PHARMACO PROHIBITA

BY RICHARD GLEN BOIRE

QUESTION: I have heard that it is legal in some states to manufacture controlled substances so long as they are for your own personal use. Does this loophole really exist?

RESPONSE: Yes and no. In some states, the definition of "manufacture" requires proof that the chemist was compounding the outlawed drug for someone other than him or herself. For example, here is how the Alabama law reads:

> The production, preparation, propagation, compounding, conversion or processing of a controlled substance either directly or indirectly, by extraction from substances of natural origin or independently by means of a chemical synthesis or by combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling of its container; *except that this term does not include the preparation or compounding of a controlled substance by an individual for his own use*... (20-2-2(14); emph. added.)

In the inaugural issue of *The Entheogen Law Reporter*, I reported on a case from the Alabama Supreme Court in which a man's MDMA manufacturing conviction was reversed for this very reason. (Ex Parte Colbert (Ala. 1992) 615 So.2d 1218.) In that case, the defendant's conviction for attempted manufacture of MDMA was reversed after the Alabama Supreme Court found there was insufficient evidence showing that the man had intended to distribute the MDMA, rather than simply use it himself.

When the police burst into the man's apartment they found a simple home-made laboratory and a host of chemicals. A forensic scientist who examined the chemicals testified that the man was attempting to manufacture MDMA, and that he had completed all but the final step necessary to create between 175 and 250 tablets of MDMA.

The Alabama Supreme Court acknowledged that the evidence against the man clearly showed he was creating MDMA in his apartment lab but even so, said the court, those actions did not fall within Alabama's law against manufacturing an illegal drug. Examining the statutory definition of "manufacture" the Alabama Supreme Court found that it plainly required not only proof that a person was preparing or compounding an outlawed drug, but also proof that the person was not doing so simply for his or her own use.

As explained by the court, the prosecutor presented no evidence that the man (whose last name was COLBERT) intended the MDMA he was making for use by anyone other than himself:

> The state offered no evidence to establish what quantity, if any, would indicate that the preparation and compounding of a drug was for something other

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> than one's own use; the state offered no evidence that Colbert had solicited sales or evidence of a sale for these; and the state offered no evidence that Colbert had previously dealt in drugs or any evidence that he was going to deal in drugs I the future. Without more than the evidence that Colbert was involved in compounding and preparing MDMA, we hold that the evidence presented by the state was merely speculative as to whether Colbert was attempting to "manufacture" the drug—*i.e.*, whether Colbert was attempting to prepare and compound the drug for something other than his own use. (*Id.* at p. 1221–1222.)

It is a huge project to examine all 50 states' definitions of "manufacture" to determine which have the personal use exemption and which do not. But, I have been able to verify that the following states *do* have it:

Alabama (Ala. Code sec. 20-2-2(14) (1997 Supp.))
Idaho (Idaho Stats., sec. 37-2701(r) (1998 Supp.))
Iowa (I.C.A. sec. 124.101(16) (1998 Supp.))
Missouri (Missouri Rev. Stats., sec. 195.010(25) (1998 Supp.))

And, the following states definitely *don't* have the exemption:

Arkansas (Ark.Stat.Ann., sec. 20-64-201(s) (1997 Supp.))
California (Cal. Health & Saf Code ; Bus. & Prof. Code, sec. 4051. (1998 Supp.))
New York (NY Pub. Health Code., sec. 3302(19) (1998 Supp.))
Oregon (Or. Rev. Stats., sec. 167.203; 475.005) (1997))

Not surprisingly, some "tough on crime" judges caught up in the frenzied jingoism of the war on some drugs, are not fans of this loophole. One way such judges have tried to get around the exemption is by reading it very narrowly. For example, courts in several states have held that the personal use exemption only applies to outlawed drugs that a defendant creates by "preparation or compounding" (*i.e.*, makes via chemistry). Under such a narrow reading, the personal use exemption has been held not to apply to people who grow a small number of *Cannabis* plants, because, said the courts in these cases, "growing [*Cannabis*] is not the same as preparation or compounding." (See for example: *State v. Griffith* (Idaho 1995) 896 P.2d 334, 337; *State v. LaMaster* (Mo.App. 1991) 811 S.W.2d 837, 839; *Bedell v. State* (Ark. 1976) 541 S.W.2d 297; *State v. Wiggins* (N.C. App. 1977) 235 S.E.2d 265, 268–269.)

It is important to realize that the personal use exemption in some state's definition of "manufacture" does not mean that compounding a small amount of, say, LSD does not result in a crime. A person who makes a personal amount of LSD in his or her own home lab in a state with the personal use exemption to manufacturing, may not be committing the crime of manufacturing, but he or she *does* commit the crime of *possession* as soon as the drug is made.

Also, there is no personal use manufacturing exemption under federal law. This means that even in a state with such an exemption the feds could step in, should the circumstances make the case attractive for one reason or another.