denies defendants' motions for new trial and for judgment of acquittal notwithstanding the verdict.

IT IS SO ORDERED.

Dated this 21st day of March, 1991.

Charles R. Wolle

CHARLES R. WOLLE, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX I

MODEL JURY INSTRUCTIONS

GOVERNMENT'S PROPOSED INSTRUCTION NO.____

21 U.S.C. 863(a)(1)

Elements of Offense

To prove a violation of Section (a)(1) of the federal drug paraphernalia statute as alleged in Count ___, the Government must show that the defendants knowingly sold or offered for sale, drug paraphernalia. Specifically, the Government must prove each of the following elements beyond a reasonable doubt:

First: That the items in question constitute drug paraphernalia;

Second: That the defendants [may insert name of defendant] knew the general nature and character of the items; and

Third: That the defendants [may insert name] knowingly sold or offered for sale drug paraphernalia.

For you to find a defendant guilty of this crime the government must prove all of these essential elements beyond a reasonable doubt as to that defendant, otherwise you must find that defendant not guilty.

21 U.S.C. § 863(a)(1)

U.S. v. Dyer, 750 F. Supp. 1278 (E.D. Va. 1990)

GOVERNMENT'S PROPOSED INSTRUCTION NO. __:

(21 U.S.C. 857(a)(1): Elements of Offense)

To prove a violation of Section (a)(1) of the federal drug paraphernalia statute as alleged in Count __, the Government must show that the defendants knowingly made use of the services of the Postal Service or other interstate conveyance as part of a scheme to sell drug paraphernalia. Specifically, the Government must prove each of the following elements beyond a reasonable doubt:

First: That the items in question constitute drug paraphernalia;

Second: That the defendants [name] knew the general nature and character of the items; and

Third: That the defendants [name] knowingly made use of the services of either the Postal Service or other interstate conveyance as part of a scheme to sell drug paraphernalia.

For you to find a defendant guilty of this crime the government must prove all of these essential elements beyond a reasonable doubt as to that defendant; otherwise you must find that defendant not guilty.

21 U.S.C. § 857(a)(1)

U.S. v. Dyer, 750 F. Supp. 1278 (E.D. Va. 1990)

GOVERNMENT'S INSTRUCTION NO.____

(21 U.S.C. 863 (a)(2) Elements of the offense)

To prove a violation of section (a)(2) of the federal drug paraphernalia statute as alleged in count_____, the Government must show that the defendants knowingly made use of the United States Mail or other facility of interstate commerce to transport drug paraphernalia. Specifically, the Government must prove each of the following elements beyond a reasonable doubt:

First: That the items in question constitute drug paraphernalia;

Second: That the defendants [name], knew the general nature and character of the items; and

Third: That the defendants [name], knowingly made use of the United States Mail or other facility of interstate commerce to transport drug paraphernalia.

For you to find a defendant guilty of this crime, the government must prove all of these essential elements beyond a reasonable doubt as to that defendant; otherwise you must find that defendant not guilty.

21 U.S.C. § 863(a)(2)

U.S. v. Dyer, 750 F. Supp. 1278 (E.D. Va. 1990)

GOVERNMENT'S INSTRUCTION NO.____

(21 U.S.C. 857 (a)(2) Elements of the offense)

To prove a violation of section (a)(2) of the federal drug paraphernalia statute as alleged in count_____, the Government must show that the defendants knowingly offered for sale and transportation in interstate or foreign commerce drug paraphernalia. Specifically, the Government must prove each of the following elements beyond a reasonable doubt:

First: That the items in question constitute drug paraphernalia;

Second: That the defendants [name] knew the general nature and character of the items; and

Third: That the defendants [name] knowingly offered for sale and transportation in interstate or foreign commerce drug paraphernalia.

For you to find a defendant guilty of this crime, the government must prove all of these essential elements beyond a reasonable doubt as to that defendant; otherwise you must find that defendant not guilty.

21 U.S.C. § 857(a)(2)

U.S. v. Dyer, 750 F. Supp. 1278 (E.D. Va. 1990)

GOVERNMENT'S PROPOSED INSTRUCTION NO.____

21 U.S.C. 863(a)(3) or 857(a)(3)

Elements of Offense

To prove a violation of Section (a)(3) of the federal drug paraphernalia statute as alleged in Count ___, the Government must show that the defendants knowingly imported or exported drug paraphernalia. Specifically, the Government must prove each of the following elements beyond a reasonable doubt:

First: That the items in question constitute drug paraphernalia;

Second: That the defendants [name] knew the general nature and character of the items; and

Third: That the defendants [name] knowingly imported or exported drug paraphernalia.

For you to find a defendant guilty of this crime the government must prove all of these essential elements beyond a reasonable doubt as to that defendant, otherwise you must find that defendant not guilty.

21 U.S.C. § 863(a)(3)

U.S. v. Dyer, 750 F. Supp. 1278 (E.D. Va. 1990)

GOVERNMENT'S PROPOSED INSTRUCTION NO. ___

(First Element: Definition of Drug Paraphernalia)

The first element of the offense that the government must prove is that the items in question constitute "drug paraphernalia." 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 the Controlled Substances Act. 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.

As a matter of law, I instruct you that the following fifteen sets of items constitute drug paraphernalia:

(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 marijuana 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.

Even if an item does not appear on this list, that item may still constitute drug paraphernalia for purposes of Section 857 (or 863). Specifically, in determining whether such an item constitutes drug paraphernalia, in addition to all other logically relevant factors, you may consider the following:

(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 items 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.

21 U.S.C. § 863(d) and (e)

GOVERNMENT'S PROPOSED INSTRUCTION NO.___

(Traditionally Intended For Use With Tobacco)

An item does not constitute drug paraphernalia if that item, in the normal lawful course of business, is traditionally intended for use with tobacco products, including any pipe, paper, or accessory. When I say "traditionally intended for tobacco use," I mean for current use with tobacco in the United States.

21 U.S.C. § 863(f)

U.S. v. 57,261 Items of Drug Paraphernalia, 705 F. Supp. 1256 (M.D. Tenn. 1988), aff'd, 869 F.2d 955, (6th Cir.), cert. denied, 110 S.Ct. 324 (1989).

GOVERNMENT'S PROPOSED INSTRUCTION NO.___

Definitions:

Primarily Intended

The term "primarily intended", as used in these instructions, does not relate to the knowledge or intent of any particular person or persons. Rather, it is for you to determine the primarily intended use of any item by considering these instructions and all logically relevant factors.

Knowledge of General Nature and Character of Item

The phrase "knew the general nature and character of the items" means that at the time of the sale or offer [or scheme to sell drug paraphernalia], the defendant was familiar with the item in the same sense that a sales person would be familiar with the merchandise that he or she sells. A defendant need not know that the item actually constituted drug paraphernalia as I have defined it to you in these instructions. That is, the law does not require that a defendant know that an item meets the legal definition of "drug paraphernalia." The law only requires that a defendant is familiar with the general nature and character of the item. Whether an item constitutes "drug paraphernalia" under the law is a matter for you, and you alone, to determine.

Interstate conveyance

"Interstate conveyance" includes the United Parcel Service, or any other carrier or package service which ships or

transports packages between states.

Scheme

The term "scheme" means a plan or design to be followed to accomplish a goal or objective. For purposes of these instructions, that goal or objective must be the sale of drug paraphernalia.

U.S. v. Dyer, 750 F. Supp. 1278 (E.D. Va. 1990)

APPENDIX J

SAMPLE SEARCH WARRANT

United States District Court

State and DISTRICT OF Colorado

In the Matter of the Search of
(Name, address or brief description of person or property to be searched)

El Dorado Trading Company, Inc.
1840 Commerce Street, Bay C
Boulder, Colorado
(See Attachment #1, Description of Location)

APPLICATION AND AFFIDAVIT FOR SEARCH WARRANT

CASE NUMBER: 91-537M

I Traci A. Kline being duly sworn depose and say

I am a(n) U.S. Customs Service Special Agent (Official Title) and have reason to believe

that ☐ on the person of or ☒ on the premises known as (name, description and/or location)

El Dorado Trading Company, Inc.
1840 Commerce Street, Bay C
Boulder, Colorado
(Further described in Attachment #1, Description of Location)

in the State and District of Colorado

there is now concealed a certain person or property, namely (describe the person or property)

(See Attachment #2, Description of Property)

which is (give alleged grounds for search and seizure under Rule 41(b) of the Federal Rules of Criminal Procedure)

(See attached Affidavit of Special Agent Traci A. Kline)

in violation of Title 21 United States Code, Section(s) 846, 857, and 841; 18 USC [illegible]

The facts to support the issuance of a Search Warrant are as follows: 19 USC 1595(a)

(See attached Affidavit of Special Agent Traci A. Kline)

Continued on the attached sheet and made a part hereof. ☒ Yes ☐ No

Traci A Kline USCS
Signature of Affiant

Sworn to before me, and subscribed in my presence

JAN 28 1991
Date

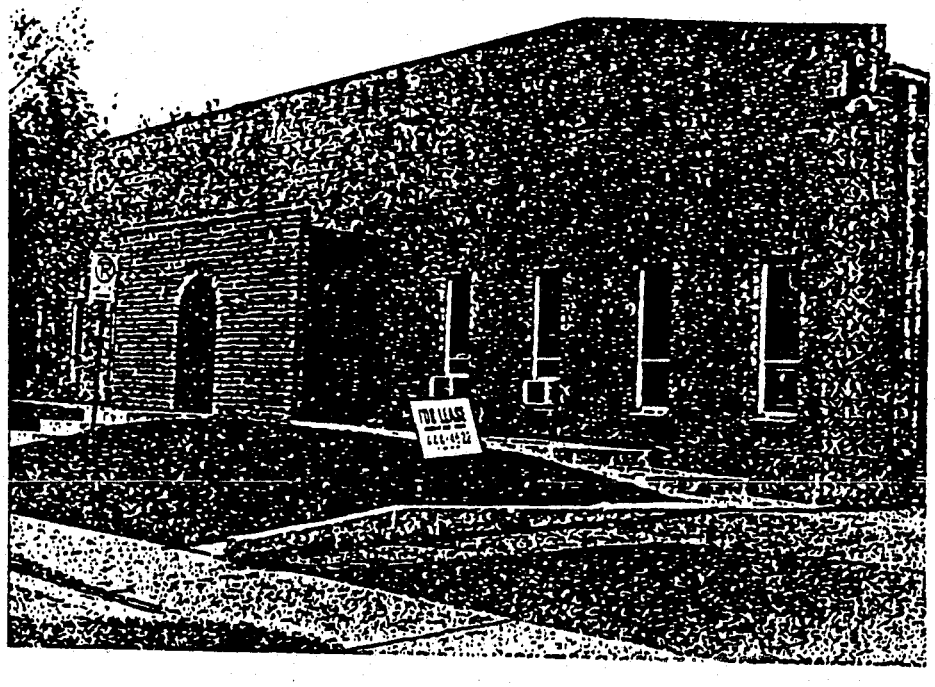
at Denver, Colorado
City and State

Hilbert Schauer. UNITED STATES MAGISTRATE
Name and Title of Judicial Officer

Signature of Judicial Officer

ATTACHMENT #1

Description of Location



1840 Commerce Street, Bay C is described as a beige and grey cinder block building located on the east side of Commerce Street. There are three loading docks located on the south side of the building and 3 pedestrian doors located on the north side of the building. There is one main entrance located on west side of the building just off of Commerce Street.

ATTACHMENT #2

DESCRIPTION OF PROPERTY

I. Any and all drug paraphernalia, as defined by 21 USC 857, to include:

1) Metal, wooden, acrylic, glass, plastic or ceramic pipes, with or without screens, permanent screens, hashish heads or punctures metal bowls.

2) Water pipes

3) Carburetion tubes and devices

4) Smoking and carburetion masks

5) Roach clips (ie: objects used to hold burning material such as a marijuana cigarette, which has become too small or too short to be held in the hand).

6) Chamber pipes

7) Carburetion pipes

8) Electric pipes

9) Air driven pipes

10) Miniature spoons with a level capacity of one-tenth centimeter or less

11) Ice pipes or chillers

12) Wired cigarette papers

13) Cocaine freebase kits

14) Glass vials (ie: small glass vials which are approximately 25mm x 95mm or smaller), and which are the type commonly used to store "rock" or "crack" cocaine, powdered cocaine and/or methamphetamine.

15) Scales (ie: gram weight scales, pocket scales and those type scales typically used to measure and divide controlled substances into smaller increments for sale).

16) Any and all other equipment, product or material of any kind primarily intended for or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling or otherwise introducing a controlled substance into the human body.

II. Business records. (To include, but not limited to: purchase orders, invoices, shipping and receiving documents, bank records, checks, check registers, cash register receipts, import/export documents, telephone records, rolodexes, supplier lists, sales purchase journals, accounting records to include receipt and disbursement journals, computer records and any computer related storage mediums to include, but not limited to, computers, computer components, computer peripherals, word processing equipment, modems, monitors, printers, plotters, encryption circuit boards, optical scanners, external hard drives, other computer related electronic devices, application software, utility programs, and any and all written or printed material which provides instructions or examples concerning the operation of a computer system, computer software and/or any related device, which specifically reflect and/or pertain to the sale, purchase, offering for sale or purchase, mailing, importation and/or shipment in interstate commerce of any drug paraphernalia, as defined in 21 USC 857, from January 1, 1987 to present. 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 the Controlled Substances Act (title II of public Law 91-513) (21 U.S.C. 801 et seq.). 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 all items referred to in section I herein.

III. Business records, (to include but not limited to purchase orders, invoices, shipping and receiving documents, bank records, checks, check registers, cash register receipts, import/export documents, telephone records, rolodexes, supplier lists, sales and purchase journals, accounting records, to include account receipts and disbursement journals, computer records and any computer related storage

mediums to include, but not limited to, computers, computer components, computer peripherals, word processing equipment, modems, monitors, printers, plotters, encryption circuit boards, optical scanners, external hard drives, other computer related electronic devices, application software, utility programs, and any and all written or printed material which provides instructions or examples concerning the operation of a computer system, computer software and/or any related device, which specifically reflect and/or pertain to the sale, purchase, offering for sale or purchase of tobacco products and tobacco accessories, from January 1, 1987, to present.

IV. Business records, (to include, but not limited to purchase orders, invoices, shipping and receiving documents, bank records, checks, check registers, import/export documents, telephone records, rolodexes, supplier lists, sales and purchase journals, accounting records, computer records and any computer related storage mediums to include, but not limited to, computers, computer components, computer peripherals, word processing equipment, modems, monitors, printers, plotters, encryption circuit boards, optical scanners, external hard drives, other computer related electronic devices, application software, utility programs, and any and all written or printed material which provides instructions or examples concerning the operation of a computer system, computer software and/or any related device, which specifically reflect and/or pertain to financial transactions which involve proceeds from any unlawful activity including the sale purchase, offer for sale and the transportation, mailing, importation and/or shipment in interstate commerce of any drug paraphernalia as defined in 21 USC 857, from January 1, 1987 to present. Drug paraphernalia has been previously identified in section II herein.

V. Written instructions provided with items of drug paraphernalia as defined by 21 USC 857, offered for sale by El Dorado, concerning their use, descriptive materials accompanying the items which depict their use, and national/local advertisements concerning the use of the item(s), any signs, disclaimers, placecards or other notices posted or not posted which are provided to the customers of El Dorado in connection with the display and sale of items of drug paraphernalia as defined by 21 USC 857.
Drug paraphernalia has been previously identified in section II herein.

VI. Any correspondence, memoranda, or other documents pertaining to membership or participation in trade associations.

APPENDIX K

SAMPLE MOTION IN LIMINE

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF VIRGINIA

Alexandria Virginia

UNITED STATES OF AMERICA	)	
	)	
v.	)	CRIMINAL NO. 90-183-A
	)	
ROBERT K. DYER, ET AL.	)	

GOVERNMENT'S MOTION IN LIMINE

Comes now the United States of America by its attorneys, Henry E. Hudson, United States Attorney for the Eastern District of Virginia, Lawrence J. Leiser and Quincy L. Ollison, Assistant United States Attorneys, and Geoffrey R. Brigham, Special Assistant United States Attorney, and hereby requests this Court to grant its motion in limine for the reasons set out in the accompanying memorandum of law.

The government requests, among other things, the exclusion of irrelevant and prejudicial argument and evidence. Defendants have suggested that they will try to introduce some of this evidence at trial. The government asks that the Court instruct the defendants and their attorneys that they may not use any tangible evidence, testimony, remarks, questions or arguments that relate to the below issues without first obtaining permission of this Court. It is further moved that defendants and their counsel be instructed to warn each of their witnesses to follow these instructions. Exclusion of such argument and evidence will avoid improper remarks in opening statements and

prejudicial admission of evidence.

The government specifically asks this Court the following:

1. To give the government's proposed preliminary jury instruction on the definition of "drug paraphernalia" at the commencement of trial; [1]

2. To exclude argument or evidence on the reliance-of-counsel defense with respect to the charged Section 857 violations, or, alternatively, to require a hearing or proffer on the defense, to order defendants not to argue that the defense is absolute, and to disallow argument or evidence on the defense when the underlying advice came from biased counsel;

3. If the advice-of-counsel defense is allowed, to disqualify those attorneys who -- before commencement of this criminal case -- advised any of the defendants on their compliance with the drug paraphernalia law in order to prevent defense counsel from being called as witnesses on the advice-of-counsel defense;

4. To bar defendants from arguing or introducing evidence at trial that the federal drug paraphernalia law is somehow vague or ambiguous, including such evidence as expert testimony on the alleged vagueness of the law, a report published by the U.S. International Trade Commission on the law in September 1989, and court decisions that found certain state drug paraphernalia laws unconstitutionally vague;

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[1] That instruction is set out in the appendix of the accompanying memorandum of law. See Appendix at 5.

5. To disallow defendants from calling the United States Attorney, Mr. Henry Hudson, as a witness to testify on the Virginia drug paraphernalia law;

6. To order defendants not to argue or introduce evidence that the United States Patent and Trademark Office (PTO) issued patents for certain items charged as drug paraphernalia in the indictment;

7. To exclude argument or evidence on the use of waterpipes and other drug paraphernalia in countries other than the United States;

8. To bar argument or evidence that local and state police officers entered defendants' businesses and failed to warn or arrest defendants for violations of state or federal drug paraphernalia laws and to disallow argument and evidence that local or state police officers bought merchandise from defendants' stores;

9. To exclude argument and evidence that non-defendant stores sold items similar to those charged in the indictment to persons (such as private detectives) who, at the time of the sale, expressed their intent to use those items with drugs;

10. To bar defendants from mentioning to the jury that the charged crimes are felonies carrying certain maximum sentences;

11. To bifurcate the issue of criminal liability and the question of forfeiture and to disallow argument and evidence concerning the possible forfeiture in this case until after the jury has rendered its guilty verdict;

12. To prohibit defendants from arguing in their opening statements any information, such as the defendant's personal history, background, present circumstances, that can be elicited only if the defendant testifies (absent an assertion that defendant will take the stand); and

13. To prohibit defendants from presenting a definition of "reasonable doubt" to the jury in their opening and closing statements.

Respectfully submitted,

HENRY E. HUDSON
UNITED STATES ATTORNEY

By: Lawrence J. Leiser (QLD)
Lawrence J. Leiser
Assistant United States Attorney

By:
Quincy L. Ollison
Assistant United States Attorney

By:
Geoffrey R. Brigham
Special Assistant
United States Attorney

CERTIFICATE OF SERVICE

This is to certify that copies of the MOTION IN LIMINE were mailed this date to counsel as listed on the attached service list.

Geoffrey R. Brigham
Special Assistant
United States Attorney

Date: June 28, 1990