Campbell Law Review

Volume 13
Issue 3 *Summer 1991*

Article 5

January 1991

Uniform Controlled Substances Act of 1990

Richard L. Braun

Follow this and additional works at: http://scholarship.law.campbell.edu/clr

Part of the Criminal Law Commons

Recommended Citation
Richard L. Braun, *Uniform Controlled Substances Act of 1990*, 13 Campbell L. Rev. 365 (1991).

This Article is brought to you for free and open access by Scholarly Repository @ Campbell University School of Law. It has been accepted for inclusion in Campbell Law Review by an authorized administrator of Scholarly Repository @ Campbell University School of Law.

UNIFORM CONTROLLED SUBSTANCES ACT OF 1990

RICHARD L. BRAUN*

I. INTRODUCTION 365
II. UNIFORM ACT—AN OVERVIEW 366
III. FORFEITURES 369
IV. MARIJUANA 370
V. PENALTIES 371
VI. MINORS 372
VII. CONTINUING CRIMINAL ENTERPRISE AND MONEY LAUNDERING 373
VIII. CONDITIONAL DISCHARGE AND TREATMENT OPTIONS 374
IX. CONCLUSION 374

I. INTRODUCTION

The Uniform Controlled Substances Act,[1] first promulgated in 1970, has been the basic law pertaining to control of narcotic drugs in forty-six (46) states. The Uniform Controlled Substances Act replaced the Uniform Narcotic Drug Act, which was drafted by the National Conference of Commissioners on Uniform Laws in 1932. The Uniform Narcotic Drug Act was adopted by all the states and was the fundamental drug law in our country until replaced by the 1970 Uniform Controlled Substances Act.

The 1990 Act[2] offers the states major revisions to the 1970 Uniform Controlled Substances Act. The new Uniform Controlled Substances Act is an effort to establish uniformity between federal law and state law, as well as uniformity among the states in the control of narcotics. The objective is to promote, to the extent feasible, both uniform and effective laws for curtailing the drug traffic

---

* Distinguished Professor Emeritus Campbell University Norman Adrian Wiggins School of Law. B.A. Stanford University, 1941; J.D. 1951 and LL.M. 1955, Georgetown University. Member, National Conference of Commissioners on Uniform State Laws, 1985; Member, Drafting Committee on 1990 Uniform Controlled Substances Act, 1985-90.

1. 9 U.L.A. 9 (1970).
2. Unif. Controlled Substances Act, 9 U.L.A. 1 (Supp. 1990).

Published by Scholarly Repository @ Campbell University School of Law, 1991

that has been such a cancerous disease throughout the country. However, the new Act has no force or effect of law until adopted by the various state legislatures. The new Uniform Controlled Substances Act in large part follows the Federal Controlled Substances Act, as the Uniform Narcotic Drug Act followed the earlier Federal Narcotic Drug Act. However, the Act has also adopted several of the most successful new provisions from various state statutes.[3]

There are two major reasons for adopting the 1990 Uniform Controlled Substances Act. The first reason being the substantial changes in federal law that have occurred since 1970;[4] and the second is the increased need for more effective laws to deal with the influence of dangerous drugs in American life.

Distinguishing what uniformity between state and federal law means is very important. Both states and the federal government have the authority to and do control dangerous drugs. The advantage of substantial uniformity is concentration of both federal and state enforcement on the same drugs and the ability to cooperate in that enforcement. However, the federal government and state governments act separately under the Constitution of the United States. For this reason, there are differences between the new Uniform Act and federal law, just as there will be variations in the way each state handles the new Uniform Act.

II. UNIFORM ACT—AN OVERVIEW

The basic structure of the 1970 Uniform Controlled Substances Act remains in the 1990 Act. Known narcotic and dangerous drugs are listed by chemical name in ranked schedules. The new Act contains five schedules which are ranked by the potential for abuse and by usefulness in medical treatment.

Contrast the standards used to place a substance in Schedule I to those used for placing a substance in Schedule V. Schedule I contains those drugs that have high potential for abuse and has no currently accepted medical use in treatment in the United States.

---

3. For example, §§ 308(a), (f) and (g) of the Act are derived from California Health & Safety Code §§ 11152, 11153(a), and 11156 (1975 & Supp. 1991); § 309 is patterned after Wisconsin Statute § 161.36 (1989); §§ 401(b), (d) and (e) are based on Florida Statutes § 893.135 (Supp. 1991); § 402(b) is derived from California Health & Safety Code § 11153.5(a) (Supp. 1991); § 405 is based on the Annotated Code of Maryland, Article 27, § 286B (1988).

4. The Uniform Controlled Substances Act has been amended ten (10) times since October 27, 1970; the Anti-Drug Abuse Act has been amended innumerable times since 1986.

Familiar substances such as heroin and cocaine, as well as many others which are less well known to the public, fall into Schedule I. The standards used to place a substance into Schedule V are the least restrictive standards used. The substances that qualify for Schedule V drugs (1) have low potential for abuse relative to substances included in the other schedules; (2) have currently accepted medical use in treatment in the United States; and (3) abuse of the substance may lead to limited physical dependence relative to the substances included in the other schedules. Comparing these standards gives some idea of the character of the five (5) different schedules used to classify a drug. Not only are heroin and cocaine controlled substances, but so are mild prescription tranquilizers. However the drugs are treated much differently under the statute.

The 1990 Uniform Controlled Substances Act attempts to include all currently available substances in the appropriate schedules. There are an almost infinite variety of such substances, some of which are depressants, stimulants, analgesics and/or hallucinogens. Laboratories, both legal and illegal, work on discovering new drugs all the time. For example, heroin was originally synthesized in the search for a better pain killer.

Keeping the schedules current, without invading the province of legislatures, is a major concern in the control of unlawful traffic in drugs. It is not enough to include all the known substances at any given time in the appropriate schedules. The potential for the development of new substances is very great. Indeed, the dangerous substances popularly called "designer drugs" are an example of that potential. Termed "analogs" in the Act, these designer drugs involve synthesization of narcotic drugs that are chemically different enough from scheduled drugs not to be included in the Uniform Controlled Substances Act. However, these drugs are similar enough to identified controlled substances to provide similar depressant, stimulant, analgesic or hallucinogenic responses. Such drugs are continually being developed, often for the purpose of eluding enforcement of the law. Therefore, the new Uniform Act must and does include such analogs within its prohibitions as well as provide for emergency scheduling.[5]

The Act similarly treats "immediate precursor" substances.[6]

---

5. *See* Unif. Controlled Substances Act §§ 101(3)(i), 201(a) and 214, 9 U.L.A. 2, 4, and 18 (Supp. 1990).

6. *Id.* § 101(11).

These substances are the principal compound in, or produced primarily for use in, the manufacture of controlled drugs. These substances are immediate chemical intermediaries used in making controlled substances and must be regulated in order more effectively to curtail their use.

The 1990 Act provides for administrative scheduling to keep the control of substances up to date.[7] There are two ways to schedule. First, a designated state agency can do the scheduling by following the procedures provided under the law. Secondly, there is a short-form scheduling procedure which allows a state to follow the actions of the Food and Drug Administration which schedules drugs under federal law. Either way, someone is responsible for keeping the schedules up to date without having to return to the legislature every time a new dangerous substance is discovered. The 1990 Act provides for notice, hearings and the ability to resort to the courts.

A few states do not authorize delegation of authority to incorporate federal rules into their law. Some even prohibit the delegation to *state* administrative agencies of the power to add to or delete from statutorily created schedules. In those jurisdictions the more cumbersome proceedings of legislative action or lengthy administrative hearings may be necessary.

The 1990 Uniform Controlled Substances Act also provides for emergency scheduling of analogs or other dangerous substances.[8] If prohibiting a substance becomes necessary on an emergency basis to avoid an imminent hazard to public safety, the substance can be scheduled without any delay. Emergency scheduling is temporary and terminates unless a permanent scheduling procedure takes place and the analog or other substance is permanently scheduled. Emergency scheduling subjects an analog to enforcement under the 1990 Act much more quickly than under the original Act, while also maintaining due process of law.

Many narcotic and dangerous substances are manufactured and prescribed legitimately. The Act was drafted with the goal of avoiding encumbrances on legitimate prescriptions, while preventing diversion into illegal markets of controlled substances which may be legitimately prescribed. In Article III, the Act requires registration of every person "who manufacturers, distributes, or dis-

7. *Id.* § 201.
8. *Id.* § 214.

penses any controlled substance."[9] Registrants must keep specific records, which are made available to the appropriate state agencies. Under section 402 of Article IV, the Act authorizes punishment for violating the terms of Article III, including punishment for the unauthorized diversion of substances even where these substances may have been properly manufactured or prescribed.

Article III of the new Act further requires a designated state agency to conduct a diversion control program. This program consists of (1) preparing reports on distribution and diversion of controlled substances on a regular basis, (2) engaging in agreements with other state agencies to identify sources of diversion, and (3) engaging in cooperative programs to identify, prevent, and control diversion. These functions are to be performed in addition to the registration requirements provided in the original Act.

Penalties are a major aspect of the 1970 and 1990 Uniform Controlled Substances Acts. The 1990 Act adds more penalty provisions including criminal penalties for "imitation" controlled substances; for conspiracy, attempt or solicitation of any person to engage in a violation of the Act; for distribution of controlled substances in the vicinity of a school or college; for using children in the distribution of controlled substances; and for participating in laundering proceeds from traffic in illegal controlled substances. The Act attempts to provide law enforcement with a full array of criminal penalties commensurate with the illegal drug trade, without infringing on the constitutional rights of defendants. These penalty provisions are discussed more fully below.

The new Uniform Controlled Substances Act should serve the states in the continuing effort to curtail the sale and use of dangerous controlled substances. Better law enhances the entire effort.

III. FORFEITURES

One subject that merits special comment is the forfeiture to the state or federal government of all illegal controlled substances, materials and equipment used in manufacturing contraband. This forfeiture includes all types of property, both real and personal, used in the manufacturing and distribution process, and all proceeds derived directly or indirectly from the operation. Many controversial issues are involved in devising a forfeiture statute that is effective in combatting the drug trade and does not unduly in-

9. *Id.* § 302(a).

fringe on the rights of the innocent or result in overly harsh penalties for minor infractions. For example, should the owner of a home lose it by forfeiture if his son grows a marijuana plant in it? Should the owner of a yacht lose it even if he does not know that a lessee was using it for transporting narcotics?[10] Who should have the burden of proving that a given piece of property is or is not subject to forfeiture? Is proof beyond a reasonable doubt or merely probable cause enough to establish the government's case? And of particular interest to attorneys, should fees received by a lawyer from a client accused of drug violation be forfeited if the lawyer knew *or should have known* that they were derived from drug profits?[11]

The 1970 Act contained a relatively brief section on forfeiture that left many such questions unanswered. Following federal initiative that toughened forfeiture provisions in recent years,[12] the initial draft of the 1990 Act expanded the forfeiture sections to an extent that caused long and heated debate in the Conference. As a result, the entire forfeiture Article was deleted from the 1990 Act, and will be reconsidered as a separate statute at a later meeting. In the opinion of this author such deletion was unfortunate because forfeiture is such an important tool in controlling illegal drug traffic. However, its separation was the only way the rest of the Act could be presented to the states this year.

IV. MARIJUANA

The treatment of marijuana has been another subject of dispute for years. The 1970 Act included the substance as a Schedule I drug which is the most serious category of controlled substances. Three years later, the Conference reversed itself and removed from the list of unlawful acts the possession of marijuana by an individual for personal use, or distribution by an individual of small amounts for no remuneration or "insignificant" remuneration not involving a profit. The offenses of manufacturing, delivery and possession of marijuana with intent to manufacture or deliver were retained in that Act.

The years since 1973 have demonstrated that marijuana is not the innocuous weed some people once thought. In addition, the

---

10. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).

11. *United States v. Monsanto*, 491 U.S. ____, 109 S. Ct. 2657 (1989); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. ____, 109 S. Ct. 2667 (1989).

12. 21 U.S.C. §§ 853, 881 (1988).

product as now distributed on the street is much more powerful than it was fifteen (15) years ago. Accordingly, the Conference has reinstated marijuana as a Schedule I substance, but the states have the responsibility of setting the punishment for its possession or sale.

V. PENALTIES

One of the key portions of any statute concerns penalties, particularly from the viewpoint of defendants. The 1990 Uniform Act followed the policy of the 1970 Act by not attempting to set specific sentences for each violation. Instead, these decisions were left for the states, which use widely varying sentencing policies and systems.

In section 401(a) of Article IV, the new Act sets out suggested language prohibiting the knowing or intentional manufacture, distribution or delivery of any controlled substance, or possession with intent to manufacture, distribute, or deliver such substance (hereinafter called "possession with intent"). Sections 401(b), (c), (d) and (e) contain suggested language for manufacture, distribution, delivery or possession with intent regarding certain specified substances, including all substances listed in Schedules I through V. Just as the standards for each schedule differ, the sentences for each schedule will most likely differ. An exception is made for marijuana, in that the manufacture, distribution, delivery or possession of that substance with intent is punishable *under this section* only if twenty-nine (29) grams or more of marijuana are involved.

Section 401(g) punishes trafficking in large amounts of heroin, cocaine, phencyclidine, LSD, methamphetamine or marijuana, with presumably heavier sentences set by the state. States are also given the option of providing that, where a minimum sentence is provided, these trafficking sentences may not be suspended, deferred, withheld or reduced by parole before the mandatory minimum sentence is served. Exceptions exist in cases where the defendant provides substantial assistance in the identification, arrest or conviction of another person under Section 401(j).

Section 402 places new major restrictions on the illegal manufacture of drugs by supposedly lawful drug firms or the diversion of lawfully made substances to illegal channels. These restrictions include extending the reach of the Act to persons who knowingly or intentionally permit places or buildings to be used or made available for the purpose of unlawful manufacture of controlled substances. Persons who permit such activities may not hide be-

hind a claimed inability to prevent them, but it is a defense if the owner, lessee or person in control of premises had no knowledge of the unlawful conduct, or having knowledge notified a law enforcement agency that it was occurring.

Section 403 punishes fraudulent conduct by registrants or others in making, distributing or dispensing controlled substances or in use of registration numbers, applications, reports or other documents required by the Act. False or fraudulent prescriptions are a major source of illicit drug trade. The possession of false or fraudulent prescriptions with intent to obtain controlled substances is prohibited.

Section 404 prohibits the knowing or intentional manufacture, delivery or possession with intent to do either, of *counterfeit* controlled substances or tools used to produce them. Section 405 prohibits the knowing or intentional delivery, or possession with intent to deliver *imitation* controlled substances.

The reader may have noted that none of the foregoing sections punishes mere possession of controlled substances. The reason is that knowing or intentional manufacture, distribution, delivery or possession with intent to do any of those things are more serious violations and contemplate heavier sentences. The same applies to the fraudulent types of conduct prescribed in sections 402-406. However, the mere knowing or intentional possession of a controlled substance is prohibited by section 406. This section suggests that possession of Schedule I or II substances, except less than twenty-nine (29) grams of marijuana, is a felony; possession of substances listed in Schedules III through V, either a felony or misdemeanor in the discretion of each state; and possession of less than twenty-nine (29) grams of marijuana, is a misdemeanor. Again, each state has the authority to set the punishment for each violation.

Sections 407 and 408 prohibit conspiracies, solicitations and attempts to violate the Act, with suggested penalties equal to the offense that was the object of the contemplated conduct.

VI. MINORS

Although actually part of the Offenses and Penalties Article, the involvement of minors in the new Act is treated separately because of the increasing importance of young people in nearly all phases of drug operations. Distribution by a person eighteen (18) or more years of age to a person less than eighteen (18) who is at least two (2) years younger is punishable under Section 409(a) by a

suggested sentence of *double* the sentence for such a violation involving only adults.

In addition, Section 409(b) authorizes double punishment for a violation of the distribution statute within 1000 feet of a public playground, or a public or private school or university. The sentence is increased under Section 409(c) to *three* (3) times the original sentence if the defendant had been previously convicted of that offense. Lack of knowledge of the age of the minor, or of the distance involved from the school are not defenses under either subsection. Minimum prison terms and elimination of parole are also suggested.

Finally, Section 410 provides that anyone eighteen (18) or more who knowingly or intentionally employs or in any way uses a person less than eighteen (18) to violate the Act, or to assist in avoiding detection of its violation is subject to twice the punishment for such a violation involving only adults (three times if defendant has a previous such conviction). If the minor is less than fifteen (15), still heavier punishment is suggested, and ignorance of the minor's age is no defense.

VII. CONTINUING CRIMINAL ENTERPRISE AND MONEY LAUNDERING

Following the lead of the federal statute[13] and several states, section 411 of the new Act also provides an optional new offense for a continuing criminal enterprise (CCE). To convict of this offense, the government must show a violation of any felony provision of the Act, that is part of a continuing series of two or more separate violations, undertaken in concert with five or more other persons, which resulted in substantial income or resources. The defendant must have occupied a leadership position in the enterprise. Stiff punishment is authorized, with a suggestion of *three times* that for a single violation. Provisions similar to those previously discussed prohibit suspension or deferral of sentence or parole. A mandatory minimum time is also suggested.

In order to further deter major drug operators Section 604 of the 1990 Act supplements criminal sanctions for CCE with a civil action that can discourage the profit motive in a major way. Section 604 authorizes civil damages in an amount equal to *three times the gross income and the value of assets acquired directly or indirectly* by reason of violation of the CCE statute. If used ef-

13. 21 U.S.C. § 848 (1988).

fectively by states, such civil actions can leave large drug cartels with little incentive to continue their illicit operations. Hopefully, state officials will take advantage of this new weapon in their arsenal.

Again following the federal pattern,[14] section 412 punishes money laundering of proceeds derived from illegal drug operations. Section 413 suggests increased punishment for a person convicted of a second or subsequent drug violation.

VIII. CONDITIONAL DISCHARGE AND TREATMENT OPTIONS

The new Act does not always come down hard on violators. Conditional discharge is authorized in section 414 for possession offenses by persons who have not been convicted of a drug offense in any court in this country within the preceding ten (10) years. The court may defer proceedings without entering a conviction, place the defendant on probation and require him or her to complete an education or treatment and rehabilitation program. However, an individual may not receive the benefits of this program more than once.

Under section 415 the defendant may, in the court's discretion, upon conviction receive the benefit of probation for most offenses, except those precluding probation, on condition of entering and completing a drug treatment program. However, the defendant must pay a fee to help defray the cost of the program.

Finally, section 418 saves a defendant from multiple prosecutions by separate sovereigns. Conviction or acquittal under federal law or the law of another state is a bar to prosecution again for the same act, even though not barred by constitutional double jeopardy principles.

IX. CONCLUSION

In summary, the 1990 Uniform Controlled Substances Act offers states a new opportunity to update outmoded statutes and bring them into line with those of the federal government and other states. Hopefully, the adoption of the Act will provide another vitally needed and useful weapon in the war on drugs that we all must fight at every level in our society.

---

14. 18 U.S.C. §§ 1956, 1957 (1988).