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Ninth Circuit Holds RFRA Applies in Entheogen Cases

On February 2, 1996, the Ninth Circuit Court of Appeals published an opinion ripe with important implications for all religious users of entheogens.[1] In a nutshell, the opinion held that a trial court in a federal marijuana case erred when it barred the defendants from introducing evidence that they were Rastafarians who used marijuana for religious purposes.

The case began in 1991 when an informant went to the FBI and told them of a plan to import and distribute marijuana in the area of Billings, Montana. The government initiated an investigation which eventually led to the search of a number of homes in which the police discovered marijuana.

On November 20, 1992, twenty-six defendants were charged in a fifty-five count federal indictment. Among the counts, were conspiracy to manufacture and distribute marijuana, illegal use of a telecommunications facility, possession with intent to distribute marijuana, and simple possession of marijuana (i.e., possession for personal use).

At their trial in the U.S. District Court for the District of Montana, a number of the defendants sought to present evidence that they were members of the Rastafarian religion and possessed the marijuana for purposes of practicing their religion. They also sought to have the jury instructed on the religious defense pursuant to the Religious Freedom Restoration Act of 1993 (RFRA), which provides in relevant part:

> Sec. 2000bb-1. Free exercise of religion protected
>
> (a) In general
>
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Exception
>
> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person —
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.[2]

The district court refused to allow evidence of the defendants' religious beliefs, and refused to instruct the jury with respect to RFRA. The district court acknowledged that the federal law outlawing the possession of marijuana did substantially burden the free exercise of the Rastafarian religion. Nevertheless, relying largely on a 1967 case in which the Fifth Circuit rejected Dr. Timothy Leary's religious defense to marijuana charges, the district court held that there was no religious defense available in a marijuana case because recognizing such a defense would destroy the government's ability to control illegal marijuana use. Quoting from the Fifth Circuit's opinion in *Leary*, the district court cautioned:

> It would be difficult to imaging the harm which would result if the criminal statutes against marihuana were nullified as to those who claim the right to possess and traffic in this drug for religious purposes. For all practical purposes the antimarihuana laws would be meaningless, and enforcement impossible.[3]

Consequently, the Montana district court ruled that even if the defendants were Rastafarians, RFRA could not be raised as a defense. The defendants appealed the district court's ruling to the Ninth Circuit Court of Appeals.

The Ninth Circuit began its analysis of the RFRA issue by acknowledging that Rastafarianism is a recognized religion which has long-embraced marijuana as a sacrament. Rastafarianism, as briefly described by the Ninth Circuit:

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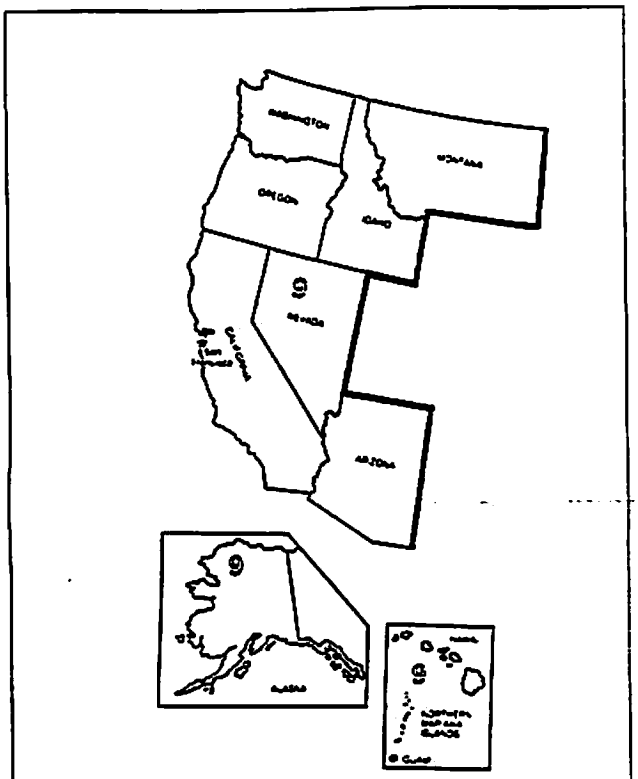
... is a religion which first took root in Jamaica in the nineteenth century and has since gained adherents in the United States. See Mircea Eliade, *Encyclopedia of Religion* 96-97 (1989). It is among the 1,558 religious groups sufficiently stable and distinctive to be identified as one of the existing religions in this country. See J. Gordon Melton, *Encyclopedia of American Religions* 870-871 (1991). Standard descriptions of the religion emphasize the use of marijuana in cultic ceremonies designed to bring the believer closer to the divinity and to enhance unity among believers. Functionally, marijuana — known as ganga in the language of the religion — operates as a sacrament with the power to raise the partakers above the mundane and to enhance their spiritual unity. [4]



The jurisdiction of the Ninth Circuit Court of Appeals.

The Ninth Circuit then briefly examined the history and language of RFRA. First, it tacitly responded to arguments that RFRA was an unconstitutional attempt by Congress to usurp the Supreme Court's interpretation of the Free Exercise Clause. The Ninth Circuit noted that the proper view of RFRA was not that it "overruled" the Supreme Court's decision in *Smith*. (Only a constitutional amendment or a subsequent decision by the Supreme Court could "overrule" *Smith*) Rather. in the view of the Ninth Circuit, RFRA created a federal *statutory* protection for religious practices and. hence, did not conflict with the principle of separation of powers. In other words, RFRA does *not* tell the Supreme Court how to analyze free exercise claims; rather, it is a new federal law which provides independent protection for religious practices.

Second. the Ninth Circuit emphasized that under RFRA, the law restraining religious practice (in this case the federal anti-marijuana laws) need not completely "prohibit" the religious practice in order to trigger application of RFRA.[5] Rather, by the plain language of subsection (a) of RFRA. the protections of RFRA are triggered if a state or federal law "substantially burdens" a person's religious practice. The Ninth Circuit did not expand on the meaning of "substantially burden."

Third, the Ninth Circuit noted that RFRA was an unusual piece of federal legislation because it expressly incorporated two Supreme Court decisions as guides to the purpose, and by implication the application, of RFRA. The two decisions were landmark cases in which the Supreme Court established and refined the balancing test that RFRA now codifies in its subsection (b).[6]

Applying RFRA to the facts in the case before it, the Ninth Circuit rejected the district court's reasoning that the mere existence of the federal anti-marijuana laws was sufficient to show that a religious defense was unavailable. The Ninth Circuit distinguished the *Leary* decision by noting that it was decided long before the enactment of RFRA.

In a sentence rich with lessons teaching the proper analysis to be employed in entheogen cases invoking RFRA, the Ninth Circuit framed the government's burden of proof as follows:

> Under RFRA...the government [must] show that the application of the marijuana laws to the defendants was in furtherance of a compelling governmental interest and, second....that the application of these laws to these defendants was the least restrictive means of furthering that compelling interest.[7]

With the government's obligations so noted. the Ninth Circuit concluded that the district court erred when it flatly rejected evidence and instructions raising the religious defense under RFRA. The Ninth Circuit was quick to point out, however, that, on the facts before it, RFRA could only be raised as a defense to the charges of *simple possession* of marijuana because the defendants failed to introduce evidence that they *distributed* marijuana or *conspired* as part of their Rastafarian religion. Therefore, the Ninth Circuit let stand the defendants' convictions for all the marijuana crimes except simple possession of marijuana. As to the simple possession charges. the Ninth Circuit remanded the case to the district court for retrial on the simple possession charge with an order that the

district court admit evidence of the defendants' religious practices and instruct the jury under the terms of RFRA. In some closing comments, the Ninth Circuit remarked that at their forthcoming retrial the defendants still had the burden of proving that they were, in fact, Rastafarians and the government was free to attack that claim as bogus. Only if the defendants met this burden would the burden of proof shift to the government.

Practice Pointers: RFRA & the Religious Use of Entheogens

The *Bauer* decision is instructive for any entheogen user who intends to raise a religious defense under RFRA. Before commenting on what the case does establish, it's important to make clear what it does *not* establish. The Ninth Circuit did not hold that Rastafarians' religious use of marijuana is legal under RFRA. Rather, the court held that RFRA is *applicable* and that a court must apply the balancing test codified in RFRA if a defendant proves his or her personal use of marijuana was indeed "religious." Whether or not the defendant will win depends upon the results of a case-by-case balancing test conducted pursuant to the terms of RFRA.

Under subsection (a) of RFRA a defendant has the burden of proving that his or her belief system is a "religion," as opposed to simply a personal philosophy. (In previous free exercise cases, courts have uniformly held that "personal philosophies" are not protected. Presumably, they would also receive no protection under RFRA.) When the *Bauer* case goes back to the district court, the defendants will have the burden of proving that they were in fact Rastafarians and that Rastafarianism is a "religion."[8]

The Ninth Circuit, referred to writings by Mircea Eliade as well as the *Encyclopedia of American Religions*, to find that Rastafarianism was indeed a "religion." Presumably the defendants in *Bauer* introduced excerpts from these texts to prove that the Rastafarianism is a 'religion." and is recognized as such by non-Rastafarians. This is a fine tactic when such evidence exists, however, the Ninth Circuit's opinion should not be read as *requiring* such evidence of outward recognition as a *necessary* condition to finding that a defendant's beliefs are indeed "religious." Nothing in RFRA says, or implies, that its protections are exclusively for organized or long-established religions. Such a distinction would likely run afoul of the Establishment Clause as well as the Equal Protection Clause. A defendant should come within RFRA so long as he or she can prove that his or her use of an entheogen was of a sincere religious nature, regardless of whether he or she is a member of an organized religion.

Clearly, determining whether a belief system is or is not a "religion" is not easy. This metaphysical question is not well suited to judicial determination, and, at least in past Free Exercise Clause cases, it has often provided judges with sufficient wiggle-room to reject a religious defense to drug charges simply by rejecting a defendant's characterization of his or her beliefs or practices as "religious." Shifting the focus from theology to the sincerity of the defendant is one way to resolve the difficult problem of defining "religion." The ability to judge the sincerity of an individual is central to our justice system and one which has been recognized as well within the ability of the finder of fact. In fact, in a case reversing the conviction of several defendants who used peyote during a Native American Church ceremony, the California Supreme Court embraced this technique, stating "[w]e do not doubt the capacity of judge and jury to distinguish between those who would feign faith in an esoteric religion and those who would follow it."[9]

Another important aspect of the *Bauer* decision is the implicit recognition by the Ninth Circuit that the psychoactive sacrament need *not* itself be considered a deity in order to trigger the protections of RFRA. In some previously decided entheogen cases, courts denied defendants protection under the Free Exercise Clause because the defendants did not deify the entheogen. By noting that for Rastafarians marijuana "operates as a sacrament with the power to raise the partakers above the mundane and to enhance their spiritual unity," the Ninth Circuit signaled that this role of the entheogen within the context of a religion was sufficient to trigger the protections afforded by RFRA. In my opinion, this was the correct interpretation of RFRA in the context of an entheogen case. So long as a defendant can show that he is sincere, and that the law outlawing his entheogenic sacrament works a "substantial burden" on his religious practice, he has satisfied sub-section (a) of RFRA and the burden should then shift to the government. There is no reason, in logic or law, for requiring a defendant to prove that he or she deifies the entheogen.

Lastly, the Ninth Circuit made a very significant point with respect to the proper scope of the government's interest. The Ninth Circuit was very clear that under subsection (b) of RFRA the government was obliged to prove that "application of the marijuana laws *to the defendants* was in furtherance of a compelling governmental interest, and... that the application of these laws *to these defendants* was the least restrictive means of furthering the compelling governmental interest." (Emph. added.) In past entheogen cases, many courts mistakenly allowed the government to present evidence of a generalized or speculative harm to the government's interest if people were permitted to raise religious defenses to drug crimes. In fact, the earlier-quoted words from the *Leary* decision are a good example of a court erroneously considering amorphous harms rather than properly examining what, if any, *specific harm* would flow from *the defendant's* religious practice. It is a maxim of American jurisprudence that cases are to be decided on the facts in evidence not on speculation.

In sum, the Ninth Circuit's opinion in *Bauer*, holds that RFRA is applicable in entheogen cases. Though its teachings

are compressed. it was a well reasoned decision which will hopefully set many of the standards to be applied in future entheogen cases invoking the protections of RFRA.

Notes

[1] *United States v. Bauer* (1996) 96 D.A.R. 1188.

The jurisdiction of the Ninth Circuit is shown by the inlay on page 92. The decision in *Bauer* is binding on all federal courts within the Ninth Circuit's jurisdiction. Additionally, because the *Bauer* decision is the first to hold RFRA applicable to drug charges, and because it was decided by the well-respected Ninth Circuit, other courts (state and federal) which face a religious entheogen case in the future will no doubt find the decision instructive.

[2] 42 U.S.C. sec. 2000bb.

The express impetus for enacting RFRA was the Supreme Court's 1990 decision in *Employment Div., Dept. of Human Resources v. Smith* (1990) 494 U.S. 872 [108 L.Ed.2d 876, 110 S.Ct. 1595], which rewrote free exercise jurisprudence in order to deny free exercise protection to two members of the Native American Church who ingested peyote during a religious ceremony. For more details on the *Smith* case, or for more discussion on the basics of RFRA, see "Entheogens and the Free Exercise Clause: Practical Legal Aspects for Individuals," in 4 TELR 28-32.

[3] *Leary v. United States* (5th Cir. 1967) 383 F.2d 851, 861. rev'd on other grounds, 395 U.S. 6 (1969).

[4] *Bauer, supra*, 96 D.A.R. at p. 1190.

[5] The First Amendment states, in part, "Congress shall make no law respecting an establishment of religion, or *prohibiting* the free exercise thereof...." (Emph. added.)

[6] See *Sherbert v. Verner* (1963) 374 U.S. 398, and *Wisconsin v. Yoder* (1972) 406 U.S. 205.

[7] *Bauer, supra*, 96 D.A.R. at p. 1192.

[8] Under subsection (a) of RFRA they will also have to prove that the law prohibiting possession of marijuana is a "substantial burden" on their religion, but that should not be difficult.

[9] *People v. Woody* (1964) 61 Cal.2d 716, 726, 394 P.2d 813, 820-821, 40 Cal. Rptr. 69, 77.

TELR

Supreme Court Decides LSD Case

On January 22, 1996, the United States Supreme Court ruled that the *actual* weight of LSD *plus its carrier medium* is to be used when determining whether a mandatory minimum has been triggered in federal LSD cases.[1]

A federal code section outside the federal sentencing guidelines establishes a five-year mandatory minimum sentence for anyone convicted of selling one gram or more "of a mixture of substance containing LSD."[2] A ten-year mandatory minimum is triggered by selling 10 grams or more "of a mixture or substance containing LSD."[3] In 1991, the Supreme Court held that the language in the mandatory minimum provisions requires federal judges to consider the entire actual weight of the defendant's LSD plus carrier medium when determining whether a mandatory minimum sentence was triggered.[4]

In November 1993, the United States Sentencing Commission amended the federal sentencing guidelines with respect to LSD. The amendment instructed federal judges to treat each does of LSD, regardless of the carrier medium, as weighing .4 milligrams. The .4 milligram standard was developed to eliminate the often widely disparate sentences in LSD cases which occurred simply because one defendant used a heavier carrier medium than another convicted of selling the same number of doses.

The federal circuits have been split on whether the .4 milligram standard is also to be used when determining whether a mandatory minimum has been triggered.[5] The Supreme Court's January 22, 1996, ended the dispute by holding that the actual weight must be used to determine whether a mandatory minimum has been triggered. Under the Court's holding, the .4 milligram standard only applies if no mandatory minimum is otherwise triggered when the actual weight of the LSD plus carrier medium is calculated.

The practical result of the Supreme Court's decision is to put LSD traffickers on notice that selling one gram or more of LSD plus carrier medium will result in a mandatory minimum sentence of five years in federal prison. Similarly, selling ten grams or more of LSD plus carrier medium will result in a mandatory ten years in federal prison.

On a somewhat positive note, Justice Kennedy, writing for the unanimous Court, acknowledged that the Court's decision would result in disproportionate sentences for LSD traffickers. He called upon Congress to remedy the incongruity, remarking, "[t]rue, there may be little in logic to defend the statute's treatment of LSD; it results in significant disparity of punishment meted out to LSD offenders relative to other narcotics traffickers.... Even so, Congress, not this Court, has the responsibility for revising its statutes."[6] Unfortunately, as Justice Kennedy must realize, the political reality is such that legislators are decidedly unlikely to vote for legislation that eases the punishment for selling LSD. Consequently, with respect to LSD, the incongruity between the federal mandatory minimum law and the federal sentencing guidelines is likely to remain into the foreseeable future.

Notes

[1] *Neal v. United States* (1996) 96 D.A.R. 666, No. 94-9088.

[2] 21 USC sec. 841 (b)(B)(v).

[3] 21 USC sec. 841 (b)(1)(A)(v).

[4] *Chapman v. United States* (1991) 500 U.S. 453.

[5] For a brief discussion of the circuit split, see "Recent Cases Significantly Reducing Federal LSD Sentences Could Signal Start of new Trend," in 6 TELR 48.

[6] *Neal, supra*, 96 D.A.R. at p. 670.

TELR

Government Returns Peyote and Drops Charges Against Arizona Couple

On October 13, 1995, eighteen armed agents from the Pinal County, Arizona narcotics task force stormed the home of Leo and Raven Mercado. The agents expected to find a large *Cannabis* garden but instead found between 600 and 1000 peyote plants which the Mercados were cultivating. The agents also found a small (personal use) amount of marijuana as well as 2 capsules of MDMA.

The couple was arrested and charged with possession of peyote, possession of marijuana, possession of MDMA, and child endangerment. Authorities notified the Mercados that they were also investigating whether they had hosted "frog-licking and cactus-eating parties" in their home. The Mercados denied hosting such "parties," and entered pleas of not guilty to all charges. The Mercados were freed after spending one day in jail and posting a $3,500 bail bond.

Leo Mercado, 36, is a former clergyman of Peyote Way Church of God, an all-race peyote-using church located in Graham County, Arizona. He has openly cultivated peyote in a household shrine for years, using the cacti as a religious sacrament. In Arizona, possession or cultivation of peyote is illegal. The law, however, provides an important exemption for people who use peyote as part of a bona fide religious practice and in a manner that does not endanger public health.[2]

Agents learned the Mercados might be growing *Cannabis* after DARE counselors confronted the Mercados' 12-year-old daughter at school and badgered declarations out of her that were twisted and exaggerated in order to obtain a search warrant. The Mercados had previously informed the school authorities that they did not want their daughter to attend the DARE program.[1]

The Mercados refused any plea bargain and their case was set for trial. Approximately two weeks before the trial was scheduled to begin, Leo Mercado began a hunger strike on the steps of the courthouse. "This is not the political maneuver of a religious zealot, but the earnest and difficult prayer of an American who still believes in the freedom our forefathers intended," he said after swallowing a small piece of peyote. During his hungerstrike, Mercado drank only water and ingested nothing but small amounts of peyote. One week into the strike, during which Mercado lost nine pounds, Pinal County prosecutors agreed to dismiss nearly all the charges against the Mercados.

The prosecutors stated that poor odds of conviction rather than the hungerstrike led to the dismissals. The MDMA charge was dismissed because the Mercados obtained the capsules when the drug was still legal and did not know they still had some in their home. The child endangerment charge, which was based on the theory that the peyote was growing within reach of the Mercados' five-year-old son, was also dismissed. The Mercados entered a plea to a marijuana misdemeanor with the promise that their record would be expunged.

Speaking after the case was dismissed and authorities agreed to return the seized peyote, Leo Mercado down-played the importance of his hungerstrike. "Returning the peyote to us was the only right thing to do," he said.

Notes

[1] Interviewing the Mercados' daughter without her parents present was a violation of school policy. The Mercados are considering pursuing a civil action against the school and the DARE program.

[2] Arizona's religious peyote exemption provides:

> In a prosecution for violation of [Arizona's criminal law prohibiting the possession, sale, or distribution of peyote], it is a defense that the peyote is being used or is intended for use:
>
> 1. In connection with the bona fide practice of a religious belief, and
>
> 2. As an integral part of a religious exercise, and
>
> 3. In a manner not dangerous to public health, safety or morals. (Arizona Rev. Stat. Ann. sec. 13-3402(B).)

TELR

Shulgin Legal Fund Announced

Subject: Alexander T. Shulgin Fund.
Sent: 02'11 9:32 PM
From: Earl Crockett, Trustee
(elc@netcom.com)

Dear Friends of Sasha and Ann:

You may or may not know that the Drug Enforcement Agency along with various other Federal, State, and local agency representatives showed up unannounced, with search warrants, at Sasha and Ann's home in Lafayette, Calif. on October 27, 1994. There were approximately thirty persons in the raiding party along with eight vehicles

(*Cont'd p. 98 "Shulgin Fund"*)

Minor's Conviction For Possessing Fake LSD Upheld

By decision published December 15, 1995, the California Court of Appeal for the Fourth District upheld the conviction of a minor found in possession of fake LSD.[1] The case began when an officer responded to a call regarding possible drug sales at the minor's home. In plain view on the kitchen counter were 10 ziplock baggies, each of which appeared to contain 2 hits of blotter-paper LSD. Nearby was $50 in cash and suspected pay-owe sheets (i.e., notes suspected of recording drug transactions).

Perhaps thinking that he was getting himself out of trouble, the minor (after waiving his right to remain silent) told the officers that what looked like blotter-paper LSD was actually fake. He stated that he was selling the fake doses for two dollars each.

A growing number of states outlaw the making of "imitation controlled substances," or possessing them with the intent to sell or distribute. The California law under which the minor in this case was charged is similar to that currently in effect in many states. It states:

> [a]ny person who knowingly manufactures, distributes, or possesses with intent to distribute. an imitation controlled substance is guilty of a misdemeanor. (Cal. Health & Saf. Code sec. 11680.)[2]

Another section defines an "imitation controlled substance" as:

> (A) a product specifically designed or manufactured to resemble the physical appearance of a controlled substance, such that a reasonable person of ordinary knowledge would not be able to distinguish the imitation from the controlled substances, or
>
> (B) a product, not a controlled substance, which by representations made and by dosage unit appearance, including color, shape, size, or markings, would lead a reasonable person to believe that, if ingested, the product would have a stimulant or depressant effect similar to or the same as that of one or more of the controlled substances included in Schedules I through five inclusive, of the Controlled Substances Act... (Cal. Health & Saf. Code sec. 11675.)

Examining the statement made by the minor himself as well as expert testimony by "a drug recognition expert," the court had no difficulty finding that to the average person the items in possession of the minor were indistinguishable from true blotter-paper LSD, and hence, ran afoul of section 11675.

The minor then launched two more arguments. First, he argued that even if the items found in his possession were considered imitation controlled substances, they are not prohibited because the legislative history of the statutes shows that they were written to prohibit only imitations of *prescription* drugs. He noted that a legislative document supporting the statute stated:

> (a) early in 1980 distributors began flooding the nation with capsules and tablets known as "imitation controlled substances."
>
> (b) Imitation controlled substances are carefully designed to resemble or duplicate the appearance of brandname amphetamines, barbiturates, tranquilizers, and narcotic pain killers.

Giving little consideration to the legislative history, the court quickly rejected the minor's argument by noting how broadly the legislature chose to word sections 11675 and 11680. The court also pointed to an earlier decision wherein a California court rejected the same argument, finding sections 11675 and 11680 broad enough to include imitations of cocaine and cocaine base.[3]

The minor's final argument was that sections 11675 and 11680 were unconstitutionally vague because it is unclear just what constitutes an imitation controlled substance. Again the court disagreed, remarking that the language of sections 11680 and 11675, when read together, is detailed and clear. "There is nothing vague or ambiguous about this definition," said the court.

Consequently, having rejected all of the minor's arguments, the court affirmed his conviction.

Notes

[1] *In re Terry* (1995) 40 Cal.App.4th 1675.

[2] Conviction is punishable by up to six months in county jail and a maximum fine of $1,000.

[3] See *People v. Hill* (1992) 6 Cal.App.4th 33.

TELR

Information Sources

Mind Books

Mind Books
321 S. Main St., # 543
Sebastopol, CA 95472
Telephone: 1-800-829-8127

Attorneys and others searching for a one-stop source for books related to entheogens should obtain a copy of the catalog just released by the new company Mind Books. The 47 page catalog lists hundreds of books at what appear to be very reasonable prices. To obtain a free copy of the Mind Books catalog call them at 1-800-829-8127.

Judge: Hallucinogenic mushrooms not illegal

A Fort Pierce lawyer found a 17-year-old Supreme Court decision that kept his client out of jail.

By SUSANNAH A. NESMITH
Palm Beach Post Staff Writer

Every year, dozens of people traipse through pastures in western Martin and St. Lucie counties picking hallucinogenic mushrooms that grow in cow manure.

For just as long, authorities have arrested and convicted them on felony drug charges. Some are sentenced to as much as five years in prison.

But a Fort Pierce lawyer says he has discovered a 17-year-old Florida Supreme Court decision that ruled mere possession of the mushrooms is not illegal. And lawyer Jeff Garland says that means the convictions could be coming to an end.

Last week, Garland persuaded a St. Lucie County Circuit judge to throw out a mushroom charge against his client, citing the little-known Supreme Court decision. The high court ruled that the law prohibiting the possession of psilocybin — a powerful hallucinogen — did not cover the fungus that produces it.

Garland says that most attorneys aren't aware of the decision because it was indexed wrong in the *Southern Reporter*, the reference books that record all Supreme Court cases.

"I stumbled across it when I was looking for something else for a completely other case," Garland said. "I just tucked it away waiting for the day I'd need it."

That day came when he got a client who was arrested with little white mushrooms in a plastic bag in his pocket.

To the untrained eye, they look like common toadstools — and not very appetizing ones, considering they grow in cow manure.

But the small white mushrooms that sprout naturally in Central and South Florida produce a strong drug that, when properly ingested, causes hallucinations similar to LSD.

They have to be picked at the right time, when they're ripe but not rotten, for the drug they produce to be usable. The drug, psilocybin, is illegal and has been since 1978.

Since that time, law enforcement officials have been arresting people possessing the mushrooms, using the psilocybin statute. Seventeen people have been arrested in St. Lucie County this year and officials estimate that Martin County officers have arrested two or three times as many.

PAUL J. MILETE/Staff Photographer

Jeff Garland poses with a portabello, a far cry from the small mushrooms that contain psilocybin.

In Palm Beach county, prosecutors see arrests for mushroom possession or sale very rarely, said Mike Edmondson, spokesman for State Attorney Barry Krischer of Palm Beach County.

The Supreme Court ruled in 1978 that the "statute failed to advise a person of ordinary and common intelligence that such substance was contained in a particular variety of mushroom."

The high court explained how the statute could be rewritten to apply to mushrooms, suggesting that it include the scientific name of the fungus. But 18 years later, the statute remains unchanged.

Prosecutors argued in Garland's case that the defendant, Robert Savrda, obviously knew the mushrooms were drugs — why else would he pick through cow manure to find them?

"It would be a stretch of the imagination to say that the reason that the defendant trespassed on property and began to pick mushrooms from cow manure was to expand his botanical knowledge or to enhance the flavor or color of his dinner salad," wrote prosecutor Tony Schwab in his memo to the court.

But Circuit Judge Cynthia Angelos, citing the high court ruling, threw the case out.

Schwab maintains that the mushrooms are still illegal in some cases. He said the issue is whether the person with the mushrooms knows that they are illegal. "The guy who has a bag of mushrooms on him, who runs from the police after he's told to stop, based on those circumstances, he knew of the illicit nature of the mushroom and he was there for the specific purpose of picking that mushroom," Schwab said.

Officials at the St. Lucie County Sheriff's Office also intend to continue arresting people they find with psilocybic mushrooms.

"Until there is any additional direction from the attorney general's office or the state attorney's office, we're going to continue to do what we're doing," said sheriff's spokesman Mark Weinberg. "Virtually every one of these cases originates when a ranchor complains about people cutting his fences or trespassing."

Weinberg added that 15 of the 17 people arrested on psilocybin charges were also charged with trespassing.

"The message to people with the inclination to trespass on private property to do anything, whether to pick mushrooms or just walk around, is don't trespass," Weinberg said. "If you don't trespass, you won't get in trouble."

As for the people who have already been charged and convicted for mushrooms, Garland has a different message.

"All ye sinners similarly charged, call Jeff Garland to get your record expunged," he said. ■

Staff writer Scott Hiaasen contributed to this report.

MUSHROOM DATA

- **What are they?** Small white mushrooms that contain psilocybin, a hallucinogenic drug that was outlawed in 1975.
- **How do they work?** When cooked properly into a tea and ingested, they cause hallucinations similar to the drug LSD.
- **Where are they found?** They sprout naturally in cow manure and are particularly common in Martin and St. Lucie counties.
- **Why are they in court?** A Fort Pierce attorney turned up an obscure Florida Supreme Court ruling from 1978 that says they aren't illegal in some cases, flying in the face of years of successful prosecutions.

The above article is reprinted from the December 4, 1995, issue of the *Palm Beach Post*. The "obscure" 1978 Florida Supreme Court ruling which was relied on by Attorney Jeff Garland is *Fiske v. State* (Fla. 1978) 366 So.2d 423. For details on *Fiske*, see "Magic Mushrooms & the Law" in 3 TELR 16-19, or the recently published dossier *Sacred Mushrooms & the Law*. (See p. 99 for information on obtaining the latter booklet.)

Shulgin Fund

(*Cont'd from p. 95.*)

that included a fire engine and marked police cars. The stunned Shulgins were informed that this was not a criminal action, but rather an "administrative investigation" to determine if Sasha was in regulatory compliance with the many stipulations of his DEA license that allows him to be in possession of, and to work with. Schedule I substances. Administrative and environmental infractions were found; as can be easily imagined in a former basement, now laboratory, that is as well known for its pet spiders as for its cornucopia of important research, and its seemingly unending creation of new molecular structures. And it's also fair to say that housekeeping is not one of Sasha's big priorities.

The DEA has now made its findings *and taken the following* action:

1. To terminate Sasha's license that allows him to work with Schedule I materials.

2. To fine him $25,000.00.

The termination of the license seems "justifiable," given the rather long list of record keeping and administrative infractions. What is puzzling, however, is that in over 15 years of being licensed two prior, friendly, that is announced and scheduled, surveys and reviews of the very same lab and records produced no adverse comment. This, of course, was before the publication of PIHKAL.

The fine is attributed to a collection of unsolicited "anonymous drug samples" that people had sent to Sasha with the hope that he might test them sometime. There are those who think that such a testing program is beneficial. The DEA does not, and expressly forbids a licensee from doing so. The allowable fine is $25,000.00 per sample.

Sasha and Ann have paid the fine, and have paid out another $15,000.00 in legal and related expenses. This $40,000.00 has come out of their retirement funds at very near the time that they are needed.

Over Sasha's initial protest, a trust account has been set up, and a mail box rented. You may send your contributions to:

Alexander T. Shulgin Trust
Box 322
343 Soquel Ave.
Santa Cruz, Ca. 95062.

Please make your checks or money orders payable to:

Alexander T. Shulgin Trust

If you would like your contribution to be anonymous please say so and the trustee will honor your request. All other contributors will be acknowledged by returned mail (e-mail), and placed on a list to be given to Sasha and Ann.

The trust will be maintained for one year, and monthly or periodic contributions are more than welcome.

TELR

Council on Spiritual Practices Presents "Code of Ethics for Spiritual Guides"

COUNCIL ON SPIRITUAL PRACTICES

Code of Ethics for Spiritual Guides

Draft for Public Comment
(through 30 June 1996)

Preamble

Throughout history, people have sought to bring meaning to their lives and to awaken to their true natures through a variety of spiritual practices. Some of these practices, such as yogas and the recitation of traditional liturgies, are integrated into daily life. Others, described here as "mystical practices," are intended to bring about extraordinary states of consciousness, such as direct experience of the Divine or of unity, and are engaged in less frequently.

Some people feel called to assist other individuals or groups along their spiritual paths. In various traditions, people who serve in this capacity are given a title in the community such as priest, rabbi, minister, pastor, curandera, shaman, or master. In this document, the word "guide" is used to identify an experienced spiritual practitioner who has some familiarity with the terrain and who takes on the role of facilitator in the spiritual practices of others. A guide need not have exclusive or definitive knowledge of the terrain.

Spiritual practices, and especially mystical practices, are not without risk. Therefore, when an individual chooses to practice with the assistance of a guide, both take on special responsibilities. In an effort to integrate the yearning for spiritual discovery with present-day societal concerns, the Council on Spiritual Practices proposes the following Code of Ethics for those who serve as spiritual guides.

CSP Code of Ethics

1. [Intention] Spiritual guides are to conduct their teaching and practices in ways that cultivate awareness, empathy, and wisdom.

2. [Serving Society] Spiritual practices are to be designed and conducted in ways that respect the common good, with due regard for public health, safety, and order. Given that the increased awareness gained from spiritual practices can catalyze desire for personal and social change, guides shall use special care to help direct the energies of those they serve, as well as their own, in responsible ways that reflect a loving regard for life in all its forms.

3. [Serving Individuals] Spiritual guides shall respect and seek to preserve the autonomy and dignity of each person. Participation in any mystical practice must be voluntary and based on advance disclosure and consent given individually by each participant while in an ordinary state of consciousness. Disclosure shall minimally include discussion of any elements of the practice that could reasonably be seen as presenting physical or psychological risks. In particular, participants must be warned that mystical experience can be difficult and dramatically transformative. Limits on the behaviors of participants and facilitators are to be made clear and agreed upon in advance of any session. Appropriate customs of confidentiality are to be established and honored. Guides shall make reasonable preparations to protect each participant's health and safety during spiritual practices and in the vulnerable periods that may follow.

4. [Competence] Spiritual guides are to assist only with those practices for which they are qualified by personal experience and by training or education.

5. [Integrity] Spiritual guides shall strive to be aware of how their own belief systems, values, needs, and limitations affect their work. During mystical practices, participants are especially vulnerable to suggestion, manipulation, and exploitation; therefore, guides pledge to protect participants and never intentionally to allow anyone to use that vulnerability in ways that will cause damage to participants or others.

6. [Quiet Presence] To avoid any harmful consequences of personal or organizational ambition, spiritual practices are usually better allowed to grow through attraction rather than by active promotion.

7. [Not for Profit] Spiritual practices are to be conducted in the spirit of service. Spiritual guides shall strive to accommodate participants without regard to their ability to pay or make donations.

8. [Religious Tolerance] Spiritual guides shall practice openness and respect with people whose beliefs are in apparent contradiction to their own.

The Code of Ethics will be augmented by various "Metaprotocols" giving more detailed guidelines for specific types of spiritual practice. CSP will release Metaprotocol drafts as they become available for review.

You are invited to comment on this draft of the Code of Ethics. Correspondence received through 30 June 1996 will be considered during the preparation the first promulgated version of the Code of Ethics, which is planned for release shortly after that date. Check our Internet Web site for intermediate revisions of the Code.

Endorsements of the Code, CSP membership inquiries, and donations in support of this project are also welcome.

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USA

DRAFT: 14 Feb., 01 March 1995

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Statement of Purpose

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

How To Contact The Entheogen Law Reporter

Please address all correspondence to Richard Glen Boire, Esq., The Entheogen Law Reporter, Post Office Box 73481, Davis, California, 95617-3481. Immediate contact can be made via facsimile transmission to 916-753-9662, or via internet e-mail to **TELR@aol.com.**

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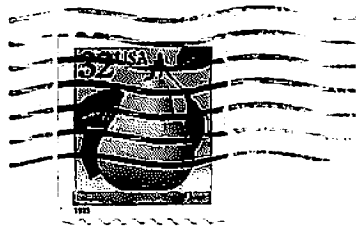

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