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158

STATE OF ALASKA

DEPARTMENT OF LAW

CRIMINAL DIVISION

STEVE COWPER, GOVERNOR

REPLY TO:

CRIMINAL DIVISION CENTRAL OFFICE
P.O. BOX KC
JUNEAU, ALASKA 99811-0310
PHONE: (907) 465-3428

OFFICE OF SPECIAL PROSECUTIONS
AND APPEALS
1031 WEST 4TH AVENUE, SUITE 318
ANCHORAGE, ALASKA 99501-5993
PHONE: (907) 279-7424

February 24, 1989

The Honorable Jan Faiks
Alaska State Senate
P.O. Box V
Juneau, Alaska 99811

Dear Senator Faiks:

A bill to update Alaska's controlled substances schedule, SB 158, has been referred to the Judiciary Committee for consideration. As reflected on page 5, line 13, one of the substances being added to the controlled substances schedule is propylhexedrine.

We have recently been contacted by a representative of SmithKline Consumer Products, a company that manufactures a product called the "Benzedrex inhaler." This inhaler is a nasal decongestant that has propylhexedrine as its active ingredient. The manufacturer's representative brought to our attention a final rule that was published by the Drug Enforcement Administration on January 19, 1989. The rule specifically excludes the Benzedrex inhaler from the provisions of the federal Controlled Substances Act. A copy of the rule is attached for your information.

As a result of the DEA's final rule, the Benzedrex inhaler is not a controlled substance and can be sold over the counter in the United States. The product is not subject to prescription requirements or other regulatory controls applicable to controlled substances.

Since the purpose of SB 158 is to conform Alaska's controlled substances schedule to the requirements of federal law, we believe language should be added to the bill to exempt propylhexedrine in a Benzedrex inhaler. Therefore, we suggest the following amendment:

Page 5, Line 13: Insert after the word "propylhexedrine"

",except when contained in a Benzedrex inhaler"

The Honorable Jan Faiks

February 24, 1989
Page 2

If you have any questions about the proposed amendment,
or about SB 158, please let me know.

Very truly yours,

DOUGLAS B. BAILY
ATTORNEY GENERAL

By: 
Laurie H. Otto
Assistant Attorney General

Attachment

cc: Gayle Horetski, Deputy Commissioner
Department of Public Safety
Bob Evans, Office of the Governor
Robert T. Angarola

LHO:me-11

Dated: January 11, 1989

Gene R. Haislip,
Deputy Assistant Administrator, Office of
Diversion Control, Drug Enforcement
Administration.
[FR Doc. 89-1239 Filed 1-18-89; 8:45 am]
BILLING CODE 4410-09-M

DATES: Effective February 21, 1989. Comments or objections may be submitted on or before March 20, 1989.

ADDRESS: Comments or objections should be submitted in quintuplicate to: Administrator, Drug Enforcement Administration, 1405 I Street, NW., Washington, DC 20537. Attn: DEA Federal Register Representative.

FOR FURTHER INFORMATION CONTACT: Howard McClain, Jr., Chief, Drug Control Section, Drug Enforcement Administration, Washington, DC 20537. Telephone: (202) 633-1366 (FTS 833-1366).

SUPPLEMENTARY INFORMATION: The Controlled Substances Act (CSA) (21 U.S.C. 801 *et seq.*) at 21 U.S.C. 811(g)(1) requires that the Attorney General exclude any nonnarcotic substance from a schedule if such substance may, under the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 301 *et seq.*), be lawfully sold over the counter without a prescription. The Bazedrex Inhaler, NDC #49692-0928, meets the criteria for such an exclusion. The Bazedrex Inhaler contains propylhexedrine, a Schedule V nonnarcotic controlled substance as an active medicinal ingredient. The inhaler is permitted, under the FD&C Act, to be sold over the counter without a prescription. In accordance with 21 CFR 1308.21, the sponsor of the product, SmithKline Consumer Products, has applied to the Administrator of the Drug Enforcement Administration (DEA) for exclusion of the product from the provisions of the CSA pursuant to 21 U.S.C. 811(g)(1). The application has been received by the Deputy Assistant Administrator, Office of Diversion Control.

The Deputy Assistant Administrator finds that the product meets the criteria for exclusion from the CSA in accordance with 21 U.S.C. 811(g)(1). Any interested person may file written comments on or objections to this order on or before March 20, 1989. If any such comments or objections raise significant issues regarding any finding of fact or conclusion of law upon which the order is based, the Deputy Assistant Administrator shall immediately suspend the effectiveness of this order until he may reconsider the application

in light of the comments and objections filed. Thereafter the Deputy Assistant Administrator shall reinstate, revoke, or amend his original order as he determines appropriate.

The Deputy Assistant Administrator hereby certifies that this matter will have no significant impact upon small businesses or other entities within the meaning the intent of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*

The addition of a product to the list of excluded nonnarcotic over-the-counter substances has the effect of removing it from the CSA and the implementing regulations.

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

The Office of Management and Budget has determined that these changes are internal agency matters which do not require formal review by that agency.

List of Subjects in 21 CFR Part 1308

Administrative practice and procedure, Drug traffic control, Narcotics, Prescription drugs.

Under the authority vested in the Attorney General by 21 U.S.C. 811(g)(1) and delegated to the Administrator of DEA by Department of Justice Regulations (28 CFR 0.100), and redelegated to the Deputy Assistant Administrator of DEA, Office of Diversion Control by 28 CFR 0.104, the Deputy Assistant Administrator hereby amends 21 CFR Part 1308 as set forth below.

PART 1308—SCHEDULES OF CONTROLLED SUBSTANCES

1. The authority citation for 21 CFR Part 1308 continues to read as follows:

Authority: 21 U.S.C. 811, 812, 871(b).

2. Section 1308.22 is amended by adding to the table, in the appropriate alphabetical order, the product listed below.

§ 1308.22 Excluded Substances.

* * * * *

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Part 1308

Excluded Nonnarcotic Over-the-Counter Substances

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Final rule.

SUMMARY: This rule excludes the Bazedrex Inhaler from the provisions of the Controlled Substances Act, since the product meets the statutory definition of an excluded product.

EXCLUDED NONNARCOTIC OVER-THE-COUNTER SUBSTANCES

Trade name or designation	Dosage form	Composition	Potency	Manufacturer or distributor
Bazedrex Inhaler	Inhaler	Propylhexedrine	250.00 mg	SmithKline Consumer Products

go0979sE
Chenoweth
3/8/89

Original sponsor: Rules/Governor

1 IN THE SENATE

BY THE JUDICIARY COMMITTEE

2 CS SENATE BILL NO. 158 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act amending schedules IA - VA of the controlled
7 substance law and the definition of 'imitation con-
8 trolled substance.'"

9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

10 * Section 1. AS 11.71.140(b)(1) is amended to read:

11 (1) opium and opiate, and any salt, compound, derivative,
12 or preparation of opium or opiate, excluding apomorphine, dextrorphan,
13 nalbuphine, nalmefene, naloxone, and naltrexone, and their respective
14 salts, but including the following:

- 15 (A) raw opium;
16 (B) opium extracts;
17 (C) opium fluid extracts;
18 (D) powdered opium;
19 (E) granulated opium;
20 (F) tincture of opium;
21 (G) codeine;
22 (H) ethylmorphine;
23 (I) etorphine hydrochloride;
24 (J) hydrocodone;
25 (K) hydromorphone;
26 (L) metopon;
27 (M) morphine;
28 (N) oxycodone;
29 (O) oxymorphone;

1 (P) thebaine;

2 * Sec. 2. AS 11.71.140(c) is amended by adding new paragraphs to read:

3 (66) alfentanil;

4 (67) alpha-methylfentanyl (N-[1-(alpha-methyl-beta-phenyl)ethyl-4-piperidyl] propionanilide; 1-(1-methyl-2-phenylethyl)-4-
5 (N-propanilido) piperidine);

6 (68) bulk dextropropoxyphene (non-dosage form);

7 (69) carfentanil;

8 (70) sufentanil;

9 (71) tilidine;

10 (72) para-fluorofentanyl (N-(4-fluorophenyl)-N-[1-(2-phenethyl)-4-piperidinyl] propanamide);

11 (73) 3-methylfentanyl (N-[3-methyl-1-(2-phenylethyl)-4-piperidyl]-N-phenylpropanamide);

12 (74) acetyl-alpha-methylfentanyl (N-[1-(1-methyl-2-phenethyl)-4-piperidinyl]-N-phenylacetamide);

13 (75) alpha-methylthiofentanyl (N-[1-(1-methyl-2-(2-thienyl)ethyl)-4-piperidinyl]-N-phenylpropanamide);

14 (76) beta-hydroxyfentanyl (N-[1-(2-hydroxy-2-phenethyl)-4-piperidinyl]-N-phenylpropanamide);

15 (77) beta-hydroxy-3-methylfentanyl (N-[1-(2-hydroxy-2-phenethyl)-3-methyl-4-piperidinyl]-N-phenylpropanamide);

16 (78) 3-methylthiofentanyl (N-[(3-methyl-1-(2-thienyl)ethyl)-4-piperidinyl]-N-phenylpropanamide);

17 (79) thiofentanyl (N-phenyl-N-[1-(2-thienyl)ethyl-4-piperidinyl]-propanamide);

18 (80) MPPP (1-methyl-4-phenyl-4-propionoxypiperidine);

19 (81) PEPAP (1-(2-phenethyl)-4-phenyl-4-acetoxypiperidine).

20 * Sec. 3. AS 11.71.150(b) is amended by adding a new paragraph to read:

1 (20) 3,4-methylenedioxymethamphetamine (MDMA).

2 * Sec. 4. AS 11.71.150(e) is amended to read:

3 (e) Schedule IIA includes, unless specifically excepted or
4 unless listed in another schedule, any material, compound, mixture, or
5 preparation which contains any quantity of the following substances
6 having a stimulant effect on the nervous system:

7 (1) amphetamine, its salts, optical isomers, and salts of
8 its optical isomers;

9 (2) methamphetamine, its salts, isomers, and salts of its
10 isomers;

11 (3) methylphenidate;

12 (4) phenmetrazine and its salts;

13 (5) fenethylamine;

14 (6) N-ethylamphetamine;

15 (7) 3,4-methylenedioxy-N-ethylamphetamine, also known as
16 N-ethyl-alpha-methyl-3,4(methylenedioxy)phenethylamine, N-ethyl MDA,
17 MDE, and MDEA;

18 (8) N-hydroxy-3,4-methylenedioxyamphetamine, also known as
19 N-hydroxy-alpha-methyl-3,4-(methylenedioxy)phenethylamine, and N-
20 hydroxy MDA;

21 (9) 4-methylaminorex, also known as 2-amino-4-methyl-5-
22 phenyl-2-oxazoline;

23 (10) N,N-dimethylamphetamine, also known as N,N,alpha-trime-
24 thylybenzencethaneamine or N,N,alpha-trimethylphenethylamine, its salts,
25 optical isomers, and salts of optical isomers.

26 * Sec. 5. AS 11.71.160(c) is amended by adding a new paragraph to read:

27 (12) tiletamine and zolazepam, or any of their salts.

28 * Sec. 6. AS 11.71.160(f) is amended by adding new paragraphs to read:

29 (4) parahexyl;

1 (5) dronabinol (synthetic) in sesame oil and encapsulated
2 in a soft gelatin capsule in a U.S. Food and Drug Administration
3 approved drug product;

4 (6) nabilone.

5 * Sec. 7. AS 11.71.170(b) is amended by adding new paragraphs to read:

6 (21) alprazolam;

7 (22) halazepam;

8 (23) temazepam;

9 (24) triazolam;

10 (25) midazolam;

11 (26) quazepam.

12 * Sec. 8. AS 11.71.170(d) is amended to read:

13 (d) Schedule IVA includes, unless specifically excepted or
14 unless listed in another schedule, any material, compound, mixture, or
15 preparation which contains any quantity of the following substances
16 having a stimulant effect on the central nervous system, including
17 their salts, isomers whether optical, position, or geometric, and
18 salts of these isomers whenever the existence of these salts, isomers,
19 and salts of isomers is possible within the specific chemical designa-
20 tion:

21 (1) diethylpropion;

22 (2) phentermine;

23 (3) pemoline, including organometallic complexes and che-
24 lates of this substance;

25 (4) mazindol;

26 (5) pipradol;

27 (6) SPA ((-)-1-dimethylamino-1,2-diphenylethane);

28 (7) cathine;

29 (8) fencamfamin;

1 (9) fenproporex;

2 (10) mefenorex.

3 * Sec. 9. AS 11.71.180 is amended by adding new subsections to read:

4 (d) Schedule VA includes, unless specifically excepted or unless
5 listed in another schedule, any material, compound, mixture or prepa-
6 ration that contains any quantity of the narcotic drug buprenorphine
7 and its salts.

8 (e) Schedule VA includes, unless specifically excepted or unless
9 listed in another schedule, any material, compound, mixture, or
10 preparation which contains any quantity of the following substances
11 having a stimulant effect on the central nervous system, including its
12 salts, isomers and salts of isomers:

13 (1) propylhexedrine, except when contained in a Benzedrex
14 inhaler;

15 (2) pyrovalerone.

16 * Sec. 10. AS 11.73.099(3) is amended to read:

17 (3) "imitation controlled substance" means a substance
18 containing ephedrine, ephedrine sulfate, pseudoephedrine, pseudo-
19 ephedrine hydrochloride, phenylpropanolamine, caffeine, theophylline,
20 lidocaine, procaine, tetracaine, dyclonine, acetaminophen, salicyla-
21 mide, doxylamine, diphenhydramine, pheniramine, chlorpheniramine, or
22 pryirilamine, or their salts, that is not a controlled substance, and
23 that by dosage unit appearance (including color, shape, size, and
24 markings) and [OR] by representations would lead a reasonable person
25 to believe that the substance is a controlled substance; the term
26 "representations", as used in this paragraph, includes

27 (A) statements made by an owner or by anyone else in
28 control of the substance concerning the nature of the substance,
29 or its use or effect;

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(B) statements made to the recipient that the substance may be resold for inordinate profit;

(C) whether the substance is packaged in a manner normally used for controlled substances;

(D) evasive tactics or actions used by the owner or person in control of the substance to avoid detection by law enforcement authorities;

(E) the storage, packaging, presentation, display of, or reference to a controlled substance with, near, or in connection with the activity involving the imitation controlled substance.

* Sec. 11. AS 11.71.160(b)(4) is repealed.

Original sponsor(s): Rules/Governor

BY THE JUDICIARY COMMITTEE

1 IN THE SENATE

2 CS FOR SENATE BILL NO. 158 (Judiciary)
3 IN THE LEGISLATURE OF THE STATE OF ALASKA
4 SIXTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act amending schedules IA - VA of the controlled
7 substance law and the definition of 'imitation con-
8 trolled substance.'"

9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

10 * Section 1. AS 11.71.140(b)(1) is amended to read:

11 (1) opium and opiate, and any salt, compound, derivative,
12 or preparation of opium or opiate, excluding apomorphine, dextrorphan,
13 nalbuphine, nalmefene, naloxone, and naltrexone, and their respective
14 salts, but including the following:

- 15 (A) raw opium;
16 (B) opium extracts;
17 (C) opium fluid extracts;
18 (D) powdered opium;
19 (E) granulated opium;
20 (F) tincture of opium;
21 (G) codeine;
22 (H) ethylmorphine;
23 (I) etorphine hydrochloride;
24 (J) hydrocodone;
25 (K) hydromorphone;
26 (L) metopon;
27 (M) morphine;
28 (N) oxycodone;
29 (O) oxymorphone;

1 (P) thebaine;

2 * Sec. 2. AS 11.71.140(c) is amended by adding new paragraphs to read:

3 (66) alfentanil;

4 (67) alpha-methylfentanyl (N-[1-(alpha-methyl-beta-phenyl)-
5 ethyl-4-piperidyl] propionanilide; 1-(1-methyl-2-phenylethyl)-4(N-pro-
6 panilido) piperidine);

7 (68) bulk dextropropoxyphene (non-dosage form);

8 (69) carfentanil;

9 (70) sufentanil;

10 (71) tilidine;

11 (72) para-fluorofentanyl (N-(4-fluorophenyl)-N-[1-(2-phen-
12 ethyl)-4-piperidinyl] propanamide);

13 (73) 3-methylfentanyl (N-[3-methyl-1-(2-phenylethyl)-4-pi-
14 peridyl]-N-phenylpropanamide);

15 (74) acetyl-alpha-methylfentanyl (N-[1-(1-methyl-2-phene-
16 tnyl-4-piperidinyl]-N-phenylacetamide);

17 (75) alpha-methylthiofentanyl (N-[1-(1-methyl-2-(2-thienyl)
18 ethyl-4-piperidinyl]-N-phenylpropanamide);

19 (76) beta-hydroxyfentanyl (N-[1-(2-hydroxy-2-phenethyl)-4-
20 piperidinyl]-N-phenylpropanamide);

21 (77) beta-hydroxy-3-methylfentanyl (N-[1-(2-hydroxy-2-
22 phenethyl)-3-methyl-4-piperidinyl]-N-phenylpropanamide);

23 (78) 3-methylthiofentanyl (N-[(3-methyl-1-(2-thienyl)ethyl-
24 4-piperidinyl]-N-phenylpropanamide);

25 (79) thiofentanyl (N-phenyl-N-[1-(2-thienyl)ethyl-4-piperi-
26 dinyl]-propanamide);

27 (80) MPPP (1-methyl-4-phenyl-4-propionoxypiperidine);

28 (81) PEPAP (1-(2-phenethyl)-4-phenyl-4-acetoxypiperidine).

29 * Sec. 3. AS 11.71.150(b)(17) is amended to read:

1 (17) analogs of phencyclidine (PCP), including:

2 (A) ethylamine analog, also known by some trade or
3 other names as follows: N-ethyl-1-phenylcyclohexylamine (1-
4 phenylcyclohexyl)-ethylamine, N-(1-phenylcyclohexyl)ethylamine,
5 cyclohexamine, PCE;

6 (B) pyrrolidine analog, also known by some trade or
7 other names as follows: 1-(1-phenylcyclohexyl)-pyrrolidine, PCPY,
8 PHP;

9 (C) thiophene analog, also known as 1-[1-(2-thienyl)
10 cyclohexyl]piperidine and 2-thienylanalog of phencyclidine, TPCP,
11 and TCP;

12 (D) 1-[1-(2-thienyl)-cyclohexyl]-pyrrolidine, also
13 known as TCPy;

14 * Sec. 4. AS 11.71.150(b) is amended by adding a new paragraph to read:

15 (20) 3,4-methylenedioxymethamphetamine (MDMA).

16 * Sec. 5. AS 11.71.150(e) is amended to read:

17 (e) Schedule IIA includes, unless specifically excepted or
18 unless listed in another schedule, any material, compound, mixture, or
19 preparation which contains any quantity of the following substances
20 having a stimulant effect on the nervous system:

21 (1) amphetamine, its salts, optical isomers, and salts of
22 its optical isomers;

23 (2) methamphetamine, its salts, isomers, and salts of its
24 isomers;

25 (3) methylphenidate;

26 (4) phenmetrazine and its salts;

27 (5) fenethylamine;

28 (6) N-ethylamphetamine;

29 (7) 3,4-methylenedioxy-N-ethylamphetamine, also known as

1 N-ethyl-alpha-methyl-3,4(methylenedioxy)phenethylamine, N-ethyl MDA,
2 MDE, and MDEA;

3 (8) N-hydroxy-3,4-methylenedioxyamphetamine, also known as
4 N-hydroxy-alpha-methyl-3,4-(methylenedioxy)phenethylamine, and N-
5 hydroxy MDA;

6 (9) 4-methylaminorex, also known as 2-amino-4-methyl-5-
7 phenyl-2-oxazoline;

8 (10) N,N-dimethylamphetamine, also known as N,N,alpha-trime-
9 thylybenzencethaneamine or N,N,alpha-trimethylphenethylamine, its salts,
10 optical isomers, and salts of optical isomers.

11 * Sec. 6. AS 11.71.160(c) is amended by adding a new paragraph to read:

12 (12) tiletamine and zolazepam, or any of their salts.

13 * Sec. 7. AS 11.71.160(f) is amended to read:

14 (f) Schedule IIIA includes

15 (1) hashish;

16 (2) hash oil or hashish oil; [AND]

17 (3) tetrahydrocannabinols;

18 (4) parahexyl;

19 (5) dronabinol (synthetic) in sesame oil and encapsulated
20 in a soft gelatin capsule in a U.S. Food and Drug Administration
21 approved drug product; and

22 (6) nabilone.

23 * Sec. 8. AS 11.71.170(b) is amended by adding new paragraphs to read:

24 (21) alprazolam;

25 (22) halazepam;

26 (23) temazepam;

27 (24) triazolam;

28 (25) midazolam;

29 (26) quazepam.

1 * Sec. 9. AS 11.71.170(d) is amended to read:

2 (d) Schedule IVA includes, unless specifically excepted or
3 unless listed in another schedule, any material, compound, mixture, or
4 preparation which contains any quantity of the following substances
5 having a stimulant effect on the central nervous system, including
6 their salts, isomers whether optical, position, or geometric, and
7 salts of these isomers whenever the existence of these salts, isomers,
8 and salts of isomers is possible within the specific chemical designa-
9 tion:

10 (1) diethylpropion;

11 (2) phentermine;

12 (3) pemoline, including organometallic complexes and che-
13 lates of this substance;

14 (4) mazindol;

15 (5) pipradol;

16 (6) SPA ((-)-1-dimethylamino-1,2-diphenylethane);

17 (7) cathine;

18 (8) fencamfamin;

19 (9) fenproporex;

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21 * Sec. 10. AS 11.71.180 is amended by adding new subsections to read:

22 (d) Schedule VA includes, unless specifically excepted or unless
23 listed in another schedule, any material, compound, mixture or prepa-
24 ration that contains any quantity of the narcotic drug buprenorphine
25 and its salts.

26 (e) Schedule VA includes, unless specifically excepted or unless
27 listed in another schedule, any material, compound, mixture, or
28 preparation which contains any quantity of the following substances
29 having a stimulant effect on the central nervous system, including its

1 salts, isomers and salts of isomers:

2 (1) propylhexedrine, except when contained in a Benzedrex
3 inhaler;

4 (2) pyrovalerone.

5 * Sec. 11. AS 11.73.099(3) is amended to read:

6 (3) "imitation controlled substance" means a substance
7 containing ephedrine, ephedrine sulfate, pseudoephedrine, pseudo-
8 ephedrine hydrochloride, phenylpropanolamine, caffeine, theophylline,
9 lidocaine, procaine, tetracaine, dyclonine, acetaminophen, salicyla-
10 mide, doxylamine, diphenhydramine, pheniramine, chlorpheniramine, or
11 pryrilamine, or their salts, that is not a controlled substance, and
12 that by dosage unit appearance (including color, shape, size, and
13 markings) and [OR] by representations would lead a reasonable person
14 to believe that the substance is a controlled substance; the term
15 "representations", as used in this paragraph, includes

16 (A) statements made by an owner or by anyone else in
17 control of the substance concerning the nature of the substance,
18 or its use or effect;

19 (B) statements made to the recipient that the sub-
20 stance may be resold for inordinate profit;

21 (C) whether the substance is packaged in a manner
22 normally used for controlled substances;

23 (D) evasive tactics or actions used by the owner or
24 person in control of the substance to avoid detection by law
25 enforcement authorities;

26 (E) the storage, packaging, presentation, display of,
27 or reference to a controlled substance with, near, or in connec-
28 tion with the activity involving the imitation controlled sub-
29 stance.

1 * Sec. 12. AS 11.71.160(b)(4) is repealed.
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STATE OF ALASKA

DEPARTMENT OF LAW

CRIMINAL DIVISION

STEVE COWPER, GOVERNOR

REPLY TO:

CRIMINAL DIVISION CENTRAL OFFICE
P.O. BOX KC
JUNEAU, ALASKA 99811-0310
PHONE: (907) 465-3428

OFFICE OF SPECIAL PROSECUTIONS
AND APPEALS
1031 WEST 4TH AVENUE, SUITE 318
ANCHORAGE, ALASKA 99501-5993
PHONE: (907) 279-7424

November 20, 1989

RECEIVED

DEC 01 1989

JAN FAIKS
SENATE OFFICE

The Honorable Jan Faiks
Alaska State Senator
P.O. Box V
Juneau, Alaska 99811

Re: SB 158 - Controlled
Substances Schedule

Dear Senator Faiks:

As you know, the Criminal Division of the Department of Law, and the Department of Public Safety, strongly support SB 158, a bill which updates the controlled substances schedules in AS 11.71. The purpose of the bill is to criminalize the possession and sale of designer drugs, such as "Ecstasy", which are illegal under federal law but are legal under state law. We are hoping that SB 158 will pass out of Senate Judiciary in an expeditious manner in order to improve the bill's chances for passage this session.

In the past year, one new drug has been added to the federal controlled substances schedule. The drug is a hallucinogen, similar to PCP and TCP, and is called "1-[1-(2-thienyl)-cyclohexyl]-pyrrolidine" or "TCPy". We believe that TCPy should be criminalized, and suggest the following amendment to SB 158:

Page 3, following line 1:

Add a new section 4 and renumber the subsequent sections accordingly.

*Sec. 4. AS 11.71.150(b)(17) is amended by adding a new subparagraph to read:

(D) 1 -[1-(2-thienyl)-cyclohexyl]-pyrrolidine, also known as TCPy;

The Honorable Jan Faiks

November 20, 1989
Page 2

Thank you in advance for any assistance you are able to provide in securing passage of SB 158.

Very truly yours,

DOUGLAS B. BAILY
ATTORNEY GENERAL

By: 

Laurie H. Otto
Assistant Attorney General

cc: Gayle Horetski



158

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

February 3, 1989

The Honorable Tim Kelly
President of the Senate
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Mr. President:

Under the authority of art. III, sec. 18, of the Alaska Constitution, and in accordance with AS 11.71.120(b), I am transmitting a bill that amends Alaska's laws regarding controlled substances and imitation controlled substances. Passage of this bill will improve our ability to combat the problems of drug abuse in Alaska.

Alaska's present controlled substance laws were adopted in 1982. The lists of substances covered by the present laws were modelled after the lists contained in the 1979 Federal Controlled Substances Act. Several new drugs have been added to the federal schedule, but have not been added to the Alaska schedule. Thus, Alaska has no way of maintaining legal control over the sales or distribution of these drugs, recently scheduled under federal law. This bill amends the existing controlled substance schedules to conform to the federal schedules, ensuring that state law enforcement authorities will have the legal tools necessary to combat illicit trafficking in dangerous drugs.

A section-by-section analysis of the bill, explaining in detail the effect of and reasons for the proposed changes, appears below. In brief summary, secs. 2 -- 9 amend the controlled substance schedules to add substances that are controlled under federal law, but not under Alaska's law. The bill adds 42 substances to the Alaska schedules: 16 to schedule IA, seven to schedule IIA, four to schedule IIIA, 12 to schedule IVA, and three to schedule VA. The bill also reschedules one substance that has been rescheduled under the federal law, and removes from control one substance that has been removed from the federal schedule. The drug scheduling criteria set out in AS 11.71.120(c) were used to determine the appropriate level of scheduling for each substance. The section-by-section analysis below explains in detail what drugs will be added to the schedules, and why. Section 10 proposes a minor amendment

that clears a problem of vagueness in the definition of "imitation controlled substance."

SECTION-BY-SECTION ANALYSIS OF BILL

Note: Unless otherwise indicated, the descriptions of the drugs listed below are based upon materials supplied by the federal Drug Enforcement Administration (DEA).

Section 1:

This section removes the substance nalmeferne from Alaska's Controlled Substances Act by adding it to the list of exclusions in AS 11.71.140(b)(1). Currently, nalmeferne is included in schedule IA (AS 11.71.140) because it is a derivative of the listed opiod thebaine. Nalmeferne is also a derivative of the narcotic antagonist na¹+rexone, currently excepted from the state Controlled Substances Act. The DEA and the Secretary of the U.S. Department of Health and Human Services have concluded that there is insufficient scientific evidence to demonstrate that nalmeferne possesses sufficient potential for abuse to justify its continued control in any schedule of the federal Controlled Substances Act.

Section 2:

This section adds 16 narcotic substances to schedule IA: alfentanil; alpha-methylfentanyl; bulk dextropropoxyphene; carfentanil; sufentanil; tilidine; para-fluorofentanyl; 3-methylfentanyl; acetyl-alpha-methylfentanyl; alpha-methylthiofentanyl; beta-hydroxyfentanyl; beta-hydroxy-3-methylfentanyl; 3-methylthiofentanyl; thiofentanyl; MPPP; and PEPAP.

Alfentanil was placed in federal schedule I in accordance with U.S. treaty obligations under the Single Convention on Narcotic Drugs. At the request of the World Health Organization, alfentanil was examined by various groups from the Committee of Problems of Drug Dependence. The results of the study showed that alfentanil is a potent morphine-like compound with two to four times the potency of morphine when used as an analgesic.

Alpha-methylfentanyl, also known as "China White" or synthetic heroin, is a close structural analog of the Alaska schedule IA substance fentanyl. It is an analgesic approximately 80 times more potent than morphine. The substance has been placed in federal schedule I because it has a high potential for abuse and currently has no accepted use in medical treatment in the United States.

Bulk dextropropoxyphene (non-dosage form) is a federal schedule II opiate. The scheduling criteria used in Alaska require that all federal schedule I and II narcotics be

placed in Alaska's schedule IA. This substance, therefore, is placed in schedule IA. It should be noted that dextropropoxyphene in dosage form is placed in Alaska's schedule IVA and federal schedule IV. Dextropropoxyphene in dosage form is better known as the drug "Darvon." Non-dosage form was placed in federal schedule II in accordance with U.S. treaty obligations under the Single Convention on Narcotic Drugs.

Carfentanil is a narcotic substance approved by the Food and Drug Administration for marketing as a new animal drug. Carfentanil is an opiate, as defined in 21 U.S.C. 802(18), because it has an addiction-forming and addiction-sustaining ability similar to morphine. Because it has been approved for marketing, it has been placed in federal schedule II. However, because it is a narcotic substance, carfentanil is being placed in Alaska's schedule IA.

Sufentanil is contained in the federal schedule II; it is a congener of the federal schedule II narcotic substance fentanyl. Sufentanil is indistinguishable in terms of abuse potential from fentanyl, a drug used mainly in operating rooms and abused primarily by operating room personnel.

Tilidine, also known as tilidate hydrochloride, is a narcotic analgesic used in the control of moderate or severe pain. Tilidine was placed in federal schedule I in accordance with U.S. treaty obligations under the Single Convention on Narcotic Drugs.

Para-fluorofentanyl, 3-methylfentanyl, acetyl-alpha-methylfentanyl, alpha-methylthiofentanyl, beta-hydroxyfentanyl, beta-hydroxy-3-methylfentanyl, 3-methylthiofentanyl, and thiofentanyl are potent analogs of the synthetic narcotic analgesic fentanyl. Each of these fentanyl analogs behaves as a typical morphinelike compound in rodent antinociceptive tests. Each analog substitutes completely for morphine when administered to morphine-dependent withdrawn monkeys. These analogs have been produced in clandestine laboratories, identified in drug evidence submissions, and associated with a number of overdose deaths.

MPPP and PEPAP are potent analogs of meperidine, a synthetic narcotic analgesic. Produced in clandestine laboratories, MPPP and PEPAP have been identified in illicit drug trafficking. MPPP in particular has been associated with drug-induced Parkinson's disease in a number of users.

Section 3:

This section would add 3,4-methylenedioxymethamphetamine (MDMA) to AS 11.71.150(b), to place it in schedule IIA.

MDMA, the designer drug known as Ecstasy, is an analog of the substance "methamphetamine." It has a high potential for abuse and currently has no accepted medical use in the United States. It is a federal schedule I drug, but because it is a non-narcotic hallucinogenic it has been placed in Alaska schedule IIA.

Section 4:

This section would add six new substances to schedule IIA (AS 11.71.150): fenethylline; N-ethylamphetamine; 3,4-methylenedioxy-N-ethylamphetamine; N-hydroxy-3,4-methylenedioxyamphetamine; 4-methylaminorex and N,N-dimethylamphetamine.

Fenethylline is a conjugate of amphetamine and theophyllin (a methylxanthine). The drug produces a delayed, but prolonged, central nervous system stimulatory effect. Fenethylline has a high potential for abuse, has no recognized medical use in the United States, and has not been tested to determine its safety for use under medical supervision. It is a federal schedule I drug, but it has been placed in Alaska's schedule IIA because the drug is non-narcotic.

N-ethylamphetamine's pharmacological and behavioral effects are similar to those of amphetamine and methamphetamine. It is a federal schedule I substance with a high potential for abuse, and no known medical use in the United States. It has been placed in Alaska's schedule IIA because the drug is non-narcotic.

3,4-methylenedioxy-N-ethylamphetamine and N-hydroxy-3,4-methylenedioxyamphetamine are analogs of the schedule IIA substance methamphetamine (MDA). 4-methylaminorex has a pharmacological profile that closely resembles that of amphetamine; it has been described as a potent central nervous system stimulant.

Because N,N-dimethylamphetamine has no current accepted medical use, it has been placed in federal schedule I. N,N-dimethylamphetamine belongs to the chemical class of compounds known as phenylisopropylamines. Amphetamine and methamphetamine also belong to this class. N,N-dimethylamphetamine is very similar in molecular structure to amphetamine and methamphetamine and produces central nervous system stimulant effects. Because N,N-dimethylamphetamine is a non-narcotic stimulant, it is being placed in Alaska schedule IIA.

The federal 1984 Crime Control Act provided the Drug Enforcement Administration with emergency scheduling authority, to avoid an imminent hazard to the public safety. This scheduling procedure was established with the onset of the illicit manufacture and distribution of designer drugs. Federal law defines a designer drug as:

New chemical analogs or variations of existing controlled substances, or other new substances, which have a psychedelic, stimulant, depressant, or narcotic effect and have a high potential for abuse.

Scheduling under this authority is effective for one year and is not applicable to substances for which there is an exemption under the Federal Food, Drug, and Cosmetic Act (e.g., investigational new drugs and new drug applications). To classify a substance under its emergency powers, the DEA must publish a notice of the classification in the Federal Register; the classification becomes effective after 30 days. On October 30, 1987, 3,4-methylenedioxy-N-ethylamphetamine and N-hydroxy-3,4-methylenedioxyamphetamine and 4-methylaminorex were scheduled in this manner. On October 14, 1988, a proposed rule was published to permanently schedule these three substances. It is anticipated that, by the time this legislation is being considered, a final rule scheduling these substances will have been signed.

On August 3, 1988, the administrator of DEA issued a final rule temporarily placing N,N-dimethylamphetamine into federal schedule I. According to DEA, a final rule permanently scheduling this substance will be published within the next several months.

Section 5:

This section places the substance "tiletamine and zolazepam" into schedule IIIA, by adding it to AS 11.71.-160(c). Tiletamine is a chemical analog of phencyclidine and has pharmacological properties similar to that substance. Zolazepam is a chemical analog of the schedule IVA benzodiazepines. As a combined substance it is used by veterinarians as a tranquilizer. This scheduling action facilitates the marketing of a veterinary pharmaceutical product and minimizes the likelihood of the product being abused.

Section 6:

This section places the following substances into AS 11.71.-160(f), to add them to schedule IIIA: parahexyl, dronabinol, and nabilone. Because these substances are THC analogs that are chemically and pharmacologically similar to THC, they have been placed in Alaska schedule IIIA.

Parahexyl is a synthetic analog of delta-9-tetrahydrocannabinol (THC). Parahexyl has no known medical use in the United States. It has been placed in federal schedule I.

Dronabinol (synthetic) in sesame oil and encapsulated in soft gelatin capsules in a Food and Drug Administration-approved drug product: Dronabinol is the synthetic equivalent of the isomer delta-9-tetrahydrocannabinol, the principal psychoactive substance in marijuana. Dronabinol is used to treat nausea and vomiting associated with cancer chemotherapy in patients who have failed to respond adequately to conventional antiemetic treatment.

Nabilone is a synthetic analog of delta-9-tetrahydrocannabinol (THC). It is used to treat nausea and vomiting associated with cancer chemotherapy. Nabilone has been placed in federal schedule II.

Section 7:

This section adds six benzodiazepines to schedule IVA (AS 11.71.170): alprazolam, halazepam, temazepam, triazolam, midazolam, and quazepam. Each substance is an anti-anxiety agent substantially similar to other benzodiazepines currently listed in Alaska's schedule IVA. All six substances have been classified into the federal schedule IV.

Section 8:

This section places the substance mazindol in schedule IVA (AS 11.71.170) (see sec. 11 description, below). Section 8 also adds six other substances to schedule IVA: pipradol, SPA, cathine, fencamfamin, fenproporex and mefenorex.

Pipradol is a mild central nervous system stimulant. Its effects resemble those of the amphetamines, but the usual therapeutic dose of pipradol results in less euphoria, anorexia, and insomnia. It is an effective anti-depressant without the extreme central nervous system stimulation found in the amphetamines.

SPA is a substance marketed in Japan. It exhibits the same properties as morphine and methamphetamine, but with analgesic effects. Results of a study conducted by the University of Michigan showed that SPA has no physical dependence capacity.

Cathine is scheduled in accordance with the 1971 Psychotropic Convention. It is a stimulant derived from the Khat plant and originates in the Middle East.

Fencamfamin, fenproporex, and mefenorex are also stimulants.

Cathine, fencamfamin, fenproporex, and mefenorex are scheduled in accordance with the 1971 Psychotropic Convention. During its February 1986 session, the United Nations Commission on Narcotic Drugs (CND) decided to include 17 phenethylamines in the schedules of the Convention on Psychotropic Substances. These substances are among the 17.

Section 9:

This section classifies the substance buprenorphine as a schedule VA drug by placing it in proposed AS 11.71.180(d). The DEA has placed buprenorphine into federal schedule V. It had previously been considered a federal schedule II drug because it is a derivative of the substance thebaine (a schedule IA narcotic in Alaska). The DEA has found that buprenorphine has a low potential for abuse, has a currently accepted medical use, and has limited potential for physical or psychological dependence.

This section also adds propylhexedrine and pyrovalerone to schedule VA by placing them in proposed AS 11.71.180(e).

Propylhexedrine and pyrovalerone are psychotropic substances. Currently pyrovalerone is neither manufactured nor distributed commercially in the United States. Propylhexedrine is marketed in the over-the-counter nasal decongestant inhalers.

These two substances are being scheduled in accordance with the 1971 Psychotropic Convention, and are among the 17 phenethylamines included in the schedules of the Convention on Psychotropic Substances by the United Nations Commission on Narcotic Drugs (CND) during its February 1986 session.

Section 10:

This section amends the language of existing AS 11.73.-099(3), which defines "imitation controlled substance." The minor amendment, substitution of "and" for "or," corrects an oversight in the imitation controlled substances law, which was enacted in 1983. The amendment changes the elements of the crime to require that a person actually make explicit or implied representations about the character of the substance. These representations and the item's appearance are facts that a judge or jury would con-

sider when deciding whether, under all the circumstances of the case, a reasonable person would have believed the substance to be controlled. The law as presently written is vague -- perfectly legal substances sold over a drug store counter might be similar in appearance to items that are manufactured and sold illicitly. A person should be able to legally possess these substances if the person has no intent to pass them as counterfeit substances.

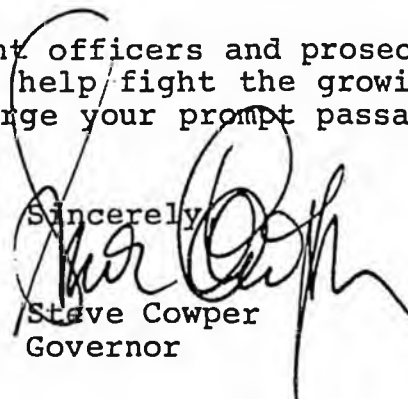
The Alaska Court of Appeals pointed out the vagueness in the current definition of "imitation controlled substance" in its recent decision in Morrow v. State, 704 P.2d 226, 232 (Ak. App. 1985). The court was not able to determine, under the facts in the record in that particular case, whether the defendant's conviction should be reversed; the appellate court remanded the case to the trial court for factual findings. Although the conviction in the Morrow case was not reversed, it is important to clarify the language of the definition -- both to ensure that the problem does not recur in the future and to give people fair notice of the types of conduct that are prohibited under the law.

Section 11:

This section removes the substance mazindol from Alaska's schedule IIIA (AS 11.71.160). Mazindol has been transferred to schedule IVA (AS 11.71.170) (see sec. 8, above). This change has been made because mazindol is an anorectic substance that has a lower potential for abuse than other schedule IIIA anorectics; it also presents less danger of psychological dependence relative to other anorectics in schedule IIIA.

To ensure that law enforcement officers and prosecutors have the necessary legal tools to help fight the growing problem of drug abuse in Alaska, I urge your prompt passage of this bill.

Sincerely,



Steve Cowper
Governor

STATE OF ALASKA

DEPARTMENT OF LAW

CRIMINAL DIVISION

STEVE COWPER, GOVERNOR

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March 13, 1989

The Honorable Jan Faiks
Chair, Senate Judiciary Committee
P.O. Box V
Juneau, Alaska 99811

Re: SB 158
Controlled Substances

Dear Senator Faiks:

You asked for a brief description of the major differences between the Alaska statutes scheduling controlled substances and the federal drug schedules. The best source for this information is the commentary to the 1982 revision of Alaska's controlled substances laws. A chart comparing the two schedules is set out as Appendix D to the commentary, which is attached for your information.

Alaska's Controlled Substances Act implements a comprehensive statutory scheme to control the possession, use, sale, and distribution of licit and illicit drugs in the state through a logical classification and penalty structure. The primary purpose of our law is to provide a basis for criminal prosecutions. In contrast, the federal laws fulfill the additional function of regulating the sale and production of a wide range of substances intended for human consumption.

In summary, the differences between the federal and state laws are:

A. The federal law considers whether the substance has an accepted medical use; this criterion is not considered under Alaska law.

B. Alaska considers whether there is a relationship between the use of the substance and other criminal activity; this criterion is not considered under federal law. As a result, simple possession of cocaine and heroin is a felony in Alaska even though it is a misdemeanor under federal law. See 21 U.S.C. § 844.

C. The schedule labeling differs. The federal schedules are labeled I through V. Under Alaska law, the schedules are labeled IA through VIA. (The "A" was added to clearly differentiate between the federal and the Alaska schedules.)

D. Under Alaska law, all federal schedule I & II narcotics are classified as Schedule IA, and all federal schedule I & II non-narcotics are classified as Schedule IIA.

E. Marijuana was placed in a separate schedule labeled VIA, in accordance with constitutional constraints placed on the regulation of marijuana by the Alaska Supreme Court.

The general criteria for scheduling drugs in Alaska are set out below:

AS 11.71.120(c)

In advising the governor of the need to add, delete, or reschedule a substance under AS 11.71.110(1), the committee shall assess the danger or probable danger of the substance after considering the following:

- (1) the actual or probable abuse of the substance including
 - (A) the history and current pattern of abuse both in this state and in other states;
 - (B) the scope, duration, and significance of abuse;
 - (C) the degree of actual or probable detriment which may result from abuse of the substance;
 - (D) the probable physical and social impact of widespread abuse of the substance;
- (2) the biomedical hazard of the substance including
 - (A) its pharmacology, in the effects and modifiers of the effects of the substance;
 - (B) its toxicology, the acute and chronic toxicity, interaction with other substances, whether controlled or not, and the degree to which it may cause psychological or physiological dependence;
 - (C) the risk to public health and the particular susceptibility of segments of the population;
- (3) whether the substance is an immediate precursor of a substance already controlled under this chapter;
- (4) the current state of scientific knowledge regarding the substance, including whether there is any acceptable means to safely use the substance under medical supervision;
- (5) the relationship between the use of the substance and other criminal activity, including
 - (A) whether persons engaged in illicit trafficking of the substance are also engaged in other criminal activity;
 - (B) whether the nature and relative profitability of manufacturing or delivering the substance encourages illicit trafficking in the substance;
 - (C) whether the commission of other crimes is one of the effects of abuse of the substance;
 - (D) whether addiction to the substance relates to the commission of crimes to support the continued use of the substance.

It may be helpful to consider the following comparison of the specific factual findings that serve as the basis for drug scheduling under the state and federal controlled substances laws.

Federal Findings for Drug
Classification

State Findings for Drug
Classification

Schedule I

- A. The drug has a high potential for abuse;
- B. The drug has no currently accepted medical use in treatment in the United States; and
- C. The drug is not accepted as safe for use under medical supervision.

Schedule IA

Is found to have the highest degree of danger or probable danger to a person or the public under AS 11.71.120(c).

Schedule II

- A. The drug has a high potential for abuse;
- B. The drug has a currently accepted medical use in treatment in the United States; and
- C. Abuse may lead to severe psychological or physical dependence.

Schedule IIA

Is found under AS 11.71.120(c) to have a degree of danger or probable danger to a person or the public which is less than substances listed in schedule IA, but higher than substances listed in schedule IIIA.

Schedule III

- A. The drug has a potential for abuse less than the drugs in schedules I and II;
- B. The drug has a currently accepted medical use in treatment in the United States; and
- C. Abuse may lead to moderate or low physical dependence or high psychological dependence.

Schedule IIIA

Is found under AS 11.71.120(c) to have a degree of danger or probable danger to a person or the public less than the substances listed in schedule IIA but higher than substances listed in schedule IVA.

Schedule IV

- A. The drug has a low potential for abuse relative to the drugs in schedule III;
- B. The drug has a currently accepted medical use in treatment in the United States; and
- C. Abuse may lead to limited physical dependence or psychological dependence relative to the drugs in schedule III.

Schedule IVA

Is found under AS 11.71.120(c) to have a degree of danger or probable danger to a person or the public which is less than the substances listed in schedule IIIA, but higher than substances listed in schedule VA.

Schedule V

- A. The drug has a low potential for abuse relative to the drugs in schedule IV;
- B. The drug has a currently accepted medical use in treatment in the United States;
- C. Abuse may lead to limited physical dependence or psychological dependence relative to the drugs in schedule IV.

Schedule VA

Is found under AS 11.71.120(c) to have a degree of danger or probable danger to a person or the public which is less than substances listed in schedule IVA, but higher than substances listed in schedule VIA.

Schedule VIA

Is found under AS 11.71.120(c) to have the lowest degree of danger or probable danger to a person or the public.

The Honorable Jan Faiks

March 13, 1989

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I hope your questions about controlled substances scheduling in Alaska have been answered, and that the Senate Judiciary Committee is now in a position to pass judgment on SB 158. As you know, the bill was introduced pursuant to the legislative mandate set out in AS 11.71.120(b): "If a substance is added as a controlled substance under federal law, the governor shall introduce legislation in accordance with the federal law."

Very truly yours,

DOUGLAS B. BAILY
ATTORNEY GENERAL

By: 

Laurie H. Otto
Assistant Attorney General

Attachment

cc: Gayle Horetski, Deputy Commissioner
Department of Public Safety
Bob Evans
Gwen Prewitt

COMMENTARY AND SECTIONAL ANALYSIS FOR THE
1982 REVISION OF ALASKA'S CONTROLLED
SUBSTANCES LAWS

CONFERENCE COMMITTEE SUBSTITUTE FOR SENATE BILL No. 190

INTRODUCTION

This legislation implements a comprehensive statutory scheme to control the possession, use, sale, and distribution of licit and illicit drugs in the state through a logical classification and penalty scheme consistent with the revised criminal code which took effect on January 1, 1980.

The legislation is patterned after the federal Controlled Substances Act of 1970 (P.L. 91-513) and the Uniform Controlled Substances Act, adopted by the National Conference of Commissioners on Uniform State Laws. It is designed to provide for relative uniformity among the laws of the states and the federal government. The federal and uniform acts have served as models for 44 states which have revised their outdated drug laws over the last decade.

The main objective and advantage of the uniform act and of this legislation is to create a single coordinated statutory system of drug control similar to that now in effect at the federal level and in most other states.

The legislation establishes seven degrees of offenses involving controlled substances in chapter 71 of the revised criminal code, Title 11 of the Alaska

3. Each offense is entitled Miscellaneous Offense, with the degree of the offense indicating the relative seriousness of the prohibited act. The first degree crime is the most serious offense, while the seventh degree offense is the least serious.

Each offense is classified within the structure of the revised criminal code. Sentencing will occur pursuant to AS 12.55, with the presumptive sentencing provisions of that chapter applying to eligible felony offenders. Consequently, a judge's discretion in sentencing a defendant convicted of a felony drug offense who has previously been convicted of any other felony offense will be substantially restricted. This sentencing structure is designed to provide emphasis on the more serious offenses under the legislation, including the delivery of a controlled substance to a minor and the commercial sale of such substances as heroin, cocaine, LSD and amphetamines.

In addition to providing penalties for unlawful acts involving controlled substances, the bill establishes a closed regulatory system for legitimate handlers of controlled substances to curtail drug diversion into illegitimate channels. This system requires, for example, registration, maintenance of records, and the use of uniform order forms. Compliance with federal requirements satisfies state law, so that pharmacists, doctors, researchers and manufacturers of controlled substances are not sub-

jected to conflicting state and federal requirements pertaining to registration, recordkeeping, order forms, and prescriptions.

COMMENTARY AND SECTIONAL ANALYSIS

Section 1. DECLARATION OF LEGISLATIVE PURPOSE.

This section states the purpose of the comprehensive revision of Alaska's drug laws and highlights the two concerns that are addressed in the legislation. The purpose of the revision is the enactment of legislation patterned after federal law and the uniform act containing penalty provisions in conformity with the revised criminal code in order to effectively combat illicit trafficking in controlled substances. The legislation addresses both public safety and public health concerns associated with controlled substances. The revisions to Title 11 address public safety concerns by providing penalties for unlawful acts involving controlled substances, while the revisions to Title 17 address public health concerns by regulating the legitimate handling of controlled substances to prevent diversion of drugs to illicit channels.

This legislation is intended to strike a balance between the sometimes conflicting provisions of the state constitutional right to privacy (Art. I, Sec. 22) and the need to protect the public health. In striking this balance, the legislation addresses the enforcement ambiguities created by the decision of the Alaska Supreme Court

in Ravin v. State, 537 P.2d 494 (Alaska 1975), which held that the state constitutional right to privacy protects the possession and use of marijuana, by an adult, for personal use in the home in a non-commercial context.

While recognizing the constitutional right to privacy, this legislation, at the same time, recognizes that marijuana poses a serious threat to the public health, particularly in cases involving the use of marijuana by minors. In approving this Act, the legislature does not intend in any way to condone or encourage the possession, use or delivery of marijuana by any person in Alaska.

Section 2. AS 11.71. CONTROLLED SUBSTANCES.

Secs. 11.71.010--11.71.900 add a new chapter to the revised criminal code containing articles which define prohibited conduct involving controlled substances, establish the Controlled Substances Advisory Committee, classify controlled substances into six schedules and define terms used throughout the chapter.

ARTICLE 1. OFFENSES RELATING TO
CONTROLLED SUBSTANCES

This article defines the seven offenses involving controlled substances. Each offense is classified under the general classification scheme applicable to the revised criminal code. See AS 11.81.250, Classification of Offenses. The penalties for each offense are specified

in AS 12.55. A chart showing the classification and penalty for each offense appears as APPENDIX A. The general provisions of the revised criminal code, including the rules on culpability, are also applicable to these crimes.

It should also be noted that each of the seven offenses provides in the introductory clause in subsection (a), that if the otherwise prohibited conduct is authorized by AS 17.30 or AS 17.35, an offense has not occurred. Those chapters regulate the legitimate handling of controlled substances by persons such as manufacturers and pharmacists.

Sec. 11.71.010. MISCONDUCT INVOLVING A CONTROLLED SUBSTANCE IN THE FIRST DEGREE.

This crime defines the most serious conduct prohibited by this legislation. The offense is an unclassified felony, and under AS 12.55.125(b), is punishable by a term of imprisonment of at least five years but not more than 99 years. Several separate acts are prohibited: (1) delivering a schedule IA (including heroin and methadone) controlled substance to a person under 19 who is at least three years younger than the defendant; (2) delivering a schedule IIA (including LSD and cocaine) or schedule IIIA controlled substance (including hashish and barbiturates) to a person under 19 who is at least three years younger than the defendant; and (3) engaging in a "continuing criminal enterprise."

For all offenses involving the "delivery" (defined in sec. 11.71.900(6)) of a controlled substance to a minor (secs. 11.71.010(a)(1); 11.71.010(a)(2); and 11.71.030(a)(2)), the ages of both the defendant and the minor are of importance. The minor must be under 19 and the defendant must be at least three years older than the minor. The purpose of this age differential is to prevent the imposition of aggravated penalties in a case, where, for example, a 19-year-old shares a controlled substance with a 17-year-old friend. Statutes in several other states, as well as the Uniform Controlled Substances Act, contain a similar three-year age difference requirement. The cut-off age of 19 for offenses involving minors receiving or possessing controlled substances has been selected in order to be consistent with laws involving alcohol in Title 04. One exception to the differentiation between minors and adults at age 19 is the provision where a person 18 or older who possesses a controlled substance on school grounds can be prosecuted and convicted of an aggravated possession offense. See secs. 11.71.030(a)(3); 11.71.040(a)(4).

As previously noted, no culpable mental state is specified in sec. 11.71.010(a)(1) and (a)(2) with respect to the age of the minor. It is the intent of the legislature, consistent with AS 11.81.610(b)(2), that a defendant must act "recklessly" as to the age of the minor in order to be convicted under these subsections. There are sev-

eral reasons for the selection of the "reckless" standard, rather than one of strict liability, which is the standard used with respect to the amount of a substance possessed or delivered. The reasons center around fairness to the defendant. Delivery of a IA, IIA or IIIA controlled substance to a minor is the most serious drug offense, an unclassified felony, with a mandatory minimum of five years imprisonment. Delivery of any other controlled substance to a minor is also a serious crime, a class B felony. Thus, due process concerns justify requiring some culpable mental state with respect to one of the circumstances of the offense, the age of the minor. Another factor is that the age of the minor may not be as easily ascertainable as, for example, the number of tablets a person possesses. It should be noted, however, that a "reasonable belief" that the minor was 19 or over and/or less than three years younger than the deliveror, is not a defense to a charge of delivery of a controlled substance to a minor. Compare State v. Guest and Evan, 583 P.2d 836 (Alaska 1978).

As with all offenses in this chapter, the defendant is not required to act with any culpable mental state regarding the classification of a substance or the fact that possession of the substance is prohibited by law. See AS 11.81.620(a). The defendant, of course, must know that he possesses the substance.

Schedule IA substances are listed in sec. 11.71-.140 and are discussed in the commentary accompanying that section. Heroin and opium are two examples of schedule IA controlled substances. Schedule IIA substances are listed in sec. 11.71.150, and schedule IIIA substances in sec. 11.71.160. Cocaine, LSD, PCP, peyote, mescaline, methamphetamine and methaqualone are scheduled in IIA, while schedule IIIA contains such substances as hashish, barbiturates and narcotics mixed with non-narcotics in specified proportions. As with all other offenses involving the delivery of controlled substances, except schedule VIA substances, this provision requires that "any amount" of the substance be involved. Consequently, the purity of the substance is irrelevant in determining whether an offense has been committed. It is unnecessary that a useable quantity of the substance be involved, as the statute prohibits certain acts involving "any amount" of the substance. See, e.g., Judd v. State, 482 P.2d 273, 280 (Alaska 1971). See also commentary accompanying sec. 11.71.320.

Sec. 11.71.010(a)(3), which prohibits engaging "in a continuing criminal enterprise," is patterned after a similar federal law defined in 21 U.S.C. §848(b). In paralleling the federal statute to a significant degree, it is expected that federal case law will be of assistance to the Alaska courts in applying the provision.

States v. Bergdoll, 412 F. Supp. 1308 (D. Del. 1976).

Sec. 11.71.020. MISCONDUCT INVOLVING A CONTROLLED
SUBSTANCE IN THE SECOND DEGREE.

This offense, a class A felony punishable by a maximum of 20 years imprisonment, prohibits three acts: manufacturing (defined in sec. 11.71.900(13)), or delivering any amount of a schedule IA controlled substance or possessing (defined in sec. 11.81.900(b)(41)) any amount of such a substance with the intent to manufacture or deliver.

Under subsection (a), the defendant need not actually deliver the substance. Possession of the substance with that intent is sufficient to support a conviction. The definition of "deliver" in sec. 11.71.900(6) does not require that the transfer constitute a sale. Merely transferring the substance, or attempting to do so, would constitute a "delivery" under the statute, without regard to remuneration.

Sec. 11.71.030. MISCONDUCT INVOLVING A CONTROLLED
SUBSTANCE IN THE THIRD DEGREE.

This offense, a class B felony punishable by a maximum sentence of 10 years, prohibits three forms of conduct: (1) manufacturing or delivering a schedule IIA or IIIA substance, or possessing any of those substances with intent to manufacture or deliver; (2) delivering a schedule IVA (including tranquilizers such as valium), VA,

The definition of "continuing criminal enterprise" in subsection (b) contains a requirement that the current offense be part of a continuing series of five or more violations of the chapter. A particular number of violations is not specified in the federal statute. The term "violation" does not mean "conviction". See generally, United States v. Michel, 588 F.2d 986 (5th Cir. 1979); cert. den. 444 U.S. 825, 62 L. Ed. 2d 32; United States v. Fry, 413 F. Supp. 1269, 1272 (E.D. Mich. 1976) ("series means three or more related acts") (emphasis added). This offense is not an "habitual" or "repeat" offender statute, nor do all the violations necessarily have to be felony offenses, so long as at least one violation is a felony. See sec. 11.71.010(b)(1).

The purpose of the "continuing criminal enterprise" provision is "to punish and take out of circulation persons who are engaged in the manufacture and sale of drugs primarily for the profits to be derived therefrom." United States v. Jeffers, 532 F.2d 1101, 1110 (7th Cir. 1976), aff'd in part, vacated in part on other grounds, 432 U.S. 137, 53 L. Ed. 2d 168, reh. den. 434 U.S. 880, 54 L. Ed. 2d 164. See also United States v. Valenzuela, 596 F.2d 1361 (9th Cir. 1979), cert. den. 444 U.S. 865, 62 L. Ed. 2d 88; United States v. Bolts, 558 F.2d 316 (5th Cir. 1977), cert. den. 434 U.S. 930, 54 L. Ed. 2d 290; United States v. Sperling, 506 F.2d 1323 (2d Cir. 1974), cert. den. 420 U.S. 962, 43 L. Ed. 2d 439; United

stances on school grounds and can still be prosecuted under the aggravated possession sections, do not pose as serious a hazard to children. Once the state has proven beyond a reasonable doubt that the defendant is 18 or over and that he knowingly possessed a controlled substance on school grounds, the defendant may establish, by a preponderance of the evidence, that at the time of his possession, the school was closed to any organized activity involving juveniles. An example would be the night janitor in a school, who at 2:00 a.m., possesses a marijuana cigarette for his own use. Successfully raising the affirmative defense, however, does not release the defendant from all criminal liability; the defendant could still be convicted of possession of the controlled substance under another statute as a lesser-included offense. The night janitor in the example above could be convicted of Misconduct Involving a Controlled Substance in the Seventh Degree, sec. 11.71.070(a)(2), for possessing less than one ounce of a substance containing marijuana while in a public place.

As used in the affirmative defense, the phrase "any organized activity" includes school as well as non-school activities, so long as the activities are of a type that involve persons under 18. Use of the word "organized" is intended to require that the activity be sanctioned by school officials. Finally, it is important to note that if the circumstances of the possession reveal an

or VIA (marijuana) controlled substance to a person under 19 who is at least three years younger than the defendant; and (3) being 18 or older, possessing any amount of a schedule IA or IIA substance within the grounds of a school or on a parking lot immediately adjacent to the school.

The conduct prohibited by paragraphs (1) and (2) of this statute has been discussed in the commentary accompanying the first and second degree offenses. The only difference between this section and the comparable provisions in the more serious crimes is, of course, the schedule of the substance involved.

Sec. 11.71.030(a)(3) (as well as its companion provision in sec. 11.71.040(a)(4) which applies to schedule IIIA-VIA controlled substances) is an aggravated possession offense intended to deter adults from possessing a controlled substance while in or near schools and school children. The protection of this provision extends to public and private schools, up to and including high schools. The requirement that the defendant be 18 or older is consistent with the general treatment of an 18-year-old as an adult when he commits an offense.

The "affirmative defense" (a term that is defined in AS 11.81.900(b)(1)) specified in subsection (b)(and the companion provision in sec. 11.71.040(b)) prevents conviction under the "school grounds" provision of a class of persons who, while they unlawfully possess controlled sub-

concerning Article 1 of AS 11.71 in this commentary, it is the intent of the legislature that strict liability be applied to the circumstance of the amount of the substance involved in an offense prosecuted under this provision, as well as under other provisions defining the level of an offense based on the amount involved. Compare the discussion in the commentary under sec. 11.71.010, where the culpable mental state of "reckless" must be shown regarding the age of the minor. The amount of a controlled substance, whether by weight or number of tablets, can be determined objectively and easily, where the age of a minor may not be.

In a prosecution under paragraph (2), it is irrelevant whether the defendant received remuneration for the delivery. It should be noted, however, that sec. 20 of the bill adds a new mitigating factor to the list presently included in AS 12.55.155(d), which can be considered at sentencing, that the defendant delivered a small amount of any controlled substance in schedules IIA through VIA to an adult for no remuneration.

Paragraph (3) prohibits the knowing possession of various amounts of controlled substances. Again, strict liability is to be applied to the defendant's awareness of the amount of the substance possessed. See AS 11.81-.600(b)(2). Cf. AS 11.81.610(b)(2). For example, if a person possesses 30 tablets of a schedule IIIA controlled substance, a class C felony, it is irrelevant, and not a

intent to deliver the substance to another person, the defendant can be prosecuted for a more serious crime, such as Misconduct Involving a Controlled Substance in the Second Degree under sec. 11.71.020(a).

Sec. 11.71.040. MISCONDUCT INVOLVING A CONTROLLED SUBSTANCE IN THE FOURTH DEGREE.

This offense, a class C felony punishable by a maximum term of imprisonment of five years, prohibits ten forms of conduct.

Paragraph (1) prohibits manufacture, delivery, or possession with the intent to manufacture or deliver any amount of a schedule IVA (common tranquilizers) or VA (primarily liquid cough suppressants) controlled substance. Again, the term "any amount" means that the purity of the substance and whether there is a "useable amount" of the substance are irrelevant, so long as there is enough of the controlled substance present for proper identification. See commentary accompanying sec. 11.71.320.

Paragraph (2) prohibits manufacture, delivery or possession with the intent to manufacture or deliver one ounce or more of marijuana, a schedule VIA controlled substance. This paragraph is the first of four provisions in this legislation establishing a penalty scheme for the delivery of marijuana, other than to a minor. The other three provisions cover delivery of less than an ounce of marijuana. As previously noted in the general discussion

stance is present. The purity of the substance is irrelevant in determining weight.

For example, the definition of "marijuana" in sec. 11.71.900(14) provides that some parts of the plant cannabis (those which contain the active ingredient "THC", such as leaves, flowers, and seeds) are "marijuana", while some parts (such as stalks) are not. Under sec. 11.71-.040(a)(3)(F), for example, if a person possesses one pound of cannabis stalks, he does not commit a crime. But if he possesses 10 ounces of leaves, flowers or seeds and 10 ounces of stalks all mixed together, he possesses one pound or more of marijuana for purposes of prosecution.

The "aggregate weight" standard, rather than a "pure weight" standard, has been adopted because it would be almost impossible for law enforcement officials or chemists to separate out all the individual pieces of marijuana from non-marijuana, or to separate out grains of a controlled substance which has been "cut" with a similar-appearing non-controlled substance, and then to test chemically each of the individual pieces or grains. The State of New York encountered such enforcement problems when it revised its statutes relating to marijuana in 1977, changing from an aggregate weight basis to one of pure weight. The problems surfaced in the case of People v. Davis, 408 N.Y.S.2d 748 (N.Y. 1978). There, the defendant was charged with violating one of the marijuana laws under New York's revised pure weight test. New

defense, that he thought he possessed less than 25 tablets, which would have made the conduct a class A misdemeanor. Possession of controlled substances in amounts less than those specified in paragraph (3) are covered by the fifth and sixth degree crimes. The amount distinctions between felony and misdemeanor possession offenses for controlled substances in schedules IIIA through VIA are intended to deter the possession of larger amounts of a controlled substance through imposition of felony penalties, while treating the person who possesses a smaller amount of a controlled substance (which is consistent with personal use) less severely. If the circumstances of the defendant's conduct show beyond a reasonable doubt that the defendant possessed the substance with an intent to deliver, prosecution could be brought under the more serious offenses prohibiting that conduct.

The legislation adopts an "aggregate weight" test for determining the weight of the controlled substance when the weight of the substance possessed or delivered is determinative of the degree of the offense. See secs. 11.71.040(a)(2) and (3)(C), (E) and (F); 11.71.050(a)(1); (2) and (3)(B), (D), and (E); 11.71.060(a)(1), (3), (4); 11.71.070(a)(1) and (2). Under the "aggregate weight" test, the total weight of any preparation, compound, mixture or substance containing a controlled substance is the weight that is relevant for purposes of prosecution and conviction, so long as some amount of a controlled sub-

further with a non-controlled substance. It was felt that this could lead to the creation of, in effect, a double aggregate weight" standard. As a practical matter, however, the use of the term "weighing" has the same effect as the use of the term "of an aggregate weight of" when applied to controlled substances included in schedule VA.

This change was deleted by the conference committee and the term "of an aggregate weight of" was reinserted in sec. 11.71.040(a)(3)(E) in the final version of the bill. However, it should be emphasized that the use of this term is not meant to compound the severity of an offense where the controlled substance itself is defined in terms of the concentration of a substance in a compound, mixture or preparation such as in schedule IIIA, sec. 11.71.160(e), and schedule VA, sec. 11.71.180(b). The purpose of the aggregate weight standard, as indicated above, is to eliminate enforcement problems and for ease of understanding on the part of the public. When the controlled substance itself is defined in terms of the concentration of a substance in a compound, mixture or preparation, a felony possession offense classification is intended only when the statutorily prescribed amount is present in the commonly-used form of the substance and not when it has been diluted further with a totally non-controlled substance with which the controlled substance is not commonly dispensed.

York's definition of marijuana was similar to that in sec. 11.71.900(14) insofar as some parts of the cannabis plant were marijuana, and other parts were not. The chemist who testified at the Davis trial, although competent, could not, "to a reasonable degree of scientific certainty, rule out the presence or gauge the amount of non-marijuana" within the 9.3 pounds of green vegetable matter contained in 20 bags which had been seized from the defendant. 408 N.Y.S.2d at 750. The New York Court dismissed the charge of possession of more than one pound of marijuana, but permitted an instruction to the jury that it could find the defendant guilty of mere possession of any amount of marijuana, a violation. 408 N.Y.S.2d at 751-52. The use of the aggregate weight test is intended to eliminate this potential enforcement problem.

The amendments to the bill made in the House of Representatives included a substitution of the term "weighing" for the term "of an aggregate weight of" in the offense pertaining to the possession of schedule VA controlled substances set out in sec. 11.71.040(a)(3)(E). This change was made as a result of a concern that because of the fact that the substances included in schedule VA, sec. 11.71.180(b), were defined in terms of the concentration of a substance in a compound, mixture or preparation that an application of the "aggregate weight" test would result in an increase in the severity of a possession offense when a schedule VA controlled substance was diluted

Increasingly more severe penalties are provided for the possession of one-half pound and one pound or more of marijuana. Possession of any amount of marijuana by a person under 19 is, however, prohibited under sec.

11.71.060(a)(3). Other acts involving any amount of marijuana, such as delivery to a minor and possession on school grounds, are also treated more severely in this legislation. See, e.g., secs. 11.71.030(a)(2); 11.71.040(a)(4).

While the definition of "manufacture" in sec. 11.71.900(13) specifically excludes the growing of marijuana for personal use, a person who grows marijuana is still subject to prosecution under the possession offenses if the total amount grown yields four ounces or more when reduced to its commonly used form. See sec. 11.71.080. A person may also be prosecuted for "manufacture" of marijuana if the growing of marijuana is not for personal use. Further, nothing in the crimes prohibiting possession precludes a prosecution for "possession with the intent to manufacture or deliver", under sec. 11.71.040(a)(2), 11.71.050(a)(1) or (2), or 11.71.070(a)(1) if that intent is present.

Paragraph (4) is similar to sec. 11.71.030(a)(3), except that controlled substances in lower schedules, when possessed on school grounds, are prohibited under this paragraph. An affirmative defense identical to that found in sec. 11.71.030(b) is also provided. The commentary

Subsection (a)(3)(F) is the first of several subsections which constitute a scheme prohibiting the possession of varying amounts of marijuana. In addition to classifying the possession of one pound or more of a substance containing marijuana as a class C felony in sec. 11.71.040(a)(3)(F), this legislation imposes class A misdemeanor penalties when the substance containing marijuana weighs one-half pound or more (sec. 11.71.050-(a)(3)(E)) and class B misdemeanor penalties when four ounces or more are possessed (sec. 11.71.060(a)(4)).

As noted in the commentary to section 1 of the Act, the classification structure of this legislation is intended to clarify the law in Alaska concerning possession of marijuana, in light of the decision of the Supreme Court of Alaska in Ravin v. State, 537 P.2d 494 (Alaska 1975). Ravin held that Alaska's constitutional right to privacy protects the possession and use of marijuana by an adult, in the home, in amounts indicative of personal use in a purely personal, non-commercial context. The approach taken in this Act is to define, for purposes of the decision in Ravin, an amount which is indicative of personal use, and to provide a clear line of demarcation of four ounces, so that citizens of this state will know precisely what conduct is prohibited. This classification structure is also intended to provide enforcement agencies in this state with adequate legislative guidelines, and to resolve the ambiguities created by the Ravin decision.

manufacture or deliver to an adult of one-half ounce or more of a substance containing marijuana, whether for remuneration or not, is a class A misdemeanor under this section. Similar acts involving less than one-half ounce of a substance containing marijuana, where there is remuneration, is also prohibited under this section. As discussed in the commentary accompanying sec. 11.71.040, the "aggregate weight" standard is again used in determining the weight of the controlled substance, where the weight is determinative of the degree of the offense. The term "remuneration" is intended to require some form of consideration for the marijuana, and includes money, as well as any other transfer of property or services having a benefit. There is no requirement that the transfer for remuneration be for profit. Compare to sec. 12.55.155-(d)(15). The seller of marijuana cannot insulate himself from prosecution for a misdemeanor or felony by using an agent, who may receive no "cut" from the sale, to consummate the sale. Similarly, the agent cannot insulate himself from prosecution by claiming he received no profit from the transaction. Remuneration may take place before, during or after the actual, constructive, or attempted transfer of the substance. This provision includes the situation where a person pays for something he has received, by delivering marijuana, as well as the sale of marijuana for some kind of remuneration.

accompanying sec. 11.71.030(a)(3) and (b) is similarly applicable to these comparable provisions of the fourth degree offense.

Paragraph (a)(5) prohibits keeping or maintaining a building, vehicle or other place which is used for keeping or distributing a controlled substance in violation of a felony offense under AS 11.71 or AS 17.30. This provision, for example, would include the landlord of a warehouse who knowingly rents to a person who uses the structure for manufacturing or distributing controlled substances illegally.

The remaining offenses included in this section (paragraphs (6)-(10)) prohibit various unlawful acts involving controlled substances, including using a revoked registration number while distributing a controlled substance, submitting false information in reports required to be filed under AS 17.30; and obtaining a controlled substance by deception, through, for example, passing a forged prescription.

Sec. 11.71.050. MISCONDUCT INVOLVING A CONTROLLED SUBSTANCE IN THE FIFTH DEGREE.

This offense, a class A misdemeanor punishable by a maximum sentence of one year, prohibits delivery of less than one ounce of marijuana, as well as the possession of schedule IIIA-VIA controlled substances in amounts less than those specified in the fourth degree crime. Manufacture, delivery to an adult, or possession with intent to

use does not apply to minors. 537 P.2d at 511 and n. 69.

Paragraph (4) is discussed in the commentary accompanying sec. 11.71.040, while paragraph (5) is directed at the legitimate industry involved in the handling and delivery of controlled substances.

Sec. 11.71.070. MISCONDUCT INVOLVING A CONTROLLED
SUBSTANCE IN THE SEVENTH DEGREE.

This offense prohibits two forms of conduct. The first, covered by subsection (a)(1), is the bottom rung of the scheme pertaining to the manufacture, delivery, or possession with the intent to manufacture or deliver marijuana, other than to a minor. It provides that any of these acts, involving less than one-half ounce of a substance containing marijuana, is a violation. The distinction between this provision and that found in sec. 11.71-.050(a)(2) is that the latter, a class A misdemeanor, requires that the delivery be "for remuneration." This provision does not contain such a requirement, and thus is applicable to the situation where one adult passes a marijuana cigarette to another at a party, for no remuneration.

Subsection (a)(2) prohibits the possession of less than one ounce of marijuana in public. If the marijuana is used or displayed in public, however, prosecution may be brought under sec. 11.71.060(a)(1), a class B misdemeanor.

Additionally, failing to make, keep, or furnish any information required by AS 17.30, the provisions in the Act pertaining to the regulation of the legitimate drug industry, is a class A misdemeanor.

Sec. 11.71.060. MISCONDUCT INVOLVING A CONTROLLED SUBSTANCE IN THE SIXTH DEGREE.

This crime, a class B misdemeanor punishable by a maximum term of imprisonment of 90 days, prohibits seven acts, six of which involve marijuana.

The use of any amount of marijuana, the display of any amount of marijuana or the possession of one ounce or more of a substance containing marijuana in public is prohibited by paragraph (1). The possession of marijuana within the immediate control of a person who is operating a propelled vehicle is covered by paragraph (2). This includes possession of marijuana in the "glove box" of a car or truck. The term "propelled vehicle" is defined in AS 11.81.900(b)(43).

While a person under 19 can be prosecuted for possessing less than four ounces of a substance containing marijuana under paragraph (3), this provision does not preclude prosecution of a juvenile for other offenses involving marijuana. An example would be possession of one pound or more of marijuana. Sec. 11.71.040(a)(3)(F). The prohibition in paragraph (3) codifies a holding implicit in Ravin v. State, supra, that the protection afforded to adults in possessing marijuana in the home for personal

Sec. 11.71.080. AGGREGATE WEIGHT OF LIVE MARIJUANA PLANTS.

This section is intended to clarify the "aggregate weight" provisions as they apply to possession of varying amounts of marijuana, when that possession is of a live cannabis (marijuana) plant itself, rather than of harvested, ready-to-use marijuana. This section makes it clear that an adult who grows his own marijuana for personal use can legally possess a cannabis plant or plants weighing four ounces or more, so long as the marijuana which can be produced by the plant or plants, from its "commonly used form", does not exceed an aggregate weight of four ounces.

ARTICLE 2. STANDARDS AND SCHEDULES

Sec. 11.71.100. CONTROLLED SUBSTANCES ADVISORY COMMITTEE.

This section establishes the nine-member Controlled Substances Advisory Committee in the Department of Law, sets forth the membership of the committee, specifies terms of appointment and compensation, designates the attorney general as the chairman, provides that five members are necessary to constitute a quorum and provides that a majority of the total membership is necessary for official action.

Sec. 11.71.110. DUTIES OF THE COMMITTEE.

This section specifies the duties of the Controlled Substances Advisory Committee. Among other

The aggregate weight standard, as previously discussed in this commentary, equally applies to the provisions of this section.

Offenses committed under this section are classified as violations. The term "violation" is defined in AS 11.81.900(b)(55). Authorized sentences for violations are specified in AS 12.55.035(b)(5) and 12.55.140.

However, an offense committed under this section, 11.71.070, carries a maximum penalty of a \$100 fine, as specified in subsection (b), rather than a maximum possible fine of \$300, as provided for other violations. Compare, for example, this provision with a similar approach in AS 11.61.110(c).

In restricting the maximum possible fine to \$100, the legislature does not in any way intend for different procedural consequences to attach in proceedings initiated under this section. Because the offenses included are classified as violations, the prohibited conduct does not indicate criminality. Additionally, the provisions of AS 11.81.900(b)(55) pertaining to the rights of trial by jury and appointed counsel and the provisions of AS 12.55.180--12.55.230 pertaining to the enforcement of violations are to be fully applicable to offenses under this section.

trolled substances. These criteria were also considered and followed by the legislature in passing this legislation. The criteria which must be assessed when the committee considers the scheduling, rescheduling or removal of a controlled substance from the schedules are set forth in APPENDIX C, along with a comparison with the criteria required under federal law. These criteria include: (1) the actual or probable abuse of a substance; (2) the biomedical hazard of a substance; (3) whether a substance is an immediate precursor of a substance already controlled; (4) the current state of scientific knowledge concerning a substance; and (5) the relationship between use of a substance and other criminal activity. Scheduling decisions are based on findings made under these criteria viewed as a whole, without any of the criteria necessarily being given more weight than any other.

The specified criteria differ from federal law in several ways. First, the federal requirements in schedule I include "no currently accepted medical use" of the substance. 21 U.S.C. § 812(b)(1)(B). This criterion has been specifically omitted from this Act. Marijuana and LSD, for example, are scheduled federally as schedule I controlled substances because of this standard. 21 U.S.C. § 812(c)(9) and (10). Second, in Alaska, all the criteria are considered in determining the danger or probable danger of each controlled substance, even though some of the criteria may not apply to a particular substance. In

things, the committee is to advise the governor on the need to add, delete or reschedule substances. The committee is advisory only, and all of its duties should be viewed in that light.

The purpose of this committee is to provide an overview of drug use and abuse in Alaska and to determine what is being done about it, from the standpoints of law enforcement, treatment and counseling, prevention and education, and legitimate handlers. This committee should be able to study Alaska's resources for eliminating and preventing drug abuse, and suggest cohesive policies which will enable all agencies to function more effectively.

Sec. 11.71.120. AUTHORITY TO SCHEDULE CONTROLLED SUBSTANCES.

The first two subsections of this section provide that the governor shall introduce legislation regarding the controlled substances schedules upon either of two events occurring: (1) if the advisory committee recommends that a substance be added to, deleted from or rescheduled within the schedules, the governor must take action in accordance with the recommendation; or (2) if a substance is added to a federal schedule of controlled substances, the governor must also introduce legislation in accordance with the federal enactment.

Subsection (c) establishes the criteria to be considered by the committee in making a determination regarding the addition, deletion or rescheduling of con-

lative Purpose, that marijuana poses a serious threat to the public health. However, substances placed in schedule VIA have the lowest degree of danger or probable danger to an individual or the public relative to those substances controlled under higher schedules, considering the criteria specified in sec. 11.71.120(c).

Secs. 11.71.140--11.71.190. SCHEDULES.

All controlled substances are classified into one of six schedules, which are labeled schedules IA through VIA. The scheduling of substances is patterned after federal law, which classifies substances into five schedules, labeled I through V. 21 U.S.C. §812; 21 C.F.R. §§1308.11-.15. Alaska has adopted the letter "A" after its numbered schedule to clearly distinguish between state and federal schedules. Additionally, because of factors unique to this state, a sixth schedule containing only the controlled substance marijuana is created.

The schedules are largely self-explanatory. A chart showing the classification of major categories of controlled substances within the six schedules is included as APPENDIX B. A comparison of the scheduling of controlled substances under the Alaska statutes with scheduling under federal law is contained in APPENDIX D.

contrast, federal law more specifically designates the weight to be given to certain factors, requiring different findings for placement in different schedules. See 21 U.S.C. §812(b)(1)-(5). Third, while the criteria in paragraphs (1)-(4) are similar or identical to some criteria included in federal law, (21 U.S.C. §811(c)), the Alaska criterion specified in paragraph (5), "the relationship between the use of the substance and other criminal activity," is not found in federal law. By adoption of this factor, the legislature has specifically found that there is or may be a relationship between the use of certain controlled substances and other criminal activity, including but not limited to those factors set out in subparagraphs (A)-(D).

The "danger or probable danger of the substance" determines the schedule in which it is placed. The degree of danger or probable danger of any substance is relative to all of the other controlled substances. Substances having the highest degree of danger or probable danger are placed in schedule IA, while those with lower degrees of danger or probable danger, in relationship to other substances, are placed in descending schedules. The description in schedule VIA preceding the listing of substances in that schedule is not intended to mean that any substance scheduled in VIA has little or no danger to a person or the public. On the contrary, the legislature has specifically found, as stated in the Declaration of Legis-

hashish and hashish oil; and small amounts of codeine, morphine and opium which are combined with other ingredients in recognized therapeutic amounts.

It should be noted that the classification of hashish, hashish oil and tetrahydrocannabinols as schedule IIIA substances is a classification that is higher than the classification of marijuana as a schedule VIA substance, although both come from the cannabis plant. This classification distinction has been made because hashish and hashish oil are more compact and are generally of higher potency than marijuana. This fact makes trafficking in these substances more profitable, encourages smuggling, and makes their relative danger significantly greater than that of marijuana. See sec. 11.71.120-(c)(5)(B).

Sec. 11.71.170. SCHEDULE IVA.

This section provides that Schedule IVA substances are less dangerous than Schedule IIIA substances but more dangerous than substances included in Schedule VA. Schedule IVA includes less serious depressants such as barbital, phenobarbital, tranquilizers such as valium, librium and tranxene, a few stimulants, and darvon, most or all of which are obtained by prescription.

Sec. 11.71.140. SCHEDULE IA.

This section establishes Schedule IA substances as those having the highest degree of danger. Schedule IA includes, among others, opium, codeine, heroin, morphine, and their derivatives, demerol, dilaudid, percodan and methadone.

Sec. 11.71.150. SCHEDULE IIA.

This section provides that Schedule IIA substances are those less dangerous than substances classified in Schedule IA and more dangerous than those in other schedules. Schedule IIA includes (hallucinogens such as LSD, analogs of PCP, and mescaline; serious depressants such as methaqualone and PCP; stimulants such as amphetamine and methamphetamine; and the substance cocaine. The definition of cocaine and coca leaves in subsection (c) includes both natural and synthetic cocaine, the former known as "L-cocaine", and the latter as "D-cocaine", an isomer of natural cocaine.

Sec. 11.71.160. SCHEDULE IIIA.

This section establishes Schedule IIIA substances as those more dangerous than substances classified in Schedule IVA but not as dangerous as the substances included in Schedule IIA. Schedule IIIA presently includes barbiturates and their derivatives, am-, seco-, and pentobarbital; moderately serious stimulants and depressants;

Sec. 11.71.180. SCHEDULE VA.

This section provides that Schedule VA substances are less dangerous than Schedule IVA substances but more dangerous than substances included in Schedule VIA.

Schedule VA includes very small amounts of codeine, ethylmorphine and opium combined with other ingredients in recognized therapeutic amounts with medicinal qualities. These substances generally are cough suppressants, obtained either by prescription or by requiring the purchaser's signature.

Sec. 11.71.190. SCHEDULE VIA.

This section establishes Schedule VIA as the least dangerous of the controlled substances and includes marijuana.

Sec. 11.71.195. EXEMPTED DRUGS.

This section attempts to ensure consistency with federal law by providing that any substance which is specifically exempt from criminal penalty under federal law is exempt from control under this chapter and AS 17.30. The list of exempted drugs under federal law can be found at 21 C.F.R. §1308.22, as of April 1, 1980. This section is intended to include substances which are subsequently exempted under federal law.

ARTICLE 3. MISCELLANEOUS PROVISIONS

Sec. 11.71.300. PENALTIES UNDER OTHER LAWS.

This section emphasizes that the criminal penalties imposed by this chapter are in addition to, and not in place of, civil or administrative penalties applicable to the prohibited conduct.

Sec. 11.71.305. REHABILITATION.

This section, based on former AS 17.12.120, and added by the House of Representatives, recognizes that rehabilitation is one factor to be considered in sentencing and the responsibility of the state to make rehabilitative services available to persons convicted of offenses involving their personal use of controlled substances. This section does not prevent a judge from ordering or recommending rehabilitative treatment as a condition of a suspended sentence or a suspended imposition of sentence at an agency other than one within the auspices of the Department of Health and Social Services. This section applies only where the defendant's personal use of the controlled substance related to the offense for which he has been convicted. Rehabilitative services under this section can only be offered in connection with a term of imprisonment or as a requirement of probation or suspended imposition of sentence. Of course, if the sentencing provisions in AS 12.55 require imposition of a presumptive

term of imprisonment, that term of imprisonment must be served.

Sec. 11.71.310. BAR TO PROSECUTION.

When read in conjunction with sec. 11.71.300, this provision makes clear that while a person cannot receive multiple criminal penalties for the same conduct under state and federal law, the person can be penalized criminally, civilly and/or administratively for the same conduct.

Sec. 11.71.320. DEFENSES EXEMPTED.

Subsection (a) codifies the law established in Lee v. State, 511 P.2d 1076 (Alaska 1973). In a prosecution for possession of a controlled substance (except marijuana) the state need not prove that the defendant possessed the substance in a "useable quantity." This applies so long as there is a sufficient quantity of the substance to permit proper identification, except in circumstances such as those in Howard v. State, 496 P.2d 657 (Alaska 1972). In the Howard case, there was no controlled substance left for testing, as the buyer of the heroin from Howard used it all himself. However, other evidence, including testimony from the addict who used the heroin, established beyond a reasonable doubt that Howard had supplied heroin.

Subsection (b) expands on the holding of State v. Erickson, 574 P.2d 1 (Alaska 1978). In that case the legislative classification of cocaine as a narcotic drug was held not to be violative of equal protection or due process, upon evidence which showed that cocaine is not pharmacologically a narcotic. This subsection provides that it is not a defense to a charge that a substance may be misclassified within a particular schedule; for example, as a depressant, when scientific evidence may show the substance is an hallucinogen. The prosecution can proceed under the degree of the offense applicable to the act and placement of that substance within a schedule, without regard to labeling or other terms used under subsections within a schedule.

Sec. 11.71.330. LIABILITY OF PUBLIC SERVANTS.

This section makes it clear that a public servant acting within the scope and authority of his employment is not criminally or civilly liable for misconduct involving a controlled substance.

Sec. 11.71.340. OFFENSES DEFINED BY AMOUNTS.

This section provides that, in a prosecution where the degree of an offense is determined by the amount of the substance possessed, it is not a defense to a lower class of offense that the amount of the controlled substance possessed was equal to or larger than the amount

which would make the offense a higher class of crime. In short, it is not a defense to a crime that the defendant actually committed a higher class of crime. This section is intended to have the same effect on offenses of misconduct involving controlled substances that AS 11.81.615 has on other crimes, such as theft offenses.

Sec. 11.71.350. BURDEN OF PROOF.

This section provides that it is the defendant's burden to prove, by a preponderance of the evidence, any exemption or exception claimed by him. The state is not required to disprove, beyond a reasonable doubt, any exemption or exception provided for under AS 11.71 or AS 17.30. This section is similar to existing AS 17.10.180 and 17.12.100.

Sec. 11.71.360. UNPRIVILEGED COMMUNICATIONS.

This section adopts existing AS 17.10.170(b), applicable only to narcotics, and expands it to all controlled substances. It provides that communications between a person and a licensed practitioner, (defined in sec. 11.71.900(19)) in an effort to commit a crime involving a controlled substance, are not privileged communications. A defendant could not therefore claim the physician-patient privilege to prevent the practitioner from testifying about the communications. This is consistent with Alaska Rule of Evidence 504(d)(2) and (7).

ARTICLE 4. DEFINITIONS

Sec. 11.71.900. DEFINITIONS.

This section defines words and phrases that are used throughout AS 11.71. Many of these definitions are similar or identical to those contained in the federal Controlled Substances Act of 1970. The federal definitions appear at 21 U.S.C. §802. Some of the definitions distinguish between acts performed by practitioners in the course of their medical practice and acts performed by persons who are not authorized to manufacture, distribute or dispense controlled substances. For example, the words "administer" and "dispense" refer to acts performed by a practitioner; "deliver or delivery" is the "actual, constructive, or attempted transfer from one person to another of a controlled substance," and includes practitioners as well as non-practitioners; and "distribute" is the delivery of a controlled substance other than by dispensing or administering.

The definition of "manufacture" specifically excludes "the growing of marijuana for personal use." The definition of "marijuana" includes "the seeds, and leaves, buds, and flowers of the plant (genus) Cannabis." It is not limited to the plant Cannabis Sativa L, which is one species of the cannabis plant. There may be more than one species, and the definition of marijuana in this Act has been drafted broadly enough to include any and all other species of the cannabis plant. Thus, litigation on the

question whether all species are included in the definition, such as that engendered in United States v. Maskeny, 609 F.2d 183 (5th Cir. 1980), United States v. Gavic, 520 F.2d 1346 (8th Cir. 1975), reh. and reh. en banc den. (1975), People v. Holcomb, 532 P.2d 45 (Colo. 1975) (en banc), and Luginbill v. State, 574 P.2d 140 (Kan. 1977), would be unnecessary.

Section 3. Sec. 12.55.015. AUTHORIZED SENTENCES.

This section of the Act adds a new subsection (d) to this provision in AS 12.55. In sentencing a person for a felony or misdemeanor under AS 11.71.010--11.71.060, and after a determination that the defendant is a drug abuser, a court may order the defendant to participate in a drug abuse treatment program. Any such participation is to be in addition to any mandatory sentence, including a presumptive sentence. Such participation may be a condition of probation, a condition of a suspended sentence or a condition of a suspended imposition of sentence. This section codifies one aspect of the Chaney criteria. State v. Chaney, 477 P.2d 441 (Alaska 1970). This section is not intended to mean that the "rehabilitation" factor should be given any more or less weight in any sentencing proceeding, because of its codification here.

Section 4. CONTROLLED SUBSTANCES.

ARTICLE I. REGULATION OF MANUFACTURE, DISTRIBUTION,
PRESCRIPTION AND DISPENSING OF CONTROLLED SUBSTANCES

This chapter generally places within the Board of Pharmacy the responsibility for regulating the legitimate industry which is involved in the manufacture, distribution and dispensing of controlled substances. Prior Alaska law in AS 17.10 and 17.12 placed responsibility for this duty jointly upon the Board of Pharmacy for narcotic drugs, and with the Commissioner of Health and Social Services for non-narcotic drugs. The intent of this chapter is to focus responsibility for regulation within one agency, and to cause state regulations to be consistent with federal regulations pertaining to the legitimate industry.

Sec. 17.30.010. REGULATIONS.

This section establishes the Board of Pharmacy as the agency responsible for the administration of laws pertaining to the legitimate manufacture, distribution and dispensing of controlled substances, and requires the board to adopt regulations for the administration of AS 17.30. The section also allows the imposition of reasonable fees for registration. This chapter and the regulations to be adopted under it are required to be patterned after federal law, so that there is consistency between state and federal requirements placed upon persons

required to register, keep records, and handle prescriptions and other order forms.

Sec. 17.30.020. REGISTRATION REQUIREMENTS.

This section requires annual registration with the Board of Pharmacy of persons who manufacture, distribute, dispense or conduct research with a controlled substance within the state, or who propose to do so.

Subsection (c) lists persons who may lawfully possess controlled substances under this chapter without registering.

First, a person who is an agent or employee of a registrant may possess a controlled substance so long as that possession is incidental to the usual course of business or employment. Should the person possess a controlled substance not incidental to the usual course of business or employment, the person subjects himself to criminal, civil and/or administrative penalties set forth in other sections, in AS 11.71, 17.30 and 17.35.

Second, a person who is a common or contract carrier or warehouseman, or his employee, whose possession of a controlled substance is within the usual course of his business or employment, may lawfully possess a controlled substance under this chapter without registering. However, the same caveat applies: should the person possess a controlled substance not within the usual course of his business or employment, the person is subject to crim-

inal, civil and/or administrative penalties under other sections, as listed in the previous paragraph.

Third, the person who is an "ultimate user", in possession of a controlled substance under a lawful order or prescription, or who is in lawful possession of a schedule VA controlled substance, may legally possess the substance without registering under AS 17.30 or 17.35. "Ultimate user" is defined in sec. 11.71.900(27), and includes the prescription holder or a family member, when the use is for the holder or family member. A person who picks up a prescription for a controlled substance for a spouse, child or pet is an "ultimate user", and can lawfully possess the controlled substance without criminal liability under AS 11.71. Possession in this instance is considered to be authorized in AS 17.30, and thus is an exception to criminal liability noted in subsection (a) of each of the sections in 11.71.010--11.71.070. The "ultimate user" of a controlled substance pursuant to a lawful prescription can lawfully possess the substance anywhere, even on school grounds. However, that person may be prosecuted for possession of a controlled substance with the intent to deliver, should he possess the substance with that intent, or for any offenses other than a possessory offense should he engage in such other conduct.

Sec. 17.30.030. REGISTRATION.

This section provides that a person who is registered under federal law to manufacture, distribute or dispense a controlled substance in Alaska shall be registered by the Board of Pharmacy, unless the board finds that the registration would be inconsistent with the public interest. Several factors are specified which are to be considered by the board in determining the public interest. Of primary importance is the ability of the applicant to maintain effective controls against diversion of the controlled substance into illicit channels.

Subsection (c) provides that any manufacturer, distributor or dispenser who complies with federal law regarding registration requirements (other than fees), is entitled to be registered under this chapter. This subsection is not to be read as inconsistent with, or more specific than, subsection (a) of this section.

Sec. 17.30.040. DENIAL, REVOCATION AND SUSPENSION OF REGISTRATION.

This section establishes procedures and grounds for the denial, revocation or suspension of a registration applied for or issued under this chapter. It also establishes a procedure for disposition of an applicant's or registrant's controlled substances during any denial, revocation or suspension proceedings.

Subsection (a) provides that the board may deny, suspend or revoke a registration applied for or issued

under the previous section if it finds that the registrant has committed any of three acts: (1) furnishing false or fraudulent material information in an application filed under this chapter; (2) being convicted of any felony offense (not only drug-related) under state or federal law; or (3) having a federal controlled substance registration denied, suspended, or revoked.

Subsection (b) provides that the board may limit its denial, revocation or suspension of a registration to a particular controlled substance, for which grounds for such action by the board exist.

Subsection (c) provides a procedure for the disposition of controlled substances owned or possessed by the applicant or registrant at the time of the denial, suspension or the effective date of the revocation order. The controlled substances may be placed under seal by the Board of Pharmacy or by the Department of Public Safety. A final disposition cannot be made of the controlled substances under seal until the time for taking an appeal has elapsed, or until all appeals have been concluded. The only exception to this general rule is that a court, upon application, may order the sale of perishable substances, and the proceeds of the sale are to be deposited with the court, even though the time for taking an appeal has not run, or any appeal has not been concluded. After the appropriate time periods or when appeals have run their course, and when a revocation order is final, all of the

controlled substances held by the registrant are to be forfeited to the state.

Subsection (d) provides that the Board of Pharmacy shall promptly notify the federal Drug Enforcement Administration of any order it issues denying, suspending or revoking registrations, and of all forfeitures of controlled substances under this section or sec. 17.30.110.

Sec. 17.30.050. ORDER TO SHOW CAUSE.

This section establishes procedures which must be followed by the Board of Pharmacy before it denies, suspends, revokes or refuses to renew a registration under this chapter. This section also provides that the board may suspend a registration without complying with these procedures, if there is imminent danger to the public health or safety which justifies immediate suspension.

Sec. 17.30.060. RECORDS OF REGISTRANTS.

This section provides that persons registered under this chapter must keep records and inventories in conformity with federal requirements and any additional requirements established by the board.

Sec. 17.30.070. ORDER FORMS; PRESCRIPTIONS.

Subsection (a) provides for distribution of a controlled substance by one registrant to another regis-

trant only in accordance with federal requirements for order forms.

Subsection (b) provides that a practitioner may not dispense a controlled substance other than in accordance with federal requirements regarding prescriptions for controlled substances.

Subsection (c) provides that if the classification of a controlled substance is different under the Alaska schedules than under the federal schedules, the requirements of subsections (a) and (b) of this section are determined by the classification of the substance under federal law. For example, if under federal law a particular controlled substance is a schedule II controlled substance, but under Alaska law it is a schedule IA controlled substance, the requirements of federal law pertaining to prescriptions and order form requirements for schedule II substances apply under this section.

Sec. 17.30.080. UNLAWFUL ADMINISTRATION, PRESCRIPTION AND DISPENSATION OF CONTROLLED SUBSTANCES.

This provision is taken from a similar provision in federal law, 21 U.S.C. §829(c), applying only to schedule V substances. The effect upon licensed practitioners is to treat them no differently than any other offender under secs. 11.71.010--11.71.070 when the practitioner dispenses, administers or prescribes a controlled substance for any reason other than a medical purpose. For example, a physician who frequently writes several pre-

scriptions for a schedule IA substance for a "patient", knowing that the person is addicted to the drug, has no medical condition other than the addiction necessitating the administration of that drug, and that the person sells the drug on the street in order to support his own habit, is liable under sec. 11.71.020(a) for the unlawful delivery of a schedule IA controlled substance. See also 21 U.S.C. §828(e).

ARTICLE 2. ENFORCEMENT AND ADMINISTRATIVE PROVISIONS

Sec. 17.30.100. COOPERATIVE ARRANGEMENTS.

This section, patterned after a similar provision in the Uniform Controlled Substances Act, is intended to foster more effective law enforcement cooperation in suppressing the trafficking in and abuse of controlled substances.

Sec. 17.30.110. FORFEITURES.

This section establishes a comprehensive scheme for the forfeiture of property used in violation of AS 11.71, 17.30 or 17.35. It specifies what property is subject to forfeiture and the procedures that are to be followed to achieve forfeiture. It is intended that federal statutory and case law will be followed should the Alaskan statutory scheme and this commentary leave any questions unanswered.

The listing of property which is subject to forfeiture is similar to that found in federal law, (see 21 U.S.C. §881(a)(1)-(6), as amended in 1979) with the addition of subsection (7), which provides for the forfeiture of firearms which are visible, carried during, or used in furtherance of a violation of this chapter or AS 11.71.

A vehicle used in the commission of an offense involving a controlled substance is subject to forfeiture under subsection (a)(4) only when the offense is a felony. The person, for example, who is arrested for a misdemeanor, such as possession of marijuana while operating a propelled vehicle (sec. 11.71.060(a)(2)) does not face forfeiture of the vehicle involved.

Subsection (a)(4) specifically protects innocent owners of or holders of secured interests in conveyances such as automobiles and airplanes. For example, under subparagraph (a)(4)(A), if an uncle loans his car to his nephew without knowledge that the nephew intends to use the vehicle to violate AS 11.71, and the uncle (owner) did not consent to the illegal use of the vehicle and would not have consented had he known of the intended use of the vehicle for the illegal purpose, the vehicle may not be forfeited under this section. This paragraph also applies to rental car agencies which may innocently rent an automobile to a person who violates AS 11.71. Once the state has met its burden of proving by a preponderance of the evidence that the conveyance was used during or in aid of

a violation of AS 17.30 or 11.71, the burden then shifts to the innocent owner to establish by a preponderance of the evidence that he did not commit the unlawful act and did not consent to or know of the act. Subparagraph (a)(4)(A) thus establishes the right to "remission" by an innocent, non-negligent owner. See the commentary accompanying subsections (n) and (o).

Under subparagraph (a)(4)(B), once the state has proven by a preponderance of the evidence that the conveyance was used during or in aid of a violation of AS 17.30 or 11.71, a person who holds a valid security interest in the conveyance at the time of the seizure must then establish, by a preponderance of the evidence, that he was not a party to the violation, and did not consent to or know of the violation. This subparagraph does not prevent the ultimate forfeiture of the conveyance if the state has met its burden of proof. However, it and other subsections, including (n) and (o), do provide a means by which the secured party can recover his interest in the conveyance.

Subsection (b) sets out the burden of proof applicable to forfeiture proceedings under this chapter. Property may be forfeited after the defendant is convicted of a criminal offense under AS 17.30 or 11.71. Property may also be forfeited in a separate in rem civil proceeding against the property. The Rules of Civil Procedure would apply, and the state, as plaintiff, would be required to prove by a preponderance of the evidence, that

the property was used during or in aid of a violation of AS 17.30 or 11.71.

Forfeiture can take place without regard to the institution or outcome of a criminal proceeding under subsection (c). So long as the state can prove by a preponderance of the evidence that the property was used during or in aid of a violation of one of the applicable chapters, the property can be forfeited.

Subsection (c) specifically provides that a criminal conviction is not a defense in an in rem proceeding brought against the property under this chapter. Federal case law provides that a dismissal of a criminal case is not a bar to an in rem proceeding; United States v. One (1) 1969 Buick Riviera, 493 F.2d 553 (5th Cir. 1974); nor is an acquittal a bar to an in rem proceeding. One Lot Emerald Cut Stones and One Ring v. United States, 409 U.S. 232, 93 S. Ct. 489, 34 L. Ed. 2d 438 (1972); United States v. Kismetoglu, 476 F.2d 269 (9th Cir. 1973).

Property subject to forfeiture may be seized with or without a court order under subsection (d). Officers may seize property without a court order if: (1) the seizure is made pursuant to a valid search warrant or incident to a valid arrest; (2) the property has been the subject of an earlier judgment in favor of the state; or (3) there are exigent circumstances including probable cause that the property was used, is being used, or is intended for use in violation of AS 11.71 or 17.30, and

the property is easily movable. When it is seized without a court order, property may not be held for more than 48 hours unless an extension is obtained from the court. To obtain a court order, a peace officer must show there is probable cause that the property may be forfeited under (a) of this section.

Once property has been seized or detained, the commissioner of public safety or a local law enforcement agency shall take custody of the property, under subsection (e). Only the court with jurisdiction over the property can cause a subsequent movement of the property out of the agency's custody. The agency with custody of the seized property may seal the property, or remove it to a place which is designated by the court or is otherwise an appropriate location for it.

Subsection (f) provides that the property must be inventoried within 10 days after it is seized, and that the value of any items, other than controlled substances, must be appraised.

Under subsection (g), formal forfeiture proceedings must be instituted within 20 days after seizure, beginning with notification to any persons known to have an interest in the property. Where property has a value of \$500 or more, notice of the forfeiture action is to be published in a local newspaper. Since controlled substances are summarily forfeited to the state under sub-

section (p), these formal proceedings do not apply to such substances.

Subsection (h) requires any person claiming an interest in the property to file an answer within 30 days after service or publication of notice. If no answer is filed, the property is forfeited without further proceedings.

The issue of forfeiture is tried before a judge, without a jury, according to subsection (i). The proceeding may be postponed until after the determination of guilt or innocence on any pending criminal charge against any person or claimant, and without regard to whether an appeal is taken in any criminal proceeding. The burden of proof is set forth in subsection (b), and has been discussed previously.

Under certain circumstances, property may be released prior to the court's decision on forfeiture, under subsections (j)-(l). A party may petition the court for its release. The property can be released only where it will remain subject to the court's jurisdiction and where release is found to be in the best interest of the state or where a bond is posted equal to twice the value of the property. Additionally, the claimant can request sale of the property prior to the decision on forfeiture. This may occur in instances, for example, where the property is perishable. The proceeds of the sale are then treated as the property which is subject to forfeiture.

Once the property is forfeited, the commissioner of administration determines the disposition of the property. Various options are listed under subsection (m): the commissioner may destroy the property, sell it and use the proceeds to cover expenses incident to the forfeiture, use the property to enforce the controlled substances laws, or forward it to the United States Drug Enforcement Administration.

Under subsection (n), a claimant who had a valid, good-faith interest in the property at the time of the illegal use, and who is innocent and ignorant of the illegal use or intended use, and not negligent in lending or leasing his property, can later obtain either the item itself (if he is entitled to it under (a)(4)(A)), the value of his interest, or the item (if he is entitled to it under (a)(4)(B)), if he pays the difference between the value of the property and his interest in it. If the conveyance is forfeited under (a)(4)(B), the state can reimburse the secured party under subsection (n)(2).

Federal statutory and case law has established that only innocent parties, who are ignorant of the illegal use or intended use of the property, and who are non-negligent in lending or leasing their property, can qualify as claimants entitled to "remission" or "remittance." See, e.g., 18 U.S.C. § 3617(b), which codifies case law from the Prohibition Era. "Remission" is a form of "pardon" of the forfeited property. The Laura, 114 U.S.

147, 5 S. Ct. 881 (1885). The burden is upon the claimant to prove by a preponderance of the evidence that he deserves relief under the remission standards. See, e.g., Wilson Motor Co. v. United States, 96 F.2d 29 (9th Cir. 1938); United States v. C.I.T. Corp., 93 F.2d 469 (2d Cir. 1937); United States v. One 1933 Ford V-8 Coach, 14 F. Supp. 243 (E.D. Ill. 1936).

The claimant must secondly prove he had a good faith property interest in the item at the time of the illegal use. Florida Dealers and Growers Bank v. United States, 279 F.2d 673 (5th Cir. 1960); United States v. One 1936 Model Ford Coach, 58 F. Supp. 802 (M.D. Ga. 1944). Thirdly, the claimant must show he was ignorant of the illegal use or intended use and was not negligent in lending or leasing his property. See, e.g., 18 U.S.C. § 3617(b)(2); One 1941 Ford 1/2 Ton Pickup Truck v. United States, 140 F.2d 255 (6th Cir. 1944); Federal Credit Co. v. United States, 109 F.2d 121 (5th Cir. 1940), reh. den. Compare Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 94 S. Ct. 2080, 40 L. Ed. 2d 452 (1974), reh. den. 417 U.S. 977, 94 S. Ct. 3187, 41 L. Ed. 2d 1148. See also State v. Rice and Cessna Finance Corp., 626 P.2d 104 (Alaska 1981), which establishes a state constitutional right in Alaska of a secured party to protect its interest in forfeiture proceedings under the Fish and Game laws.

Subsection (o) provides that where the conveyance is subject to another's financial interest, the person who

used the conveyance, in violation of any chapter on controlled substances, shall be assessed a fine at least equal to the cost of any lien payment or remittance made by the state to the secured interest, plus the reasonable costs of the seizure. This may include impound costs or special storage costs which may have been incurred, such as refrigeration of perishable chemicals.

Controlled substances, including plants, are summarily forfeited to the state without any formal proceedings under subsections (p) and (q). These subsections do not prevent a law enforcement agency from retaining controlled substances as evidence.

Sec. 17.30.130. JUDICIAL REVIEW.

This section provides for review by the superior court of administrative decisions made under the Controlled Substances Act in accordance with the provisions of the Alaska Administrative Procedure Act (AS 44.62).

Sec. 17.30.140. EDUCATION AND RESEARCH.

This section requires the commissioner of health and social services to encourage education and research in the field of drug abuse, and empowers the commissioner to establish research projects and educational programs.

Sec. 17.30.150. CONFIDENTIALITY.

This section provides that information supplied by the Drug Enforcement Administration of the United States Department of Justice may be presumed to be valid by the Board of Pharmacy when it exercises its regulatory powers under AS 17.30. Additionally, this section prohibits the disclosure of either the names or identities of patients who are participating in drug research programs.

Sec. 17.30.160. DEFINITIONS.

This section provides that the definitions set out in AS 11.71.900 apply to the Controlled Substances Act (AS 17.30).

Section 5. CHAPTER 35. ALASKA THERAPEUTIC RESEARCH ACT.

The purpose of this act is to create an experimental research program for the treatment of some cancer patients and glaucoma patients to permit them to use a capsulized form of the active ingredient found in marijuana, delta-9-tetrahydrocannabinol. See National Institute on Drug Abuse, Research Monograph 31, Marijuana Research Findings: 1980, at 33-36, 199-214. Many states, including New York, California and Washington, have enacted similar legislation permitting the therapeutic use of marijuana for these patients. Stringent guidelines have been established by the Drug Enforcement Administration for the acceptance of a patient, registration of a

practitioner, and the dispensing of THC. At the time of the passage of this legislation in 1982, the Drug Enforcement Administration permitted only the use of federally grown, harvested and prepared THC, in capsule form. It is the intent of this research act to comply fully with all regulations and requirements of the Drug Enforcement Administration, the federal Food and Drug Administration, the National Institute on Drug Abuse, and the National Cancer Institute.

This legislation specifically does not include confiscated marijuana as a source of marijuana for use by patients in this therapeutic research program. One of the main reasons for this decision is a lack of quality control over both the potency and the additives of marijuana which has been confiscated by law enforcement officers. The THC capsules which are produced by the federal government are uniform in potency of THC for each dosage unit.

Sec. 17.35.010. LEGISLATIVE PURPOSE.

The intent of this chapter is to enable cancer patients who are undergoing chemotherapy and radiology to receive marijuana to alleviate nausea associated with chemotherapy and radiology. Glaucoma patients are also eligible for treatment by the use of marijuana. This section establishes that there is a need for further research regarding the use of marijuana under strictly controlled conditions, and this chapter is enacted for that purpose.

Sec. 17.35.020. THERAPEUTIC RESEARCH PROGRAM.

This section establishes the research program within the Board of Pharmacy, and provides that the board shall administer the program. It provides for regulations of federal agencies to be taken into consideration, that only persons suffering from certain diseases and undergoing particular types of treatment are eligible, and that they must be certified by the Patient Qualification Review Committee. Full disclosure of the risks must be made to the patient.

Sec. 17.35.030. PATIENT QUALIFICATION REVIEW COMMITTEE.

This section establishes the Patient Qualification Review Committee and provides for its membership and duties. It provides for confidentiality of persons participating in the program. It also provides for expansion of the program to other disease groups, after approval by the Board of Pharmacy and consistent with applicable federal regulations.

Sec. 17.35.040. SOURCES AND DISTRIBUTION OF MARIJUANA.

This section provides that a patient who is certified to participate in the program may lawfully obtain and possess marijuana, as it is distributed by federal agencies. The definition of marijuana used in this chapter, found in sec. 11.71.900(14), may be too narrow to encompass the form of the active ingredient made

available by the federal government. Thus, language has been incorporated to include marijuana derivatives, or active ingredients, whether natural or synthetic, to ensure that this Act permits the use of the drug in the form in which it is made available by the federal government.

Subsection (b) is intended to ensure that a state agency, the Board of Pharmacy, is not to go into the business of supplying marijuana to certified patients. Instead, it is intended and anticipated that the regulations adopted by the board under this chapter will enable certified patients, as well as the pharmacies or hospitals which supply them, to obtain the marijuana, without going through as much red tape in order to do so.

Sec. 17.35.050. REPORT TO THE GOVERNOR AND LEGISLATURE.

This section provides for the board to make findings and recommendations to the governor and the legislature regarding the effectiveness of the program by March 1, 1984.

Sec. 17.35.060. DEFINITIONS.

This section defines words and phrases used in AS 17.35.

MISCELLANEOUS PROVISIONS
(Only Substantive Changes are Noted)

Section 15. AS 12.30.040, 5) RELEASE AFTER CONVICTION.

This amendment expands the list of crimes for which a defendant cannot be released on bail after conviction and pending sentencing or appeal to include all unclassified and class A felonies (including Misconduct Involving a Controlled Substance in the First and Second Degrees). In doing so it addresses an equal protection infirmity in the existing statute which limits bail after conviction for some offenders, but not all, who have committed extremely dangerous crimes. See, Walker v. Huston, No. A79-395 Civil, Opinion rendered on record (D. Alaska, May 29, 1980); Griffith v. State, _____ P.2d _____, Opin. No. 71 (Alaska App. March 4, 1982).

Section 16. AS 12.45.155. LABORATORY REPORT OF CONTROLLED SUBSTANCES.

This section is intended to facilitate criminal trials of persons charged with controlled substances offenses and to diminish the amount of time which expert laboratory analysts, usually chemists, must spend in court. Similar provisions are found in laws of other states. See, e.g., Annotated Code of Maryland, §§10-1001-13; Ohio Revised Code §2925.51; Washington Criminal Rule 6.13(b), effective January 1, 1975, and Justice Court Criminal Rule 4.09, Criminalist's Report, effective January 1, 1975. The section changes the con-

tent of laboratory reports of controlled substances so that more detail is required regarding the controlled substance; the report must be notarized after being signed by the analyst; it must contain information including the duties of the analyst, his education, training and experience for performing an analysis; it must state that scientifically accepted tests were performed with due caution and whether the evidence was handled in accordance with established and accepted procedures within the laboratory.

Procedures are established under this section for service of a copy of the report upon the defendant or his attorney. There is a provision that the accused or his attorney may demand the testimony of the person signing the report, and the procedures for demanding such testimony are set out.

Section 19. Sec. 12.55.155(c). AGGRAVATING FACTORS.

This section adds four aggravating factors to the list included in AS 12.55.155(c) which can be considered at sentencing. The factors are intended to enhance the penalty of a person who engages in illegal acts involving delivery of a controlled substance for financial benefit as part of a commercial enterprise; a person who smuggles controlled substances into the state; a person who is convicted of an offense involving large quantities of controlled substances; or a person involved in the distribu-

tion of a controlled substance which has been adulterated with a toxic substance, making the substance even more dangerous.

Section 20. Sec. 12.55.155(d). MITIGATING FACTORS.

This section adds three mitigating factors to the list included in AS 12.55.155(d) which can be considered at sentencing. Primarily, they involve the converse of the acts or circumstances considered as new aggravating factors: the involvement with small amounts of controlled substances; distribution of a controlled substance, other than a schedule IA substance, to an adult acquaintance for no profit; and possession of any controlled substance for personal use in the defendant's home.

Section 22. Sec. 33.15.190. RELEASE ON PAROLE AND TERMS AND CONDITIONS OF RELEASE.

This section provides that a person who has been convicted of a felony or misdemeanor offense involving a controlled substance, who has been incarcerated, and who is a drug abuser, may not be released on parole unless he has participated in a treatment program for drug abusers, if one is available. As a condition of his parole, he may be required to continue participation in a drug abuse treatment program. This section is an extension of the holding of Rust v. State, 582 P.2d 134 (Alaska 1978), on reh. 584 P.2d 38, which held that a prisoner had a right to treatment for a medical disability while the prisoner

was incarcerated, and Good v. State, 590 P.2d 420 (Alaska 1979), which held that a sentencing judge should recommend to the Division of Corrections that a defendant receive rehabilitative treatment while incarcerated for an offense committed as a result of a drug addiction. This section is applicable where it is shown the defendant has a drug abuse problem and has recognized that he will only be helped if he commits himself to a treatment program. This provision is in no way intended to affect a mandatory sentence, a presumptive sentence, or any other sentence imposed by a judge, and does not confer any right to parole.

CLASSIFICATION SCHEME AND PENALTIES
UNDER CONFERENCE COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 190

Offense in AS 11.71	IA	IIA	IIIA	IVA	VA	VIA (Marijuana)
Delivery to a Minor (under 19 and 3 years younger than Deliveror)	Unclassified felony	Unclassified felony	Unclassified felony	B felony	B felony	B felony
Continuing Criminal Enterprise	Involving any substance in Schedules IA through VIA; Unclassified Felony					
Delivery, Manufacture or Possession with Intent to Manufacture or Deliver	A felony	B felony	B felony	C felony	C felony	C felony: - one ounce or more A misdemeanor: - one-half ounce or more - less than one-half ounce for remuneration Violation (\$100 fine): - less than one-half ounce (for no remuneration)
Possession on School Grounds by an Adult (18 or over)	B felony	B felony	C felony	C felony	C felony	C felony
Possession	C felony	C felony	C felony: - 25 or more tablets - 3 grams or more A misdemeanor: - less than 25 tablets - less than 3 grams	C felony: - 25 or more tablets - 3 grams or more A misdemeanor: - less than 25 tablets - less than 3 grams	C felony: - 50 or more tablets - 6-grams or more A misdemeanor: - less than 50 tablets - less than 6 grams	C felony: - 1 lb. or more A misdemeanor: - 1/2 lb. or more B misdemeanor: - 4 ozs. or more - Use or display of any amount in public - Possession while operating a vehicle - Possession by Minor (under 19) - Possession of 1 oz. or more in Public, Violation: - Possession of less than 1 oz. in Public (\$100 fine)

SENTENCES UNDER AS 12.55

Unclassified Felony - 5-99 yrs/\$75,000
A Felony - 0-20 years/\$50,000
2nd offense - 10 years presumptive
3rd offense - 15 years presumptive
B Felony - 0-10 years/\$50,000
2nd offense - 4 years presumptive
3rd offense - 6 years presumptive
C Felony - 0-5 years/\$50,000
2nd offense - 2 years presumptive
3rd offense - 3 years presumptive
A Misdemeanor - 0-1 year/\$5,000
B Misdemeanor - 0-90 days/\$1000
Violation - \$300 fine
(Under 11.71 - \$100 fine)

SCHEDULING EXAMPLES

Schedule IA - Opium, opiates, heroin, methadone, dilaudid, percodan, demerol
Schedule IIA - LSD, cocaine, mescaline, PCP, amphetamines, methaqualone
Schedule IIIA - Barbiturates, hashish
Schedule IVA - Tranquilizers such as valium and librium; darvon
Schedule VA - Small amounts of codeine or opium in non-narcotic mixtures having medicinal qualities
Schedule VIA - Marijuana

CLASSIFICATIONS OF SOME SUBSTANCES
CONTROLLED IN ALASKA SCHEDULES

SUBSECTION CLASS.	IA	IIA	IIIA	IVA	VA	VIA
Narcotics	Dilaudid (b)(1)(k) Percodan (b)(1)(H) Demerol (c)(47) heroin (d)(11) methadone (c)(39)		specified amounts as free anhydrous base or alkaloid	difenoxin + atropine sulfate	specified amounts combined with 1 or more non-narcotic active medicinal ingredients	
Hallucinogens		DMA, PMA, DET, DMT, LSD, mescaline, peyote, anulogs of PCP, psilocybin, psilocyn	hashish hash oil tetrahydrocannabinols			marijuana
Stimulants		amphetamine methamphetamine ritalin preludin (phen- metrazine)	benzphetamine chlorphentermine clortermine mazindol	diethylpropion phentermine pernoline		
Depressants		Amobarbital Pentobarbital Secobarbital Methaqualone (Quaaludes) PCP Mecloqualone	barbituric acid salts chlorhexadol glutethimide lysergic acid & acid amide methyprylon sulfordiethylmethane	numerous tran- quillizers Valium (b)(7) Librium (b)(4) Tranxene (b)(6) Equanil (b)(13) Serax (b)(16)		
Other		cocaine coca leaves immediate pre- cursors to amph.; methamph.; & PCP	nalorphine	fenfluramine (c) Darvon (f)(1) talwin (f)(2)	loperamide (c)	

Alaska Criteria

Comparable
Federal Law
21 U.S.C. §

- | | |
|---|---|
| (1) The actual or probable abuse of the substance, including: | 811(c) (1) |
| (A) the history and current pattern of abuse both in this state and in other states; | 811(c) (4) |
| (B) the scope, duration, and significance of abuse; | 811(c) (5) |
| (C) the degree of actual or probable detriment which may result from abuse of the substance; | |
| (D) the probable physical and social impact of widespread abuse of the substance; | 811(c) (6) |
| (2) the biomedical hazard of the substance including | |
| (A) its pharmacology, the effects and modifiers of the effects of the substance; | 811(c) (2) |
| (B) its toxicology, the acute and chronic toxicity, interaction with other substances, whether controlled or not, and the degree to which it may cause psychological or physiological dependence; | 811(c) (2)
811(c) (7) |
| (C) the risk to public health and the particular susceptibility of segments of the population; | 811(c) (6) |
| (3) whether the substance is an immediate precursor of a substance already controlled under this chapter; | 811(c) (8) |
| (4) the current state of scientific knowledge regarding the substance, including whether there is an acceptable means to safely use the substance under medical supervision; | 811(c) (3)
812(b) (1) (C) |
| (5) the relationship between the use of the substance and other criminal activity, including | [Sec. Pub. L. 91-513, as amended by Pub. L. 92-13, May 14, 1971; & 601(d) (1) (D), at 21 U.S.C. §801, page 170 (19__); re. duties of the Commission on Marihuana and Drug Abuse.] |
| (A) whether persons engaged in illicit trafficking of the substance are also engaged in other criminal activity; | |
| (B) whether the nature and relative profitability of manufacturing or delivering the substance encourages illicit trafficking in the substance; | |
| (C) whether the commission of other crimes is one of the effects of abuse of the substance; | |
| (D) whether addiction to the substance relates to the commission of crimes to support the continued use of the substance. | |

COMPARISON OF ALASKA AND FEDERAL SCHEDULING

OF CONTROLLED SUBSTANCES

New Drug Code Section	Alaska Schedule	Federal Schedule	Federal Law Provision
11.71.140	IA		
(b) substances veg. or chem.		(II)	21 CFR §1308.12(b) (1), (2); (3), +(5).
(c) opiates		(I & II)	21 CFR §1308.11(b) §1308.12(c)
(d) opium derivatives		(I)	21 CFR §1308.11(c)
11.71.150	IIA		
(b) hallucinogens		I	21 CFR §1308.11(d)
(c) cocaine		II	21 CFR §1308.12(b) (4)
(d) depressants except mecloqualone		II	21 CFR §1308.12(e)
(e) stimulants		I	21 CFR §1308.11(e)
(f) immediate precursors		II	21 CFR §1308.12(d)
		(II)	21 CFR §1308.12(f)
11.71.160	IIIA		
(b) stimulants		III	21 CFR §1308.13(b)
(c) depressants		III	21 CFR §1308.13(c)
(d) nalorphine		(III)	21 CFR §1308.13(d)
(e) narcotics & non-narcotics		III	21 CFR §1308.13(e)
(f) hallucinogens		I	21 CFR §1308.11(d) (20) (THC)

New Drug Code Section	Alaska Schedule	Federal Schedule	Federal Law Provision
11.71.170	IVA		
(b) depressants		IV	21 CFR §1308.14 (c)
(c) fenfluramine		IV	21 CFR §1308.14 (d)
(d) stimulants		IV	21 CFR §1308.14 (e)
(e) narcotics & non-narcotics		IV	21 CFR §1308.14 (b)
(f) others		IV	21 CFR §1308.14 (f)
11.71.180	VA		
(b) narcotics & non-narcotics		V	21 CFR §1308.15 (b)
(c) loperamide		V	21 CFR §1308.15 (c)
11.71.190	VIA		
(b) marijuana		I	21 CFR §1308.11 (d) (13)

tion) which is executed for transportation or exportation as required in §§ 1312.18(c) and 1312.27(b) of this chapter.

(c) Except as stated in paragraph (a) of this section, no applicant or registrant is required to use the Administrative Code for Controlled Substances Code for any purpose.

§ 1308.21, Mar. 30, 1973. Redesignated at § 1308.21, Sept. 24, 1973 and amended at § 1318, Apr. 23, 1986]

(1) Submission of information by manufacturers.

(a) Each person who manufactures, packages, repackages, labels, relabels, distributes under his own label any controlled substance (including any compound, salt, or preparation, diagnostic, reagent, buffer, or biological) containing a controlled substance (whether such product is itself controlled or is excepted, exempted, or derived from some or all controls pursuant to § 1308.21-24 or § 1308.31-33) shall submit information required in paragraph (b) of this section for such product being manufactured or sold on July 1, 1972. The information should be submitted by registered mail, return receipt requested,

to the Regulatory Support Section, Attention: Project Label, Drug Enforcement Administration, Department of Justice, Washington, D.C. 20535, by August 31, 1972. In the case of products manufactured after July 1, 1972, or new dosage forms or unit forms manufactured after July 1, 1972, or changes in information required by August 31, 1972, the registrant shall submit the information required in such item within 30 days of the date on which the manufacture commences or information is required to occur. In the case of products, the manufacture of which is discontinued after July 1, 1972, the registrant shall submit notice of such discontinuance within 30 days after the date on which the manufacture ceases. In the case of products the manufacture of which is discontinued before July 1, 1972, the registrant shall still be required to submit a notice of such discontinuance with his initial submission.

(b) Two labels or other documents reflecting the following information shall be submitted with reference to each dosage form or other unit form of each item containing any quantity of any controlled substance:

(1) The trade name, brand name, or other commercial name of the product;

(2) The generic or chemical name and quantity of each active ingredient, including both controlled and noncontrolled substances (if any of this information is a proprietary trade secret, please indicate those portions);

(3) The National Drug Code Number assigned to the product, if any; and

(4) The weight (in metric measure) of each dosage unit or the weight (in metric measure) of the controlled substance per 100 grams of finished product for all items containing any quantity of any narcotic controlled substance in solid dosage forms.

(21 U.S.C. 821 and 871(b))

§ 138 FR 8254, Mar. 30, 1973. Redesignated at § 138 FR 26609, Sept. 24, 1973, and amended at § 46 FR 28841, May 29, 1981]

SCHEDULES

§ 1308.11 Schedule I.

(a) Schedule I shall consist of the drugs and other substances, by whatever official name, common or usual name, chemical name, or brand name designated, listed in this section. Each drug or substance has been assigned the DEA Controlled Substances Code Number set forth opposite it.

(b) *Opiates*. Unless specifically excepted or unless listed in another schedule, any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters and ethers, whenever the existence of such isomers, esters, ethers and salts is possible within the specific chemical designation (for purposes of paragraph (b)(34) only, the term *isomer* includes the optical and geometric isomers):

(1) Acetyl-alpha-methylthioantanyll (N-[1-(1-methyl-2-phenylethyl)-4-piperidinyl]-N-phenylacetamide).....	9815
(2) Acetylmeperidol.....	9601
(3) Allylprodine.....	9602
(4) Alphacetylmethadol.....	9603
(5) Alphameprodine.....	9604
(6) Alphamethadol.....	9605

(7) Alpha-methylthioantanyll (N-[1-(alpha-methyl-benzyloxyethyl)-4-piperidinyl] propionamide; 1-(1-methyl-2-phenylethyl)-4-(N-propionido) piperidine).....	9814
(8) Alpha-methylthioantanyll (N-[1-methyl-2-(2-thienylethyl)-4-piperidinyl]-N-phenylpropanamide).....	9832
(9) Benzethidine.....	9606
(10) Betacetylmethadol.....	9607
(11) Beta-hydroxyantanyll (N-[1-(2-hydroxy-2-phenylethyl)-4-piperidinyl]-N-phenylpropanamide).....	9830
(12) Beta-hydroxy-3-methylthioantanyll (N-[1-(2-hydroxy-2-phenylethyl)-3-methyl-4-piperidinyl]-N-phenylpropanamide).....	9831
(13) Belamprodone.....	9608
(14) Belamethadol.....	9609
(15) Belaprodine.....	9611
(16) Clonazepam.....	9612
(17) Dextromoramide.....	9613
(18) Diamprone.....	9615
(19) Diethylthiambutene.....	9616
(20) Difentanil.....	9188
(21) Dimenoxadol.....	9617
(22) Dimethylthiambutene.....	9618
(23) Dimethylthiambutene.....	9619
(24) Dioxaphetyl butyrate.....	9621
(25) Dipipanone.....	9622
(26) Ethylmethylthioantanyll.....	9623
(27) Etioxyline.....	9624
(28) Etioverine.....	9625
(29) Furethidine.....	9626
(30) Hydroxypethidine.....	9627
(31) Ketobemidone.....	9628
(32) Levomoramide.....	9629
(33) Levophenacymorphan.....	9631
(34) 3-Methylthioantanyll (N-[3-methyl-1-(2-phenylethyl)-4-piperidinyl]-N-phenylpropanamide).....	9813
(35) 3-methylthioantanyll (N-[1-(3-methyl-1-(2-thienylethyl)-4-piperidinyl]-N-phenylpropanamide).....	9833
(36) Morphine.....	9632
(37) MPPP (1-methyl-4-phenyl-4-propionoxypiperidine).....	9661
(38) Noracetylmethadol.....	9633
(39) Norlevorphanol.....	9634
(40) Normethadone.....	9635
(41) Norpipanone.....	9635
(42) Para-fluorolantanyll (N-[4-fluorophenyl]-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide).....	9812
(43) PEPAP (1-(1-(2-phenylethyl)-4-phenyl-4-azetoxypiperidine).....	9663
(44) Phensedoxone.....	9637
(45) Phenampromide.....	9638
(46) Phenomorphan.....	9647
(47) Phenopidine.....	9641
(48) Pintramide.....	9642
(49) Proheptazine.....	9643
(50) Propidine.....	9644
(51) Propiram.....	9649
(52) Racemoramide.....	9645
(53) Thioantanyll (N-phenyl-N-[1-(2-thienylethyl)-4-piperidinyl] propanamide).....	9835
(54) Tilidine.....	9750
(55) Trimeperidine.....	9646

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

(1) Acetorphine.....	9319
(2) Acetyl dihydrocodeine.....	9051
(3) Benzylmorphine.....	9052
(4) Codeine methylbromide.....	9070
(5) Codeine-N-Oxide.....	9053
(6) Cyrenorphine.....	9054
(7) Desomorphine.....	9055
(8) Dihydrogenorphine.....	9145
(9) Drolobanol.....	9335
(10) Etorphine (except hydrochloride salt).....	9056
(11) Heroin.....	9200
(12) Hydromorphinol.....	9301
(13) Methyl desorphine.....	9302
(14) Methyl dihydromorphine.....	9304
(15) Morphine methylbromide.....	9305
(16) Morphine methylsulfonate.....	9306
(17) Morphine-N-Oxide.....	9307
(18) Myrophine.....	9308
(19) Nicocodine.....	9309
(20) Nicomorphine.....	9312
(21) Normorphine.....	9313
(22) Pholcodine.....	9314
(23) Thebacoil.....	9315

Some trade and other names: 7-Ethyl-6,8,β,7,8,9,10,12,13-octahydro-2-methoxy-6,9-methano-5H-pyrido [1', 2':1,2] azepino [5,4-b] indole; Tabernanthe iboga

(13) Lysergic acid diethylamide.....	7315
(14) Marijuana.....	7360
(15) Mescaline.....	7381
(16) Parahexyl—7374; some trade or other names: 3-Hoxyl-1-hydroxy-7,8,9,10-tetrahydro-6,6,5-L-methyl-5H-dibenzol[b,d]pyran; Synhexyl.....	
(17) Peyote.....	7415

Meaning all parts of the plant presently classified botanically as *Lophophora williamsi* Lemare, whether growing or not, the seeds thereof, any extract from any part of such plant, and every compound, manufacture, salts, derivative, mixture, or preparation of such plant, its seeds or extracts

(Interprets 21 USC 812(c), Schedule I(c) (12))

(18) N-ethyl-3-piperidyl benzilate.....	7482
(19) N-methyl-3-piperidyl benzilate.....	7484
(20) Psilocybin.....	7437
(21) Psilocylin.....	7438
(22) Tetrahydrocannabinols.....	7370

(d) *Hallucinogenic substances.* Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation, which contains any quantity of the following hallucinogenic substances, or which contains any of its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation (for purposes of this paragraph only, the term "isomer" includes the optical, position and geometric isomers):

(1) 4-bromo-2,5-dimethoxy amphetamine.....	7391
Some trade or other names: 4-bromo-2,5-dimethoxy-α-methylphenethylamine; 4-bromo-2,5-DMA	
(2) 2,5-dimethoxyamphetamine.....	7396
Some trade or other names: 2,5-dimethoxy-α-methylphenethylamine; 2,5-DMA	
(3) 4-methoxyamphetamine.....	7411
Some trade or other names: 4-methoxy-α-methylphenethylamine; paramethoxyamphetamine, PMA	
(4) 5-methoxy-3,4-methylenedioxy-amphetamine.....	7401
(5) 4-methyl-2,5-dimethoxy-amphetamine.....	7395
Some trade and other names: 4-methyl-2,5-dimethoxy-α-methylphenethylamine; "DOM"; and "STP"	
(6) 3,4-methylenedioxy amphetamine.....	7400
(7) 3,4-methylenedioxymethylamphetamine (MDMA).....	7405
(8) 3,4,5-trimethoxy amphetamine.....	7396
(9) Bufotenine.....	7433
Some trade and other names: 3-(β-Dimethylaminoethyl)-5-hydroxyindole; 3-(2-dimethylaminoethyl)-5-indolol; N, N-dimethylserotonin; 5-hydroxy-N,N-dimethyltryptamine; mappone	
(10) Diethyltryptamine.....	7434
Some trade and other names: N,N-Diethyltryptamine; DET	
(11) Dimethyltryptamine.....	7435
Some trade or other names: DMT	
(12) Ibogaine.....	7260

Synthetic equivalents of the substances contained in the plant, or in the resinous extractives of *Cannabis*, sp. and/or synthetic substances, derivatives, and their isomers with similar chemical structure and pharmacological activity such as the following:

Δ1 cis or trans tetrahydrocannabinol, and their optical isomers

Δ6 cis or trans tetrahydrocannabinol, and their optical isomers

Δ3,4 cis or trans tetrahydrocannabinol, and its optical isomers

(Since nomenclature of these substances is not internationally standardized, compounds of these structures, regardless of numerical designation of atomic positions covered.)

(23) Ethylamine analog of phencyclidine.....	7455
Some trade or other names: N-ethyl-1-phenylcyclohexylamine, (1-phenylcyclohexyl)ethylamine, N-(1-phenylcyclohexyl)ethylamine, cyclohexamine, PCE	
(24) Pyrrolidine analog of phencyclidine.....	7458
Some trade or other names: 1-(1-phenylcyclohexyl)pyrrolidine, PCPy, PHP	
(25) Thiophene analog of phencyclidine.....	7470
Some trade or other names: 1-[1-(2-thienyl)cyclohexyl]piperidine, 2-thienylanalog of phencyclidine, TPCP, TCP	

(e) *Depressants.* Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Mecloqualone.....	2572
(2) Methaqualone.....	2565

Trade and other names: 7-Ethyl-8,9,10,12,13-octahydro-2-methoxy-6,9-no-5H-pyrido [1, 2',1,2] azepino [5,4-b] Tabernanthe iboga

PC acid diethylamide..... 7315

..... 7360

..... 7381

..... 7374; some trade or other names: 3-hydroxy-7,8,9,10-tetrahydro-6,6,9-trimethyl-2,6-dipyrrol; Synhexyl..... 7415

all parts of the plant presently classified solely as *Lophophora williamsii* Lemara, or growing or not, the seeds thereof, any part from any part of such plant, and every kind, manufacture, salt, derivative, mixture or preparation of such plant, its seeds or its

is 21 USC 812(c), Schedule I(c) (12))

..... 7482

..... 7484

..... 7437

..... 7438

..... 7370

equivalents of the substances contained in plant, or in the resinous extractives of the, sp. and/or synthetic substances, doses, and their isomers with similar chemical and pharmacological activity such as following:

or trans tetrahydrocannabinol, and their isomers

or trans tetrahydrocannabinol, and their isomers

is or trans tetrahydrocannabinol, and its isomers

nomenclature of these substances is not nationally standardized, compounds of these names, regardless of numerical designation of positions covered.)

mine analog of phencyclidine..... 7455

Trade or other names: N-ethyl-1-phenylcyclohexane, (1-phenylcyclohexyl)ethylamine, N-(1-cyclohexyl)ethylamine, cyclohexamine, PCE

dine analog of phencyclidine..... 7458

Trade or other names: 1-(1-phenylcyclohexyl)-dine, PCPy, PHP

mine analog of 7470

Trade or other names: 1-(2-thienyl)-cyclo-pipendine

..... analog of phencyclidine, PCP, TC

(f) *Stimulants.* Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system, including its salts, isomers, and salts of isomers:

- (1) Fenethylline..... 1503
- (2) N-ethylamphetamine..... 1475

(g) *Temporary listing of substances subject to emergency scheduling.* Any material, compound, mixture or preparation which contains any quantity of the following substances:

- (1) N-[1-benzyl-4-piperidyl]-N-phenylpropanamide (benzylfentanyl), its optical isomers, salts and salts of isomers..... 9818
- (2) N-[1-(2-thienyl)methyl-4-piperidyl]-N-phenylpropanamide (thienylfentanyl), its optical isomers, salts and salts of isomers..... 9834
- (3) 3,4-methylenedioxy-N-ethylamphetamine (also known as N-ethyl-alpha-methyl-3,4-(methylenedioxy)phenethylamine, N-ethyl MDA, MDE, and MDEA)..... 7404
- (4) N-hydroxy-3,4-methylenedioxyamphetamine (also known as N-hydroxy-alpha-methyl-3,4-(methylenedioxy)phenethylamine, and N-hydroxy MDA)..... 7402
- (5) 4-methylaminorex (also known as 2-amino-4-methyl-5-phenyl-2-oxazoline)..... 1590

[39 FR 22141, June 20, 1974]

EDITORIAL NOTE: FOR FEDERAL REGISTER citations affecting § 1308.11, see the List of CFR Sections Affected in the Finding Aids section of this volume.

§ 1308.12 Schedule II.

(a) Schedule II shall consist of the drugs and other substances, by whatever official name, common or usual name, chemical name, or brand name designated, listed in this section. Each drug or substance has been assigned the Controlled Substances Code Number set forth opposite it.

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

(1) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate excluding apomorphine, dextrorphan, nalbuphine, nalmeferene, naloxone, and naltrexone, and their respective salts, but including the following:

- (1) Raw opium..... 9600
- (2) Opium extracts..... 9610
- (3) Opium fluid..... 9620
- (4) Powdered opium..... 9630
- (5) Granulated opium..... 9640
- (6) Tincture of opium..... 9630
- (7) Codeine..... 9050
- (8) Ethylmorphine..... 9190
- (9) Etorphine hydrochloride..... 9059
- (10) Hydrocodone..... 9193
- (11) Hydromorphone..... 9150
- (12) Meperon..... 9260
- (13) Morphine..... 9300
- (14) Oxycodone..... 9143
- (15) Oxymorphone..... 9652
- (16) Thebaine..... 9333

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

(3) Opium poppy and poppy straw.

(4) Coca leaves (9040) and any salt, compound, derivative or preparation of coca leaves (including cocaine (9041) and ecgonine (9180) and their salts, isomers, derivatives and salts of isomers and derivatives), and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include decocainized coca leaves or extraction of coca leaves, which extractions do not contain cocaine or ecgonine.

(5) Concentrate of poppy straw (the crude extract of poppy straw in either liquid, solid or powder form which contains the phenanthrene alkaloids of the opium poppy), 9670.

(c) *Opiates.* Unless specifically excepted or unless in another schedule any of the following opiates, including its isomers, esters, ethers, salts and salts of isomers, esters and ethers whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical desig-

Depressed Unless specifically listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system, including its salts, isomers, and salts of isomers, whenever the existence of such isomers, and salts of isomers is possible within the specific chemical designation:

- 2572
- 2565

nation, dextrophan and levopropoxyphene excepted:

(1) Alfentanil.....	9737
(2) Alphaprodine.....	9010
(3) Anilidine.....	9020
(4) Bezitramide.....	9800
(5) Bulk dextropropoxyphene (non-dosage forms).....	9273
(6) Dihydrocodeine.....	9120
(7) Diphenoxylate.....	9170
(8) Fentanyl.....	9801
(9) Isomethadone.....	9236
(10) Levomethorphan.....	9210
(11) Levorphanol.....	9220
(12) Metazocine.....	9240
(13) Methadone.....	9250
(14) Methadone-Intermediate, 4-cyano-2-dimethylamino-4,4-diphenyl butane.....	9254
(15) Moramide-Intermediate, 2-methyl-3-morpholino-1,1-diphenylpropano-carboxylic acid.....	9802
(16) Pethidine (mependine).....	9230
(17) Pethidine-Intermediate-A, 4-cyano-1-methyl-4-phenylpiperidine.....	9232
(18) Pethidine-Intermediate-B, ethyl-4-phenylpiperidine-4-carboxylate.....	9233
(19) Pethidine-Intermediate-C, 1-methyl-4-phenylpiperidine-4-carboxylic acid.....	9234
(20) Phenazocine.....	8715
(21) Pimodine.....	9730
(22) Racemethorphan.....	9732
(23) Racemorphan.....	9733
(24) Sufentanil.....	9740

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

(1) Amphetamine, its salts, optical isomers, and salts of its optical isomers.....	1100
(2) Methamphetamine, its salts, isomers, and salts of its isomers.....	1105
(3) Phenmetrazine and its salts.....	1631
(4) Methyphenidate.....	1724

(e) *Depressants.* Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Amobarbital.....	2125
(2) Pentobarbital.....	2270
(3) Phencyclidine.....	7471
(4) Secobarbital.....	2315

(f) *Hallucinogenic substances.*

- (1) Dronabinol (synthetic) in sesame oil and encapsulated in a soft gelatin capsule in a U.S. Food and Drug Administration approved drug product..... 7369
[Some other names for dronabinol: (8a*R*-*trans*-6a,7,8,10a-tetrahydro-6,6,9-trimethyl-3-pentyl-8H-dibenzo[*b,d*]pyran-1-yl, or (-)-delta-9-(*trans*)-tetrahydrocannabinol]
- (2) Nabilone..... 7379
(Another name for nabilone: (±)-*trans*-3-(1,1-dimethylheptyl)-6,6a,7,8,10,10a-hexahydro-1-hydroxy-6,6-dimethyl-9H-dibenzo[*b,d*]pyran-9-one]

(g) *Immediate precursors.* Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances:

(1) Immediate precursor to amphetamine and methamphetamine:

- (i) Phenylacetone..... 8501
Some trade or other names: phenyl-2-propanone; P2P; benzyl methyl ketone; methyl benzyl ketone;

(2) Immediate precursors to phencyclidine (PCP):

- (i) 1-phenylcyclohexylamine..... 7460
- (ii) 1-piperidinocyclohexanecarbonitrile (PCC)..... 8603

[39 FR 22142, June 20, 1974]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 1308.12, see the List of CFR Sections Affected in the Finding Aids section of this volume.

§ 1308.15 Schedule III.

(a) Schedule III shall consist of the drugs and other substances, by whatever official name, common or usual name, chemical name, or brand name designated, listed in this section. Each drug or substance has been assigned the DEA Controlled Substances Code Number set forth opposite it.

(b) *Stimulants.* Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system, including its salts, isomers (whether optical, position, or geometric), and salts of such isomers whenever the existence

hallucinogenic substances.

- ...ol (synthetic) in sesame oil and encapsu-
a soft gelatin capsule in a U.S. Food and
ministration approved drug product. 7389
... other names for dronabinol: (6aR-trans)-
8,10a-tetrahydro-6,6,9-trimethyl-3-pentyl-
benzo[b,d]pyran-1-ol, or (-)-delta-9-
-s)-tetrahydrocannabinol]
... 7379
...er name for nabiline: (±)-trans-3-(1,1-di-
tylheptyl)-6,8a,7,8,10,10a-hexahydro-1-
oxy-6,6-dimethyl-9H-dibenzo[b,d]pyran-9-
]

Immediate precursors. Unless
ally excepted or unless listed in
r schedule, any material, com-
mixture, or preparation which
s any quantity of the following
nces:
nmediate precursor to ampheta-
nd methamphetamine:

- ...etone 8591
... trade or other names: phenyl-2-propanone;
... benzyl methyl ketone; methyl benzyl
... one;

Immediate precursors to phenacyl-
(PCP):

- ...cyclohexylamine 7460
... dincyclohexanecarbonitrile (PCC) 8603

22142, June 20, 1974]

RIA. NOTE: FOR FEDERAL REGISTER ci-
affecting § 1308.12, see the List of
ctions Affected in the Finding Aids
of this volume.

3 Schedule III.

chedule III shall consist of the
and other substances, by what-
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chemical name, or brand name
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er set forth opposite it.

Stimulants. Unless specifically
ed or unless listed in another
le, any material, compound,
e, or preparation which con-
any quantity of the following
nces having a stimulant effect
central nervous system, includ-
salts, isomers (whether optical,
n, or geometric), and salts of
omers whenever the existence

of such salts, isomers, and salts of iso-
mers is possible within the specific
chemical designation:

- (1) Those compounds, mixtures, or preparations in
dosage unit form containing any stimulant sub-
stances listed in schedule II which compounds,
mixtures, or preparations were listed on August 25,
1971, as excepted compounds under § 308.32, and
any other drug of the quantitative composition shown
in that list for those drugs or which is the same
except that it contains a lesser quantity of con-
trolled substances. 1405
(2) Benzphetamine 1228
(3) Chlorphentermine 1645
(4) Clortermine 1347
(5) Phendimetrazine 1815

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

- (1) Any compound, mixture or preparation containing:
(i) Amobarbital 2128
(ii) Secobarbital 2318
(iii) Pentobarbital 2271
or any salt thereof and one or more other active
medicinal ingredients which are not listed in
any schedule.
(2) Any suppository dosage form containing:
(i) Amobarbital 2128
(ii) Secobarbital 2318
(iii) Pentobarbital 2271
or any salt of any of these drugs and approved
by the Food and Drug Administration for mar-
keting only as a suppository.
(3) Any substance which contains any quantity of a
derivative of barbituric acid or any salt thereof 2100
(4) Chlormexadol 2510
(5) Glutethimide 2550
(6) Lysergic acid 7300
(7) Lysergic acid amide 7310
(8) Methyprylon 2575
(9) Sulfondiethylmethane 2600
(10) Sulfonethylmethane 2605
(11) Sulfonmethane 2610
(12) Tiletamine and zolazepam or any salt thereof 7295

Some trade or other names for a tiletamine-
zolazepam combination product:
Tetazol
Some trade or other names for tiletamine:
2-(ethylamino)-2-(2-ivonyl)-cyclohexanone
Some trade or other names for zolazepam:
4-(2-fluorophenyl)-6,8-dihydro-1,3,8-
trimethylpyrazolo-[3,4-e] [1,4]-diazepin-
7(1H)-one, fluprazapon

(d) Nalorphine 9400.

(e) Narcotic Drugs. Unless specifical-
ly excepted or unless listed in another
schedule, any material, compound,
mixture, or preparation containing
any of the following narcotic drugs, or
their salts calculated as the free anhy-

drous base or alkaloid, in limited quan-
tities as set forth below:

- (1) Not more than 1.8 grams of codeine per 100
milliliters or not more than 90 milligrams per
dosage unit, with an equal or greater quantity of an
isoquinoline alkaloid of opium. 9803
(2) Not more than 1.8 grams of codeine per 100
milliliters or not more than 90 milligrams per
dosage unit, with one or more active, nonnarcotic
ingredients in recognized therapeutic amounts. 9804
(3) Not more than 300 milligrams of dihydrocodemone
(hydrocodone) per 100 milliliters or not more than
15 milligrams per dosage unit, with a fourfold or
greater quantity of an isoquinoline alkaloid of opium. 9805
(4) Not more than 300 milligrams of dihydrocodeinone
(hydrocodone) per 100 milliliters or not more than
15 milligrams per dosage unit, with one or more
active nonnarcotic ingredients in recognized thera-
peutic amounts. 9806
(5) Not more than 1.8 grams of dihydrocodeine per
100 milliliters or not more than 90 milligrams per
dosage unit, with one or more active nonnarcotic
ingredients in recognized therapeutic amounts. 9807
(6) Not more than 300 milligrams of ethylmorphine
per 100 milliliters or not more than 15 milligrams
per dosage unit, with one or more active, nonnar-
cotic ingredients in recognized therapeutic amounts. 9808
(7) Not more than 500 milligrams of opium per 100
milliliters or per 100 grams or not more than 25
milligrams per dosage unit, with one or more active,
nonnarcotic ingredients in recognized therapeutic
amounts. 9809
(8) Not more than 50 milligrams of morphine per 100
milliliters or per 100 grams, with one or more
active, nonnarcotic ingredients in recognized thera-
peutic amounts. 9810

[39 FR 22142, June 20, 1974, as amended at
41 FR 43401, Oct. 1, 1978; 43 FR 3359, Jan.
25, 1978; 44 FR 40888, July 13, 1979; 46 FR
52334, Oct. 27, 1981; 51 FR 5320, Feb. 13,
1986; 52 FR 2222, Jan. 21, 1987; 52 FR 5952,
Feb. 27, 1987]

§ 1308.14 Schedule IV.

(a) Schedule IV shall consist of the
drugs and other substances, by what-
ever official name, common or usual
name, chemical name, or brand name
designated, listed in this section. Each
drug or substance has been assigned
the DEA Controlled Substances Code
Number set forth opposite it.

(b) Narcotic drugs. Unless specifical-
ly excepted or unless listed in another
schedule, any material, compound,
mixture, or preparation containing
any of the following narcotic drugs, or
their salts calculated as the free anhy-
drous base or alkaloid, in limited quan-
tities as set forth below:

- (1) Not more than 1 milligram of difenoxin and not
less than 25 micrograms of atropine sulfate per
dosage unit. 9167

(2) Dextropoxyphene (alpha-(+)-4-dimethylamino-1,2-diphenyl-3-methyl-2-propionoxybutane)..... 9278

(c) *Depressants.* Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Alprazolam.....	2882
(2) Barbitol.....	2145
(3) Bromazepam.....	2748
(4) Camazepam.....	2749
(5) Chloral betane.....	2460
(6) Chloral hydrate.....	2465
(7) Chloridazepoxide.....	2744
(8) Clonazepam.....	2751
(9) Clonazepam.....	2737
(10) Clonazepam.....	2768
(11) Clonazepam.....	2752
(12) Cloxazolam.....	2753
(13) Delorazepam.....	2754
(14) Diazepam.....	2765
(15) Estazolam.....	2756
(16) Ethchlorvynol.....	2540
(17) Ethinamate.....	2545
(18) Ethyl loflazepam.....	2758
(19) Fludiazepam.....	2759
(20) Flunitrazepam.....	2763
(21) Flurazepam.....	2767
(22) Halazepam.....	2762
(23) Haloxazolam.....	2771
(24) Ketazolam.....	2772
(25) Loprazolam.....	2773
(26) Lorazepam.....	2885
(27) Lormetazepam.....	2774
(28) Mebutamate.....	2800
(29) Medazepam.....	2636
(30) Meorobamate.....	2820
(31) Methohexital.....	2264
(32) Methylphenobarbital (mephobarbital).....	2250
(33) Midazolam.....	2884
(34) Nimetazepam.....	2837
(35) Nitrazepam.....	2834
(36) Nordiazepam.....	2838
(37) Oxazepam.....	2835
(38) Oxazolam.....	2839
(39) Paraldehyde.....	2585
(40) Petrichloral.....	2591
(41) Phenobarbital.....	2285
(42) Pinazepam.....	2883
(43) Prazepam.....	2764
(44) Quazepam.....	2881
(45) Temazepam.....	2925
(46) Tetrazepam.....	2886
(47) Triazolam.....	2887

(d) *Fenfluramine.* Any material, compound, mixture, or preparation which contains any quantity of the following substances, including its salts, isomers (whether optical, position, or geometric), and salts of such isomers, whenever the existence of

such salts, isomers, and salts of isomers is possible:

(1) Fenfluramine..... 1670

(e) *Stimulants.* Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system, including its salts, isomers and salts of isomers:

(1) Diethylpropion.....	161C
(2) Mazindol.....	16C5
(3) Pemoline (including organometallic complexes and chelates thereof).....	1530
(4) Phentermine.....	1640
(5) Pipradrol.....	1750
(6) SPA ((-)-1-dimethylamino-1,2-diphenylethane).....	1635

(f) *Other substances.* Unless specifically excepted or unless listed in another schedule, any material, compound, mixture or preparation which contains any quantity of the following substances, including its salts:

(1) Pentazocine..... 9709

[39 FR 22143, June 20, 1974]

EDITORIAL NOTE: FOR FEDERAL REGISTER citations affecting § 1308.14, see the List of CFR Sections Affected in the Finding Aids section of this volume.

§ 1308.15 Schedule V.

(a) Schedule V shall consist of the drugs and other substances, by whatever official name, common or usual name, chemical name, or brand name designated, listed in this section.

(b) *Narcotic drugs.* Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation containing any of the following narcotic drugs and their salts, as set forth below:

(1) Buprenorphine..... 9064

(c) Narcotic drugs containing non-narcotic active medicinal ingredients. Any compound, mixture, or preparation containing any of the following narcotic drugs, or their salts calculat-

salts, isomers, and salts of isomers possible:

Amphetamine..... 1670

Stimulants. Unless specifically excluded or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system, including its salts, isomers and salts of isomers:

Propylhexedrine..... 1610
 Pseudoephedrine..... 1605
 Ephedrine (including organometallic complexes and salts thereof)..... 1530
 Phenylephrine..... 1540
 Norephedrine..... 1750
 (±)-1-dimethylamino-1,2-diphenylethane..... 1635

Other substances. Unless specifically excluded or unless listed in another schedule, any material, compound, mixture or preparation which contains any quantity of the following substances, including its salts:

Cocaine..... 9709

22143, June 20, 1974]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 1308.14, see the List of Sections Affected in the Finding Aids of this volume.

15 Schedule V.

Schedule V shall consist of the following substances, by whatever official name, common or usual name, chemical name, or brand name designated, listed in this section:

Narcotic drugs. Unless specifically excluded or unless listed in another schedule, any material, compound, mixture, or preparation containing any of the following narcotic drugs or their salts, as set forth below:

Morphine..... 9064

Narcotic drugs containing non-narcotic active medicinal ingredients, compound, mixture, or preparation containing any of the following narcotic drugs, or their salts calculated

as the free anhydrous base or alkaloid, in limited quantities as set forth below, which shall include one or more non-narcotic active medicinal ingredients in sufficient proportion to confer upon the compound, mixture, or preparation valuable medicinal qualities other than those possessed by narcotic drugs alone:

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

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

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

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

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

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

[39 FR 22143, June 20, 1974, as amended at 43 FR 38383, Aug. 28, 1978; 44 FR 40868, July 13, 1979; 47 FR 49841, Nov. 3, 1982; 50 FR 81108, Feb. 28, 1985; 52 FR 5952, Feb. 27, 1987]

EXCLUDED NONNARCOTIC SUBSTANCES

§ 1308.21 Application for exclusion of a nonnarcotic substance.

(a) Any person seeking to have any nonnarcotic substance which may be sold under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301), be lawfully sold over the counter without a prescription, excluded from any schedule, pursuant to section 201(g) (1) of the Act (21 U.S.C. 811 (g) (1)), may apply to the Administrator, Drug Enforcement Administration, Department of Justice, Washington, D.C. 20537.

(b) An application for an exclusion under this section shall contain the following information:

- (1) The name and address of the applicant;
- (2) The name of the substance for which exclusion is sought; and

(3) The complete quantitative composition of the substance.

(c) Within a reasonable period of time after the receipt of an application for an exclusion under this section, the Administrator shall notify the applicant of his acceptance or non-acceptance of his application, and if not accepted, the reason therefore. The Administrator need not accept an application for filing if any of the requirements prescribed in paragraph (b) of this section is lacking or is not set forth as to be readily understood. If the applicant desires, he may amend the application to meet the requirements of paragraph (b) of this section. If the application is accepted for filing, the Administrator shall issue and publish in the FEDERAL REGISTER his order on the application, which shall include a reference to the legal authority under which the order is issued and the findings of fact and conclusions of law upon which the order is based. This order shall specify the date on which it shall take effect. The Administrator shall permit any interested person to file written comments on or objections to the order within 60 days of the date of publication of his order in the FEDERAL REGISTER. If any such comments or objections raise significant issues regarding any finding of fact or conclusion of law upon which the order is based, the Administrator shall immediately suspend the effectiveness of the order until he may reconsider the application in light of the comments and objections filed. Thereafter, the Administrator shall reinstate, revoke, or amend his original order as he determines appropriate.

(d) The Administrator may at any time revoke any exclusion granted pursuant to section 201(g) of the Act (21 U.S.C. 811(g)) by following the procedures set forth in paragraph (c) of this section for handling an application for an exclusion which has been accepted for filing.

§ 1308.22 Excluded substances.

The following nonnarcotic substances which may, under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301), be lawfully sold over the

FEDERAL BUREAU OF INVESTIGATION

Effect of amendments. — The 1986 amendment deleted "or AS 17.35" following "AS 17.30" in the introductory language of subsection (a).

Sec. 11.71.070. Misconduct involving a controlled substance in the seventh degree. (a) Except as authorized in AS 17.30, a person commits the offense of misconduct involving a controlled substance in the seventh degree if the person

(1) manufactures or delivers, or possesses with the intent to manufacture or deliver, one or more preparations, compounds, mixtures, or substances of an aggregate weight of less than one-half ounce of a schedule VIA controlled substance; or

(2) possesses one or more preparations, compounds, mixtures, or substances of an aggregate weight of less than one ounce containing a schedule VIA controlled substance on a public street or sidewalk or on the premises of a public carrier or business establishment or in any other public place.

(b) Misconduct involving a controlled substance in the seventh degree is a violation and is punishable as authorized in AS 12.55, except that if a fine is imposed it shall not be more than \$100. (§ 2 ch 45 SLA 1982; am § 12 ch 146 SLA 1986)

Effect of amendments. — The 1986 amendment deleted "or AS 17.35" following "AS 17.30" in the introductory language of subsection (a).

Sec. 11.71.080. Aggregate weight of live marijuana plants.

NOTES TO DECISIONS

Applicability of definition. — The definition in this section did not apply where the marijuana was already dried and processed. *Gibson v. State*, Ct. App. Op. No. 621 (File No. A-917), 719 P.2d 687 (1986).

Article 2. Standards and Schedules.

Section 120. Authority to schedule controlled substances	Section 160. Schedule IIIA 180. Schedule VA
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Sec. 11.71.120. Authority to schedule controlled substances. (a) If, after considering the factors set out in (c) of this section, the committee decides to recommend that a substance should be added to, deleted from, or rescheduled in a schedule of controlled substances under AS 11.71.140 — 11.71.190, the governor shall introduce legislation in accordance with the recommendation of the committee.

(b) If a substance is added as a controlled substance under federal law, the governor shall introduce legislation in accordance with the federal law.

(c) In advising the governor of the need to add, delete, or reschedule a substance under AS 11.71.110(1), the committee shall assess the

danger or probable danger of the substance after considering the following:

(1) the actual or probable abuse of the substance including (A) the history and current pattern of abuse both in this state and in other states;

(B) the scope, duration, and significance of abuse;

(C) the degree of actual or probable detriment which may result from abuse of the substance;

(D) the probable physical and social impact of widespread abuse of the substance;

(2) the biomedical hazard of the substance including

(A) its pharmacology, in the effects and modifiers of the effects of the substance;

(B) its toxicology, the acute and chronic toxicity, interaction with other substances, whether controlled or not, and the degree to which it may cause psychological or physiological dependence;

(C) the risk to public health and the particular susceptibility of segments of the population;

(3) whether the substance is an immediate precursor of a substance already controlled under this chapter;

(4) the current state of scientific knowledge regarding the substance, including whether there is any acceptable means to safely use the substance under medical supervision;

(5) the relationship between the use of the substance and other criminal activity, including

(A) whether persons engaged in illicit trafficking of the substance are also engaged in other criminal activity;

(B) whether the nature and relative profitability of manufacturing or delivering the substance encourages illicit trafficking in the substance;

(C) whether the commission of other crimes is one of the effects of abuse of the substance;

(D) whether addiction to the substance relates to the commission of crimes to support the continued use of the substance.

(d) [Repealed. § 40 ch 6 SLA 1984.]

(e) The committee has no authority over tobacco or alcoholic beverages as defined in AS 04.21.080. (§ 2 ch 45 SLA 1982; am § 40 ch 6 SLA 1984)

Effect of amendments. — The 1984 amendment repealed former subsection (d), relating to a precursor of an immediate precursor. For statement of the purpose of the 1984 repeal of subsection (d) of this section, see the 1984 House Journal at p. 2287, in the paragraph captioned "Section 40."

Legislative history reports. — For

Sec. 11.71.150. Schedule IIA.

NOTES TO DECISIONS

Cited in *Williams v. State*, Ct. App. Op. No. 749 (File Nos. A-1783, A-1807), 743 P.2d 397 (1987).

Sec. 11.71.160. Schedule IIIA. (a) A substance shall be placed in schedule IIIA if it is found under AS 11.71.120(c) to have a degree of danger or probable danger to a person or the public less than the substances listed in schedule IIA but higher than substances listed in schedule IVA.

(b) Schedule IIIA includes, unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system, including their salts, isomers whether optical, position, or geometric, and salts of these isomers whenever the existence of these salts, isomers, and salts of isomers is possible within the specific chemical designation:

- (1) benzphetamine;
- (2) chlorphentermine;
- (3) clortermine;
- (4) mazindol;
- (5) phendimetrazine;

(6) any compound, mixture, or preparation in dosage unit form containing any stimulant substance listed in schedule IIA, which compound, mixture, or preparation was listed on August 25, 1971, as an excepted compound under 21 C.F.R. § 1308.32, and any other drug of the quantitative composition shown in that list for those substances, or which is the same except that it contains a lesser quantity of any controlled substance.

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

(1) amobarbital, secobarbital, or pentobarbital or any salt of these substances, combined with one or more other active medicinal ingredients which are not listed in any other schedule;

(2) amobarbital, secobarbital, or pentobarbital or any salt of these substances, approved by the Federal Food and Drug Administration for marketing only as a suppository;

(3) any substance which contains any quantity of a derivative of barbituric acid or any salt of barbituric acid;

- (4) chlorhexadol;
- (5) glutethimide;
- (6) lysergic acid;

- (7) lysergic acid amide;
- (8) methyprylon;
- (9) sulfondiethylmethane;
- (10) sulfonethylmethane;
- (11) sulfonmethane.

(e) Schedule IIIA includes, unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation containing any of the following narcotic drugs or their salts calculated as the free anhydrous base or alkaloid, in the following quantities:

(1) not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with an equal or greater quantity of an isoquinoline alkaloid of opium;

(2) not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(3) not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with a fourfold or greater quantity of an isoquinoline alkaloid of opium;

(4) not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active nonnarcotic ingredients in recognized therapeutic amounts;

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

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

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

(8) not more than 50 milligrams of morphine per 100 milliliters or per 100 grams, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(f) Schedule IIIA includes

- (1) hashish;
- (2) hash oil or hashish oil; and
- (3) tetrahydrocannabinols. (§ 2 ch 45 S.L.A. 1982)

Editor's notes. — This section is set out to correct an error in enactment.

Sec. 11.71.180. Schedule VA. (a) A substance shall be placed in schedule VA if it is found under AS 11.71.120(c) to have a degree of danger or probable danger to a person or the public which is less than substances listed in schedule IVA, but higher than substances listed in schedule VIA.

(b) Schedule VA includes any compound, mixture, or preparation containing any of the following limited quantities of narcotic drugs or their salts, calculated as the free anhydrous base or alkaloid, in limited quantities as specified in (1) — (6) of this subsection, which includes one or more nonnarcotic active medicinal ingredients in sufficient proportion to confer upon the compound, mixture, or preparation valuable medicinal qualities other than those possessed by schedule IA substances alone:

(1) not more than 200 milligrams of codeine per 100 milliliters or per 100 grams;

(2) not more than 100 milligrams of dihydrocodeine per 100 milliliters or per 100 grams;

(3) not more than 100 milligrams of ethylmorphine per 100 milliliters or per 100 grams;

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

(5) not more than 100 milligrams of opium per 100 milliliters or per 100 grams;

(6) not more than 0.5 milligrams of difenoxin and not less than 25 micrograms of atropine sulfate per dosage unit.

(c) [Repealed. § 1 ch 66 SLA 1987.] (§ 2 ch 45 SLA 1982; am § 1 ch 66 SLA 1987)

Effect of amendments. — The 1987 amendment deleted subsection (c), which read "Schedule VA includes loperamide."

Article 3. Miscellaneous Provisions.

Section 305. Rehabilitation

Sec. 11.71.305. Rehabilitation. A person convicted of violating a provision of this chapter may, when the violation relates to that person's own personal use of a controlled substance, be committed to the custody of the Department of Corrections for rehabilitative treatment for not to exceed one year. Such treatment may be imposed in place of a fine or imprisonment, but only where the imprisonment would not have exceeded one year. (§ 2 ch 45 SLA 1982; am E.O. No. 55, § 2 (1984))

Effect of amendments. — The 1984 "Health and Social Services" in the first amendment substituted "Corrections" for "sentence."

Article 4. Definitions.

Section 900. Definitions

Sec. 11.71.900. Definitions. In this chapter, unless the context clearly requires otherwise,

(1) "administer" means the direct application of a controlled substance, whether by injection, inhalation, ingestion, or any other means into the body of a patient or research subject by

(A) a practitioner or, in the practitioner's presence, by the practitioner's authorized agent; or

(B) the patient or research subject at the direction and in the presence of a practitioner;

(2) "agent" means an authorized person who acts on behalf of or at the direction of a manufacturer, distributor, or dispenser, but does not include a common or contract carrier, public warehouseman, or employee of the carrier or warehouseman;

(3) "committee" means the Controlled Substances Advisory Committee established in AS 11.71.100;

(4) "controlled substance" means a drug, substance, or immediate precursor included in the schedules set out in AS 11.71.140 — 11.71.190;

(5) "counterfeit substance" means a controlled substance which, without authorization, bears the trademark, trade name, or other identifying mark, imprint, number, or device of a manufacturer, distributor, or dispenser other than the person or persons who in fact manufactured, distributed, or dispensed the substance and which falsely purports or is represented to be the product of, or to have been distributed by, the other manufacturer, distributor, or dispenser;

(6) "deliver" or "delivery" means the actual, constructive, or attempted transfer from one person to another of a controlled substance whether or not there is an agency relationship;

(7) "dispense" means to deliver a controlled substance to an ultimate user or research subject by or under the lawful order of a practitioner, including the prescribing, administering, packaging, labeling, or compounding necessary to prepare the substance for that delivery; "dispenser" means a practitioner who dispenses;

(8) "distribute" means to deliver other than by administering or dispensing a controlled substance, whether or not there is any money or other item of value exchanged; it includes sale, gift, or exchange; "distributor" means a person who distributes;

(9) "drug"

(A) means

(i) a substance recognized as a drug in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to these publications;

(ii) a substance intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in humans or animals;

(iii) a substance, other than food, intended to affect the structure or any function of the body of humans or animals; and

(iv) a substance intended for use as a component of any article specified in (i), (ii), or (iii) of this subparagraph;

(B) does not include a device or its components, parts, or accessories;

(10) "hashish" means the dried, compressed, resinous product of the plant (genus) *Cannabis*;

(11) "hashish oil" means the viscous liquid concentrate of tetrahydrocannabinols extracted from the plant (genus) *Cannabis*;

(12) "immediate precursor" means a substance which is by statute or regulation designated as the principal compound commonly used or produced primarily for use, and which is an immediate chemical intermediary used or likely to be used in the manufacture of a controlled substance, the control of which is necessary to prevent, curtail, or limit manufacture of that controlled substance;

(13) "manufacture"

(A) means the production, preparation, propagation, compounding, conversion, growing, or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis; however, the growing of marijuana for personal use is not manufacturing;

(B) includes the preparation, compounding, packaging, repackaging, labeling, or relabeling of a controlled substance or its container unless done in conformity with applicable federal law

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

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

(14) "marijuana" means the seeds, and leaves, buds, and flowers of the plant (genus) *Cannabis*, whether growing or not; it does not include the resin or oil extracted from any part of the plants, or any compound, manufacture, salt, derivative, mixture, or preparation from the resin or oil, including hashish, hashish oil, and natural or synthetic tetrahydrocannabinol; it does not include the stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mix-

ture, or preparation of the stalks, fiber, oil or cake, or the sterilized seed of the plant which is incapable of germination;

(15) "opiate" means

(A) a substance having an addiction-forming or addiction-sustaining capability similar to morphine or being capable of conversion into a drug having addiction-forming or addiction-sustaining capability; and

(B) includes its racemic and levorotatory forms; but

(C) does not include the dextrorotatory isomer of 3-methoxy-n-methylmorphinan and its salts (dextromethorphan);

(16) "opium poppy" means the plant of any species of *Papaver* containing the phenanthrine alkaloids of opium, except its seeds;

(17) "peyote" means any part of the plant classified botanically as *Lophophora Williamsii* Lemaire, whether growing or not, the seeds of the plant, any extract from any part of the plant, and a compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or extracts, including mescaline;

(18) "poppy straw" means all parts, except the seeds, of the opium poppy, after mowing;

(19) "practitioner" means

(A) a physician, dentist, veterinarian, scientific investigator, or other person licensed, registered, or otherwise permitted to distribute, dispense, conduct research with respect to, or to administer or use in teaching or chemical analysis a controlled substance in the course of professional practice or research in the state;

(B) a pharmacy, hospital, or other institution licensed, registered, or otherwise permitted to distribute, dispense, conduct research with respect to, or to administer a controlled substance in the course of professional practice or research in the state;

(20) "sale" means to sell, barter, exchange, give, or dispose of to another, or an exchange for a thing of value;

(21) "schedule IA controlled substance" means a controlled substance included in the schedule in AS 11.71.140;

(22) "schedule IIA controlled substance" means a controlled substance included in the schedule in AS 11.71.150;

(23) "schedule IIIA controlled substance" means a controlled substance included in the schedule in AS 11.71.160;

(24) "schedule IVA controlled substance" means a controlled substance included in the schedule in AS 11.71.170;

(25) "schedule VA controlled substance" means a controlled substance included in the schedule in AS 11.71.180;

(26) "schedule VIA controlled substance" means a controlled substance included in the schedule in AS 11.71.190;

(27) "ultimate user" means a person who lawfully possesses a controlled substance for the person's own use or for the use of a member of the person's household or for administering to an animal owned by the

person or by a member of the person's household. (§ 2 ch 45 SLA 1982; am § 41 ch 6 SLA 1984)

Effect of amendments. — The 1984 amendment in paragraph (16), deleted "unless specifically designated as controlled under AS 11.71.120" following "in-

clude" in subparagraph (C) and made a series of technical changes in subparagraphs (A) and (B).

NOTES TO DECISIONS

Purpose of definition of marijuana. — The definition of marijuana in this section is for the purpose of determining whether or not a person could be charged with marijuana possession or delivery, but has nothing to do with determining aggregate weight. *Gibson v. State, Ct.*

App. Op. No. 621 (File No. A-917), 719 P.2d 687 (1986).

Applied in *Stuart v. State, Ct. App. Op. No. 461 (File No. A-276), 698 P.2d 1218 (1985); State v. Resek, Ct. App. Op. No. 573 (File Nos. A-591, A-631, A-680), 706 P.2d 706 (1985).*

Chapter 73. Imitation Controlled Substances Act.

Sec. 11.73.010. Manufacture or delivery of an imitation controlled substance.

NOTES TO DECISIONS

Applied in *Morrow v. State, Ct. App. Op. No. 499 (File No. A-510), 704 P.2d 226 (1985).*

Sec. 11.73.099. Definitions.

NOTES TO DECISIONS

This section, as interpreted, was not unconstitutionally vague. — See *Mor-*

row v. State, Ct. App. Op. No. 499 (File No. A-510), 704 P.2d 226 (1985).

Chapter 76. Miscellaneous Offenses.

Section 105. Selling or giving tobacco to a minor
105. Purchase of tobacco by a minor

Section 130. Interference with rights of disabled person

Sec. 11.76.100. Selling or giving tobacco to a minor. (a) A person commits the offense of selling or giving tobacco to a minor if the person is 19 years of age or older and

(1) knowingly sells, exchanges, or gives a cigarette, a cigar, tobacco, or a product containing tobacco to a person under 19 years of age; or

(2) maintains a vending machine that dispenses cigarettes, cigars, tobacco, or products containing tobacco and that is accessible to persons under 19 years of age.

(b) Notwithstanding the provisions of (a) of this section, a person who maintains a vending machine is not in violation of (a)(2) of this section if

(1) the vending machine is in a location that is generally supervised by a person who maintains the vending machine, or an employee of the person, during the hours the machine is accessible;

(2) the vending machine is in a location where a person under 31 years of age, other than an employee of the owner of the premises, is not allowed entry by law unless accompanied by a parent, guardian, or spouse of the person who is 21 years of age or older; or

(3) the vending machine is in a location where a person under 19 years of age is not allowed entry by policy of the owner of the premises unless accompanied by a person 15 years of age or older.

(c) In this section, a person maintains a vending machine if the person owns the machine or owns or controls a facility in which the machine is located.

(d) Selling or giving tobacco to a minor is a violation. (§ 9 ch 166 SLA 1978; am § 2 ch 125 SLA 1988)

Effect of amendments. — The 1988 amendment rewrote this section to the extent that a detailed comparison is impracticable.

Sec. 11.76.105. Purchase of tobacco by a minor. (a) A person under 19 years of age may not purchase a cigarette, a cigar, tobacco, or a product containing tobacco in this state.

(b) Purchase of tobacco by a minor is a violation. (§ 3 ch 125 SLA 1988)

Cross references. — For statement of SLA 1988 in the Temporary and Special legislative purpose, see sec. 1, ch. 125, Acts.

Sec. 11.76.130. Interference with rights of disabled person. (a) A person commits the crime of interference with the rights of a disabled person if the person intentionally prevents or restricts

(1) a physically or mentally disabled person from having full and free pedestrian use of a street, highway, sidewalk, walkway, or other thoroughfare, to the same extent that any other person has a right to pedestrian use; or

(2) a physically disabled person from being accompanied or assisted by a certified service animal, without an extra charge for the service animal, in a common carrier, place of public accommodation, or other place to which the general public is invited, except as provided in (b) of this section.

(b) A physically disabled person who is accompanied or assisted by a certified service animal in a common carrier, place of public accommodation, or other place to which the general public is invited, is liable for property damage done by the animal.

Model Penal Code § 1.07(3) (Proposed Official Draft 1962).

I assume Judge Coats would recognize this principle as well since he says:

In this case the prosecution could have avoided any double jeopardy problems by charging the tampering offense before Williams was tried for murder. At least then Williams could have moved to consolidate the trial so that he would not be tried twice on essentially the same evidence.

State v. Williams, 704 P.2d at 222. I assume the converse would be true as well and that if the charges had been initially joined and Williams had moved for a severance, Judge Coats would find further prosecution permissible. See *Jeffers v. United States*, 432 U.S. 137, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977) (plurality opinion: A defendant waives double jeopardy challenge to successive prosecution if charges originally joined and he successfully obtains a severance). While first-degree murder and tampering with evidence were not joined in a single charging document against Williams, the prosecution did seek to have the jury which considered the homicide charges also consider the tampering with evidence charges as a lesser-included offense, and Williams objected. Judge Rowland sustained Williams' objection and would not instruct on the charges subsequently brought against Williams. Despite the fact that all parties agreed at the time that tampering was not a lesser-included offense,⁴ Williams' refusal to allow his first jury to consider these charges substantially undercuts his current claim that re-prosecution subjected him to unconstitutional harassment and mental suffering. I do not understand Williams' objection to have been based on a contention that time constraints made him unable to meet the tampering charge at his first trial. Nevertheless, the protection of the double jeopardy clause may be waived but it cannot be forfeited. See *Lemon v. State*, 654 P.2d 277, 280 (Alaska App.1982). While a per-

4. I assume tampering and murder in context address different societal concerns and there-

fore the former is not a lesser of the latter even under the cognate theory. suasive argument could be made that Williams waived the protection of the double jeopardy clause by objecting to jury instructions on hindering prosecution at his first trial on the basis of *Jeffers v. United States*, 432 U.S. 137, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977), the state has not made that argument either here or in the court below, and the trial court has not passed on it. It would be inappropriate to recognize it *sua sponte* in this appeal. I therefore join in the decision affirming Judge Moody's dismissal of the indictment against Williams.



Jo Ann MORROW, Appellant,

v.

STATE of Alaska, Appellee.

No. A-510.

Court of Appeals of Alaska.

Aug. 9, 1985.

Defendant was convicted in the Superior Court, Fourth Judicial District, Fairbanks, Thomas B. Stewart, J., of possession with intent to deliver an imitation controlled substance, and she appealed. The Court of Appeals, Coats, J., held that: (1) juvenile informant's credibility was adequately supported, and thus, search warrant affidavit was not inadequate on that ground; (2) affidavit in support of search warrant was not based on stale information; (3) there was sufficient nexus between defendant's residence and items to be searched; (4) police had authority to seize telephone list which had on it informant's name and telephone number; (5) preliminary laboratory report that a substance which defendant was charged with

fore the former is not a lesser of the latter even under the cognate theory.

possessing contained ephedrine and caffeine was properly admitted into evidence; (6) imitation controlled substances statute was not unconstitutionally overbroad or vague; and (7) remand was necessary to determine whether defendant's conviction should stand in light of construction of statute under which she was convicted.

Case remanded.

1. Drugs and Narcotics ⇐188

Juvenile who told police officer she had obtained pills from defendant, and that defendant told her the pills were "speed" and instructed her to sell each pill for one dollar, was sufficiently credible to support issuance of a search warrant for defendant's home.

2. Drugs and Narcotics ⇐188

Magistrate who issued search warrant for defendant's home properly concluded that information on which search warrant was based was not stale, despite fact that informant's alleged transaction with defendant had occurred seven to nine days prior to issuance of warrant, where affidavit stated that money had been turned over to defendant within last few days, and that defendant had represented to informant that if informant sold all of the substances defendant could obtain more.

3. Drugs and Narcotics ⇐188

Fact that juvenile informant indicated she obtained pills from defendant while defendant was in her car did not mean there was no nexus between defendant's residence and items to be searched for; rather, magistrate properly concluded from continuing contact between informant and defendant that defendant was engaged in ongoing business, and could logically assume that some of drugs would be stored at defendant's residence, establishing probable cause to search defendant's residence.

4. Criminal Law ⇐394.4(13)

Fact that defendant had juvenile's name and telephone number on list in her purse showed her connection to juvenile and corroborated juvenile's story to police

that defendant had given her pills which were allegedly speed and had instructed juvenile to sell each pill for one dollar, giving police authority to seize the list; thus, trial judge properly refused to suppress use of the list as evidence.

5. Indictment and Information ⇐10.2(8)

Preliminary laboratory report that substance which defendant was charged with possessing contained ephedrine and caffeine gave grand jury sufficient information to properly find that substance which defendant possessed fell within imitation controlled substances statute, AS 11.73.010(a), where police officer who introduced the report gave grand jury background information about chemist who performed the test, including fact she had testified as an expert in other drug cases, where police officer testified that he field-tested the suspected drugs and found that they were not amphetamines, and where chemist's testimony at trial was essentially the same as the preliminary report.

6. Constitutional Law ⇐90.1(1), 91 Drugs and Narcotics ⇐43

Imitation controlled substances statute, AS 11.73.010(a), regulates conduct, the possession and sale of certain specified drugs, not speech or association, and thus is not overbroad. Const. Art. 1, § 7.

7. Drugs and Narcotics ⇐43

Statute prohibiting manufacture, delivery, or possession with intent to deliver an imitation controlled substance, AS 11.73.010(a), could be interpreted to apply to situations involving an intentional misrepresentation that an imitation drug is a controlled drug, and thus, the statute is not vague. Const. Art. 1, § 7.

8. Drugs and Narcotics ⇐43

Imitation controlled substances statute, AS 11.73.010(a), is not unconstitutionally vague on grounds of arbitrary enforcement. Const. Art. 1, § 7.

9. Criminal Law ⇐1181.5(1)

Defendant's conviction for possession with intent to deliver an imitation controlled substance would be remanded in

light of Court of Appeals' construction of statute under which she was convicted. AS 11.73.010(a); Const. Art. 1, § 7.

Carl E. Forsberg, Birch, Horton, Bittner, Pestinger and Anderson, Anchorage, for appellant.

John A. Scukanec, Asst. Atty. Gen., Anchorage, and Norman C. Gorsuch, Atty. Gen., Juneau, for appellee.

Before BRYNER, C.J., and COATS and SINGLETON, JJ.

OPINION

COATS, Judge.

On December 1, 1983, the mother of a sixteen-year-old juvenile, M.W., contacted Alaska State Trooper Geoffrey Engleman. M.W.'s mother informed Trooper Engleman that she believed her daughter was dealing drugs. Later that day, Trooper Engleman and another officer met with M.W.'s mother at her residence. There, she informed them that she had discovered plastic bags containing pills in M.W.'s purse. An officer then searched M.W.'s purse and discovered six plastic bags containing different colored pills.

Subsequently, Trooper Engleman interviewed M.W. At that time, M.W. informed the trooper that seven to nine days previously, Jo Ann Morrow had supplied her with 300 pills. She had obtained them from Morrow while in Morrow's car. At that time, Morrow told M.W. the pills were "speed" and instructed M.W. to sell each pill for \$1.00. Morrow told M.W. she would receive 1/3 of the money from the sales and if M.W. ran out of pills, Morrow could supply more. M.W. also stated that she had sold some of the pills and had given Morrow \$39 and Morrow had returned \$12 or \$14 to M.W. on November 30, 1983, as commission on the sales.

Trooper Engleman had the pills field-tested and determined that they were not "speed." However, because of their appearance, they could pass for "speed" on the street. Subsequent laboratory tests

disclosed that the pills contained caffeine and ephedrine.

Based on the information provided by M.W., and his own familiarity with "fake controlled substances," Trooper Engleman obtained a search warrant for Morrow's residence. The warrant authorized a search of the residence for: drugs which appeared to be amphetamine based; written records of the ordering of such drugs; and magazines or books from which such drugs could be ordered. A search of the residence on December 1, 1983, resulted in the seizure of: approximately 5,000 tablets and capsules, similar to those obtained from M.W.; brochures advertising diet pills and stimulants; various items of drug paraphernalia; and from Morrow's purse, a list of names and telephone numbers, including M.W.'s.

On December 6, 1983, a grand jury returned a two-count indictment charging Morrow with delivery of an imitation controlled substance to a minor and possession of an imitation controlled substance with intent to deliver. AS 11.73.030(a); AS 11.73.010(a). On March 10, 1984, a jury returned a verdict of guilty on the possession with intent to deliver charge only.

Morrow now appeals, raising the following issues: (1) that the trial court erred by denying her motion to suppress evidence because the search warrant for her residence was not supported by probable cause; (2) that the trial court erred in denying her motion to dismiss the indictment because hearsay evidence was presented to the grand jury in the form of a "telex" preliminary lab report; and (3) that AS 11.73.099, the statute defining "imitation controlled substances," is unconstitutional.

SEARCH WARRANT ISSUES

The standard of review regarding a magistrate's determination of probable cause was enunciated in *Rosa v. State*, 633 P.2d 1027, (Alaska App.1981), where this court said:

In reviewing a magistrate's determination of probable cause this court must

give great deference to the magistrate's decision and must resolve doubtful or marginal cases largely by the preference to be accorded warrants.... "The Fourth Amendment's requirements are practical and not abstract, and affidavits 'must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion....'" The burden of proof on questions pertaining to the sufficiency of the affidavit is on the defendant. [Citations and footnotes omitted.]

Id. at 1029-30, quoting *State v. Dav-enport*, 510 P.2d 78, 82 n. 8 (Alaska 1973). With these standards in mind, the question to be asked is "whether the issuing judge [or magistrate] was provided sufficient evidence to make an independent finding of probable cause" to issue a warrant. *Lockwood v. State*, 591 P.2d 969, 970 (Alaska 1979), quoting *Davis v. State*, 499 P.2d 1025, 1028 (Alaska 1972), *rev'd on other grounds*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

Morrow argues that the affidavit in support of the search warrant was inadequate because there was no indication that M.W. was a credible informant. *See Kralick v. State*, 647 P.2d 1120, 1124-25 (Alaska App. 1982). Morrow argues that the affidavit does not make any allegation that M.W. had given reliable information in the past and the police did not conduct an independent investigation to corroborate her statements. Morrow also contends that this warrant is defective for the same reasons we articulated in *Jones v. State*, 681 P.2d 364 (Alaska App.1984). In *Jones* we held that an affidavit in support of a search warrant by a police detective was not sufficient where the detective relied on a report by a juvenile informant that he witnessed a sale of one-half gram of cocaine at Casey Jones's apartment. The juvenile also stated that he had been to the apartment several times when "he or his companions have purchased cocaine from Jones in the last few months." *Id.* at 365. The juvenile also pointed out an apartment which was confirmed by another police officer to be Jones's apartment. In noting that the

hearsay statement of the juvenile informant was not sufficient to support the warrant, we stated:

Moreover, B.V.'s statements that he had observed a friend purchase cocaine and that he had been to Jones's apartment ten to fifteen times when "he or his companions" had purchased cocaine do not qualify as the kind of declarations against penal interest which a court could find inherently credible. It is not a crime to be present when someone else is purchasing cocaine even though that someone else is a friend; nor would vague admissions about past purchases of cocaine support a criminal prosecution in the absence of evidence establishing a *corpus delicti* for a specific purchase. More significantly, the affidavit does not explain the circumstances under which B.V.'s statement was made. If B.V. was being prosecuted by juvenile authorities for drug transactions unrelated to Casey Jones, he would hardly view his statement that he had purchased cocaine in the past from Jones as increasing his exposure to criminal sanctions.

Id. at 365.

[1] We see the situation in this case as significantly different from that in *Jones*. M.W. had the imitation drugs in her possession and apparently believed that she was confessing to the police that she had been selling amphetamines. There was every reason for the magistrate to credit her story as a declaration against interest. 1 W. LaFave, *Search and Seizure*, § 3.3(c) (1978). We conclude that M.W.'s credibility was adequately supported.

Morrow next argues that the affidavit in support of the warrant did not establish probable cause because it was based on stale information. She argues this is true because M.W.'s alleged transaction with Morrow had occurred seven to nine days prior to the issuance of the warrant.

In *Snyder v. State*, 661 P.2d 638, 647 (Alaska App.1983), this court said:

The question of whether the information contained in the affidavit was "stale"

depends on an evaluation of the circumstances related by the affidavit and the length of time between the issuance of the search warrant and the time of the most recent incriminating activity described in the affidavit.

In evaluating "staleness," this court has chosen to evaluate the following four factors: (1) the type of crime; (2) the nature of the items sought; (3) the extent of the suspect's opportunity for concealment; and (4) normal inferences as to where a criminal would be likely to hide incriminating articles. *Id.* at 648.

[2] It appears that the magistrate could have properly concluded the information was not stale because the affidavit evidenced ongoing criminal activity. *See, e.g.,* 1 W. LaFave, *Search and Seizure* § 3.7(a), at 683-87 (1978); *State v. Ogden*, 391 So.2d 434 (La.1980) (probable cause found despite fact that drug sale took place five days prior to the issuance of the warrant where the informant's statements indicated continuous activity and drug transactions, supporting an inference that a continuing supply of cocaine would be available). On the present facts, the affidavit stated that although the actual capsules and tablets were obtained from Morrow seven to nine days previously, money had been turned over to Morrow "within the last few days." Also, Morrow had represented to M.W. that if M.W. "sold out" of the substances, Morrow could readily obtain more. We conclude that the magistrate could properly find that there was probable cause that Morrow was still in possession of the imitation drugs and related material.

[3] Next Morrow argues that because M.W. indicated she obtained the pills from Morrow while Morrow was in her car, there was no nexus between Morrow's residence and the items to be searched for.

In *Snyder*, 661 P.2d at 645, we said:

Probable cause to search requires sufficient information to permit the conclusion that criminal activity or evidence of crime will be found at the place to be searched. Put another way, there must

be a "nexus" between the place to be searched, criminal activity, and the items sought. 1 W. LaFave, *Search and Seizure* § 3.7(d), at 704 (1978).

See also State v. Gutman, 670 P.2d 1166 (Alaska App.1983). We believe that the magistrate could properly conclude from the continuing contacts between M.W. and Morrow that Morrow was engaged in an ongoing business and it is logical to assume that some of the drugs would be stored at her residence. We conclude there was probable cause to search Morrow's residence.

[4] Morrow next contends that the police should not have been permitted to seize the telephone list which had on it M.W.'s name and telephone number along with several other names and telephone numbers. Morrow concedes the police could search her purse to find the list, but argues that the incriminating nature of the list was not immediately apparent and therefore the police had no authority to seize it. We disagree. The fact that Morrow had M.W.'s name and telephone number on a list in her purse showed her connection to M.W. and corroborated M.W.'s version of the relationship. It was also probable that the other names and telephone numbers on the list were connected with Morrow's distribution of imitation controlled substances. We conclude the police had authority to seize the list and that the trial judge did not err in refusing to suppress the use of the list as evidence.

GRAND JURY

[5] Morrow argues that the indictment should have been dismissed since the state proved by means of a preliminary laboratory report that the substance which she was charged with possessing contained ephedrine and caffeine. Morrow claims that introduction of this report was inadmissible hearsay for which there was no compelling justification. Alaska R.Crim.P. 6(r). Morrow recognizes that in *McKinon v. State*, 526 P.2d 18 (Alaska 1974), the supreme court permitted the state to introduce the results of a laboratory report de-

spite the fact that the report was hearsay. Morrow specifically objects to the fact that the report presented to the grand jury was a telex which read: "Preliminary screening indicates presence of ephedrine and caffeine. Final report will be mailed upon completion of analysis." She argues that the situation in her case is more similar to that described by the supreme court in *Meller v. State*, 581 P.2d 669, 673-74 (Alaska 1978), where the court disapproved of introducing at grand jury the hearsay conclusion of handwriting experts. In *Meller* the court concluded that the grand jury was given insufficient information to evaluate the credibility of the experts and their methods. However in Morrow's case, Trooper Engleman, who introduced the report, did give the grand jury background information about the chemist who performed the test. He indicated that the chemist, Suzanne Feller, was a state chemist that he was personally acquainted with and that she had testified as an expert in other drug cases. Trooper Engleman also testified that he field-tested the suspected drugs and found they were not amphetamines. We also note that Suzanne Feller's testimony at trial was apparently essentially the same as her preliminary report, so it appears that we do not have a situation where later tests were inconsistent with the preliminary one. We conclude that under these circumstances the grand jury had sufficient information to evaluate Suzanne Feller's hearsay testimony and that the grand jury could properly find that the substances which Morrow possessed fell within the imitation controlled substances statute.

VAGUENESS AND OVERBREADTH

Morrow next challenges the statute under which she was convicted as being unconstitutionally overbroad and vague. U.S. Const. amend. XIV and Alaska Const. art. 1 § 7. Morrow was convicted of possession of imitation controlled substances with the intent to deliver in violation of AS 11.73.010(a). That statute provides in part that "a person may not manufacture, deliver, or possess with intent to deliver, an

imitation controlled substance." The definition of "imitation controlled substances" is found in AS 11.73.099(3) which provides:

(3) "imitation controlled substance" means a substance containing ephedrine, ephedrine sulfate, pseudoephedrine, pseudoephedrine hydrochloride, phenylpropanolamine, caffeine, theophylline, lidocaine, procaine, tetracaine, dyclonine, acetaminophen, salicylamide, doxylamine, diphenhydramine, pheniramine, chlorpheniramine, or pryrilamine, or their salts, that is not a controlled substance, and that by dosage unit appearance (including color, shape, size, and markings) or by representations would lead a reasonable person to believe that the substance is a controlled substance; the term "representations", as used in this paragraph, includes

(A) statements made by an owner or by anyone else in control of the substance concerning the nature of the substance, or its use or effect;

(B) statements made to the recipient that the substance may be resold for inordinate profit;

(C) whether the substance is packaged in a manner normally used for controlled substances;

(D) evasive tactics or actions used by the owner or person in control of the substance to avoid detection by law enforcement authorities;

(E) the storage, packaging, presentation, display of or reference to a controlled substance with, near, or in connection with the activity involving the imitation controlled substance. [Emphasis provided.]

Morrow points out that this statute could reach some conduct which it is unlikely that the statute was intended to cover. Morrow proposes a hypothetical where someone, without any intent to deceive, gives caffeine diet pills, which are available as non-prescription medicine, to someone indicating that the pills are "as effective for weight loss as any prescription medicine." The state recognizes that the stat-

ute could be construed to reach conduct, such as that described by Morrow, which it is unlikely that the legislature intended to prohibit in promulgating the statute. The state urges us to interpret the statutory language defining an "imitation controlled substance" in such a manner that the meaning of the statute will be more clear to avoid any vagueness problems. As AS 11.73.099(3) now reads in part, an "imitation controlled substance" is a substance containing specific chemical components which "by dosage unit appearance . . . or by representations would lead a reasonable person to believe that the substance is a controlled substance." [Emphasis provided.] The state asks us to read the "or" in AS 11.73.099(3) as "and" in construing the statute. The state argues that as so construed, the statute would not reach innocent behavior.

In *Summers v. Anchorage*, 589 P.2d 863, 866-67 (Alaska 1979), the supreme court set out three factors which must be considered in determining whether a statute is unconstitutionally vague:

First, a statute may not be so imprecisely drawn and overbroad that it "chills" the exercise of first amendment rights. The second consideration is that in order to be consistent with notions of fundamental fairness a statute must give adequate notice of the conduct that is prohibited. The final element in an analysis of statutory vagueness is whether the statute's imprecise language encourages arbitrary enforcement by allowing prosecuting authorities undue discretion to determine the scope of its prohibitions. [Footnotes omitted.]

[6] The first question we need to answer is whether the statute is overbroad. The overbreadth doctrine was described in *Marks v. Anchorage*, 500 P.2d 644, 646 (Alaska 1972):

The overbreadth doctrine has evolved to give adequate breathing room to specific first amendment freedoms; a statute violates the doctrine when constitutionally-protected conduct as well as conduct

1. It appears to us that it may be argued that

which the state can legitimately regulate are included within the ambit of the statute's prohibition. [Footnote omitted.]

The statute in question regulates conduct, the possession and sale of certain specific drugs, not speech or association. See *Summers v. Anchorage*, 589 P.2d at 867; *McKenzie v. Anchorage*, 631 P.2d 514, 516-17 (Alaska App., 1981). We therefore conclude that the statute is not overbroad.

[7] The next question which we need to answer is whether the statute gives "adequate notice of the conduct that is prohibited." The state has conceded that the statute does have vagueness problems in this area and has asked us to construe the statute. In *Stock v. State*, 526 P.2d 3, 8 (Alaska 1974), the supreme court stated the doctrine which allows a court to construe a statute which is vague on its face in such a way as to avoid constitutional vagueness problems:

A statute in its broad contours may be subject to criticism for failure to give adequate notice as to all types of conduct which are punishable, but, when not involved with the "overbreadth" problem, may still pass muster if: (a) there can be no question as to its applicability to the particular offense involved, and (b) a construction may be placed upon the statute so that in the future the type of offenses coming within its purview may reasonably be understood. [Footnotes omitted.]

In this case the state contends Morrow possessed certain imitation drugs with the intent to deliver those drugs. The state alleges that Morrow knew that the drugs were imitation drugs but intended to deliver them while intentionally misrepresenting that the imitation drugs were controlled drugs. Certainly the conduct which the state alleges is clearly covered by the statute. We believe that the statute can be interpreted by us to apply to those situations involving an intentional misrepresentation that an imitation drug is a controlled drug. As so interpreted we believe that the statute is not vague.¹

certain other conduct falls within the statute.

[8] The third factor which we are to consider is the statute's potential for arbitrary enforcement. The record of this case does not reflect a history of arbitrary or selective enforcement of this statute. See *Summers v. Anchorage*, 589 P.2d at 868. We also do not find that the language of the ordinance is so vague that arbitrary enforcement is likely. See *Brown v. Anchorage*, 584 P.2d 35 (Alaska 1978). We therefore do not invalidate the ordinance for vagueness on this ground. We conclude that the statute, as interpreted, is not unconstitutionally vague.

[9] The state asks us to affirm Morrow's conviction even though the state concedes that the jury instructions which were given in the trial below vary from the interpretation of the imitation controlled drug statute which the state has argued on appeal. The state contends that it is clear that Morrow's defense did not turn on the particular jury instructions which were given in her trial and which might be modified in response to her vagueness claim. See *Stock v. State*, 526 P.2d at 11-12. Morrow did not file a reply brief and therefore has not responded to the state's argument that the statute can be construed so that it is not vague or whether, if the statute is so construed, Morrow's conviction should be affirmed. Furthermore, we have before us only a minimal record to decide this case, which does not include a transcript of the trial. We therefore do not decide whether Morrow has any claim that her conviction was improper because of a claim that might arise out of our post-trial construction of the statute. We remand the case to the trial court to determine whether Morrow's conviction should stand in light of our construction of the statute under which she was convicted.²

This case is REMANDED for proceedings not inconsistent with this opinion.

An example of conduct which might fall within the statute would be a person who delivers an imitation drug honestly believing that the imitation drug is a controlled substance. However, the case before us does not present this ques-

Michael E. ALLEY, Appellant,

v.

STATE of Alaska, Appellee.

No. A-368.

Court of Appeals of Alaska.

Aug. 9, 1985.

Defendant was convicted in the Superior Court, Fourth Judicial District, Fairbanks, Gerald J. Van Hoomissen, J., of forgery in the third degree and misconduct involving a controlled substance in the fourth degree and sentenced to 90 days' imprisonment for forgery and four years with all but 90 days suspended for misconduct involving a controlled substance. Defendant appealed. The Court of Appeals, Singleton, J., held that: (1) Alaska constitutional law does not preclude trial on a greater offense where the two offenses are charged together and an intervening plea to the lesser offense or mistrial on greater offense precludes state from having a jury pass on greater offense; (2) multiple punishment for a greater offense and a lesser included offense violates Alaska constitutional law; and (3) defendant violated but one societal interest by his two offenses, regulation of availability of dangerous drugs, and thus, only one conviction and punishment were authorized.

Remanded in part with instructions, affirmed in part.

1. Criminal Law \S 199

Alaska constitutional law does not preclude trial on a greater offense after con-

tion, and this matter has not been briefed on appeal. We reserve ruling on this issue.

2. We retain jurisdiction of this appeal.

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STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: SB 158
PUBLISH DATE: 2/3/89

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: Amending the controlled and imitation controlled substance laws
Sponsor: Rules Committee
Requestor: Governor

Agency Affected: Public Safety
BRU: Alaska State Troopers
Component: _____

EXPENDITURES/REVENUES: (Thousands of Dollars) (Inflation not included)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
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REVENUE	-0-	-0-	-0-	-0-	-0-	-0-
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FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

This bill revises the State's controlled substance laws. Any fiscal impact is expected to be small, and can be absorbed within the existing budget.

Prepared by: Gayle A. Horetski, Deputy Commissioner
Division: Office of the Commissioner

Phone: 465-4322
Date: 1/23/89

Approved by Commissioner: D. H. English
Agency: Department of Public Safety

Date: 1-23-89