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PRE-CLASS ASSIGNMENT

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Commissioner

KRS CHAPTER 218A

Selected Sections

KRS 218A.010 Definitions for chapter

As used in this chapter:

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

(a) A practitioner or by his or her authorized agent under his or her immediate supervision and pursuant to his or her order; or

(b) The patient or research subject at the direction and in the presence of the practitioner.

(2) **"Anabolic steroid"** means any drug or hormonal substance chemically and pharmacologically related to testosterone that promotes muscle growth and includes those substances listed in KRS 218A.090 (5) but does not include estrogens, progestins, and anticosteroids.

(3) **"Cabinet"** means the Cabinet for Health Services.

(4) **"Child"** means any person under the age of majority as specified in KRS 2.015.

(5) **"Cocaine"** means a substance containing any quantity of cocaine, its salts, optical and geometric isomers, and salts of isomers;

(6) **"Controlled substance"** means methamphetamine, or a drug, substance, or immediate precursor in Schedules I through V and includes a controlled substance analogue.

(7) (a) **"Controlled substance analogue"**, except as provided in paragraph (b), means a substance:

1. The chemical structure of which is substantially similar to the structure of a controlled substance in Schedule I or II; and

2. Which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in Schedule I or II; or

3. With respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in Schedule I or II.

(b) Such term does not include:

1. Any substance for which there is an approved new drug application;

2. With respect to a particular person, any substance if an exemption is in effect for investigational use for that person pursuant to federal law to the extent conduct with respect to such substance is pursuant to such exemption; or

3. Any substance to the extent not intended for human consumption before the exemption described in subparagraph 2 of this paragraph takes effect with respect to that substance.

(8) "Counterfeit substance" means a controlled substance which, or the container or labeling of which, without authorization, bears the trademark, trade name, or other identifying mark, imprint, number, or device, or any likeness thereof, of a manufacturer, distributor, or dispenser other than the person who in fact manufactured, distributed, or dispensed the substance.

(9) "Dispense" means to deliver a controlled substance to an ultimate user or research subject by or pursuant to the lawful order of a practitioner, including the packaging, labeling, or compounding necessary to prepare the substance for that delivery.

(10) "Dispenser" means a person who lawfully dispenses a Schedule II, III, IV, or V controlled substance to or for the use of an ultimate user.

(11) "Distribute" means to deliver other than by administering or dispensing a controlled substance.

(12) "Dosage unit" means a single pill, capsule, ampule, liquid, or other form of administration available as a single unit;

(13) "Drug" means:

(a) Substances recognized as drugs in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them;

(b) Substances intended for use in the diagnosis, care, mitigation, treatment, or prevention of disease in man or animals;

(c) Substances (other than food) intended to affect the structure or any function of the body of man or animals; and

(d) Substances intended for use as a component of any article specified in this subsection.

It does not include devices or their components, parts, or accessories.

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(15) "Hazardous chemical substance" includes any chemical substance used or intended for use in the illegal manufacture of a controlled substance as defined in this section or the illegal manufacture of methamphetamine as defined in KRS 218A.1431, which:

(a) Poses an explosion hazard;

(b) Poses a fire hazard; or

(c) Is poisonous or injurious, if handled, swallowed, or inhaled;

(16) "Heroin" means a substance containing any quantity of heroin, or any of its salts, isomers, or salts of isomers;

(17) "Immediate precursor" means a substance which is 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 or methamphetamine, the control of which is necessary to prevent, curtail, or limit manufacture.

(18) "Intent to manufacture" means any evidence which demonstrates a person's conscious objective to manufacture a controlled substance or methamphetamine. Such evidence includes, but is not limited to statements, a chemical substance's usage, quantity, manner of storage, or proximity to other chemical substances or equipment used to manufacture a controlled substance or methamphetamine.

(19) "Isomer" means the optical isomer, except as used in KRS 218A.050 (3) and 218A.070 (1) (d). As used in KRS 218A.050 (3), the term "isomer" means the optical, positional, or geometric isomer. As used in KRS 218A.070 (1) (d), the term "isomer" means the optical or geometric

isomer.

(20) **"Manufacture"**, except as provided in KRS 218A.1431, means 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 chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container except that this term does not include activities:

(a) By a practitioner as an incident to his or her administering or dispensing of a controlled substance in the course of his or her professional practice; or

(b) By a practitioner, or by his or her authorized agent under his supervision, for the purpose of, or as an incident to, research, teaching, or chemical analysis and not for sale; or

(c) By a pharmacist as an incident to his or her dispensing of a controlled substance in the course of his or her professional practice.

(21) **"Marijuana"** means all parts of the plant Cannabis sp., whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin or any compound, mixture, or preparation which contains any quantity of these substances.

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(25) **"Methamphetamine"** means any substance that contains any quantity of methamphetamine, or any of its salts, isomers, or salts of isomers.

(26) **"Narcotic drug"** means any of the following, 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:

(a) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate;

(b) Any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in paragraph (a) of this subsection, but not including the isoquinoline alkaloids of opium;

(c) Opium poppy and poppy straw;

(d) Coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(e) Cocaine, its salts, optical and geometric isomers, and salts of isomers;

(f) Ecgonine, its derivatives, their salts, isomers, and salts of isomers; and

(g) Any compound, mixture, or preparation which contains any quantity of any of the substances referred to in paragraphs (a) to (f) of this subsection.

(27) **"Opiate"** means any substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having addiction-forming or addiction-sustaining liability. It does not include, unless specifically designated as controlled under KRS 218A.030, the dextrorotatory isomer of 3-methoxy-n-methylmorphinan and its salts (dextromethorphan). It does include its racemic and levorotatory forms.

(28) **"Opium poppy"** means the plant of the species papaver somniferum L., except its seeds.

(29) **"Person"** means individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, or any other legal entity.

(30) **"Physical injury"** has the same meaning it has in KRS 500.080.

(31) **"Poppy straw"** means all parts, except the seeds, of the opium poppy, after mowing.

(32) **"Pharmacist"** means a natural person licensed by this state to engage in the practice of the profession of pharmacy.

(33) **"Practitioner"** means a physician, dentist, podiatrist, veterinarian, scientific investigator, optometrist as authorized in KRS 320.240, or other person licensed, registered, or otherwise permitted by state or federal law to acquire, distribute, dispense, conduct research with respect to, or to administer a controlled substance in the course of professional practice or research in this state. "Practitioner" also includes a physician, dentist, podiatrist, or veterinarian who is a resident of and actively practicing in a state other than Kentucky and who is licensed and has prescriptive authority for controlled substances under the professional licensing laws of another state, unless the person's Kentucky license has been revoked, suspended, restricted, or probated, in which case the terms of the Kentucky license shall prevail.

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(35) **"Prescription"** means a written, electronic, or oral order for a drug or medicine, or combination or mixture of drugs or medicines, or proprietary preparation, signed or given or authorized by a medical, dental, chiropody, veterinarian, or optometric practitioner, and intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals.

(36) **"Prescription blank,"** with reference to a controlled substance, means a document that meets the requirements of KRS 218A.204 and 217.216.

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(38) **"Production"** includes the manufacture, planting, cultivation, growing, or harvesting of a controlled substance.

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(40) **"Salvia"** means Salvia divinorum or Salvinorin A and includes all parts of the plant presently classified botanically as Salvia divinorum, whether growing or not, the seeds thereof, any extract from any part of that plant, and every compound, manufacture, derivative, mixture, or preparation of that plant, its seeds, or its extracts, including salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation of that plant, its seeds, or extracts. The term shall not include any other species in the genus salvia;

(41) **"Second or subsequent offense"** means that for the purposes of this chapter an offense is considered as a second or subsequent offense, if, prior to his conviction of the offense, the offender has at any time been convicted under this chapter, or under any statute of the United States, or of any state relating to substances classified as controlled substances or counterfeit substances, except that a prior conviction for a nontrafficking offense shall be treated as a prior offense only when the subsequent offense is a nontrafficking offense. For the purposes of this section, a conviction voided under KRS 218A.275 or 218A.276 shall not constitute a conviction under this chapter.

(42) **"Sell"** means to dispose of a controlled substance to another person for consideration or in furtherance of commercial distribution.

(43) **"Serious physical injury"** has the same

meaning it has in KRS 500.080.

(44) "Synthetic cannabinoid agonists or piperazines" means any chemical compound that contains Benzylpiperazine; Trifluoromethylphenylpiperazine; 1,1-Dimethyl-11-hydroxytetrahydrocannabinol; 1-Butyl-3-(1-naphthoyl)indole; 1-Pentyl-3-(1-naphthoyl)indole; dexanabinol; (1-(2-morpholin-4-ylethyl)indol-3-yl)-napthalen-1-ylmethanone (JWH-200); 1-pentyl-3-(2-methoxyphenylacetyl)indole (JWH-250); or 2-[(1R,3S)-3-hydroxycyclohexyl]-5-(2-methyloctan-2-yl)phenol. The term shall not include synthetic cannabinoids that require a prescription, are approved by the United States Food and Drug Administration, and are dispensed in accordance with state and federal law;

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(46) "Tetrahydrocannabinols" means synthetic equivalents of the substances contained in the plant, or in the resinous extractives of the plant Cannabis, sp. or synthetic substances, derivatives, and their isomers with similar chemical structure and pharmacological activity such as the following:

1. Delta 1 cis or trans tetrahydrocannabinol, and their optical isomers;

2. Delta 6 cis or trans tetrahydrocannabinol, and their optical isomers;

3. Delta 3, 4 cis or trans tetrahydrocannabinol, and its optical isomers.

(47) "Traffic," except as provided in KRS 218A.1431, means to manufacture, distribute, dispense, sell, transfer, or possess with intent to manufacture, distribute, dispense, or sell a controlled substance.

(48) "Transfer" means to dispose of a controlled substance to another person without consideration and not in furtherance of commercial distribution.

(49) "Ultimate user" means a person who lawfully possesses a controlled substance for his or her own use or for the use of a member of his or her household or for administering to an animal owned by him or her or by a member of his household.

KRS 218A.050 Schedule I controlled substances

Unless otherwise rescheduled by regulation of the Cabinet for Health and Family Services, the controlled substances listed in this section are included in Schedule I:

(1) Any material, compound, mixture, or preparation which contains any quantity of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, unless specifically excepted, whenever the existence of these isomers, esters, ethers, or salts is possible within the specific chemical designation: Acetylmethadol; Allylprodine; Alphaceylmehtadol; Alphameprodine; Alphamethadol; Benzethidine; Betacetylmethadol; Betameprodine; Betamethadol; Betaprodine; Clonitazene; Dextromoramide; Dextrorphan; Diampromide; Diethylthiambutene; Dimenoxadol; Dimepheptanol; Dimethylthiambutene; Dioxaphetyl butyrate; Dipipanone; Ethylmethylthiambute; Etonitazene; Etoxeridine; Furethidine; Hydroxypethidine; Ketobemidone; Levomoramide; Levophenacylmorphan; Morpheridine; Noracymethadol; Norlevorphanol; Normethadone; Norpipanone; Phenadoxone; Phenampromide; Phenomorphan; Phenoperidine; Piritramide; Proheptazine; Properidine; Propriram; Racemoramide; Trimeperidine.

(2) Any material, compound, mixture, or preparation which contains any quantity of the following opium derivatives, including their salts, isomers, and salts of isomers, unless specifically excepted, whenever the existence of these salts, isomers, or salts of isomers is possible within the specific chemical designation: Acetorphine; Acetyldihydrocodeine; Benzylmorphine; Codeine methybromide; Codeine-N-Oxide; Cyprenorphine; Desomorphine; Dihyrdomorphine; Etorphine; Heroin; Hydromorphinol; Methyldesorphine; Methyldihydromorphine; Morphine methybromide; Morphine methysulfonate; Morphine_N-Oxide; Myrophine; Nicocodeine; Nicomorphine; Normorphine; Pholcodine; Thebacon.

(3) Any material, compound, mixture, or preparation which contains any quantity of the following hallucinogenic substances, their salts, isomers, or salts of isomers, unless specifically excepted, whenever the existence of these salts, isomers, and salts of isomers is possible within the specific chemical designation: 3, 4-methylenedioxymaphetamine; 5-methoxy-3, 4-methylenedioxy amphetamine; 3, 4, 5-trimethoxyamphetamine; Bufotenine; Diethyltryptamine; Dimethyltryptamine; 4-methyl-2, 5-dimethoxyamphetamine; Ibogaine; Lysergic acid diethylamide; Marijuana; Mescaline; naphthylprovalerone, 3,4-methylenedioxypyrovalerone, 3, 4-methylenedioxymethlcathinone, or 4-methylmethcathinone, Peyote; N-ethyl-3-piperidyl benzilate; Psilocybin; Psilocyn; Tetrahydrocannabinols; Hashish; Phencyclidine, 2 Methylamino-1-phenylpropan-1-one (including, but limited to, Methcathinone, Cat, and Ephedrone); salvia; synthetic cannabinoid agonists or piperazines.

(4) Any material, compound, mixture, or preparation which contains any quantity of the following substance having a depressant effect on the central nervous system, including its salts, isomers, and salts of isomers, unless specifically excepted, whenever the existence of these salts, isomers, and salts of isomers is possible within the specific chemical designation: gamma hydroxybutyric acid.

KRS 218A.140 Prohibited acts relating to controlled substances – Penalties

(1) (a) No person shall obtain or attempt to obtain a prescription for a controlled substance by knowingly misrepresenting to, or knowingly withholding information from, a practitioner.

(b) No person shall procure or attempt to procure the administration of a controlled substance by knowingly misrepresenting to, or withholding information from, a practitioner.

(c) No person shall obtain or attempt to obtain a controlled substance or procure or attempt to procure the administration of a controlled substance by the use of a false name or the giving of a false address.

(d) No person shall knowingly make a false statement regarding any prescription, order, report, or record required by this chapter.

(e) No person shall, for the purpose of obtaining a controlled substance, falsely assume the title of or represent himself or herself to be a manufacturer, wholesaler, distributor, repacker, pharmacist, practitioner, or other authorized person.

(f) In order to obtain a controlled substance, no person shall present a prescription for a controlled substance that was obtained in violation of this chapter.

(g) No person shall affix any false or forged label to a package or receptacle containing any controlled substance.

(2) No person shall possess, manufacture, sell, dispense, prescribe, distribute, or administer any counterfeit substance.
(3) No person shall knowingly obtain or attempt to obtain a prescription for a controlled substance without having formed a valid practitioner-patient relationship with the practitioner or his or her designee from whom the person seeks to obtain the prescription.
(4) No person shall knowingly assist a person in obtaining or attempting to obtain a prescription in violation of this chapter.
(5) Any person who violates any subsection of this section shall be guilty of a Class D felony.

KRS 218A.1401 Selling controlled substances other than substituted cathinones, synthetic cannabinoid agonists or piperazines, or salvia to minor – Penalties

(1) A person is guilty of selling controlled substances to a minor when he or she, being eighteen (18) years of age or older, knowingly and unlawfully sells or transfers any quantity of a controlled substance other than naphthylprovalerone, 3,4-methylenedioxypyrovalerone, 3, 4-methylenedioxymethlcathinone, or 4-methylmethcathinone, synthetic cannabinoid agonists, piperazines, or salvia to any person under eighteen (18) years of age.
(2) Selling controlled substances to a minor is a Class C felony for a first offense, and a Class B felony for each subsequent offense, unless a more severe penalty for trafficking in controlled substances is applicable, in which case the higher penalty shall apply.

KRS 218A.1404 Prohibited activities relating to controlled substances – Penalties

(1) No person shall traffic in any controlled substance except as authorized by law.
(2) No person shall possess any controlled substance except as authorized by law.
(3) No person shall dispense, prescribe, distribute, or administer any controlled substance except as authorized by law.
(4) Unless another specific penalty is provided in this chapter, any person who violates the provisions of subsection (1) or (3) of this section shall be guilty of a Class D felony for the first offense and a Class C felony for subsequent offenses and any person who violates the provisions of subsection (2) of this section shall be guilty of a Class A misdemeanor.

KRS 218A.141 Additional penalties for trafficking in controlled substance other than substituted cathinones, synthetic cannabinoid agonists or piperazines, salvia or marijuana

Any person convicted of, pleading guilty to, or entering an Alford plea to any offense involving trafficking in a controlled substance, other than trafficking in naphthylprovalerone, 3,4-methylenedioxypyrovalerone, 3, 4-methylenedioxymethlcathinone, or 4-methylmethcathinone trafficking in synthetic cannabinoid agonists, piperazines, salvia, or trafficking in marijuana shall, in addition to any other penalty authorized by law, be sentenced to:

(1) Pay the costs of disposal of the controlled substances;
(2) Pay the costs of disposal of all equipment, chemicals, materials, or other items used in or in furtherance of the trafficking offense;
(3) Pay the costs involved with environmental clean-up and remediation required for the real property and personal property used for or in furtherance of the trafficking offenses; and
(4) Pay the costs of protecting the public from dangers from chemicals, materials, and

other items used for or in furtherance of the trafficking offense from the time of the arrest until the time that the clean-up or remediation of the real and personal property is concluded. The Commonwealth shall have a lien on all of the assets of the defendant until the amount specified by the court under this subsection is paid in full. The Commonwealth's attorney shall file the lien.

KRS 218A.1411 Trafficking in controlled substance in or near school – Exception for certain misdemeanor offenses – Penalty

(1) Any person who unlawfully traffics in a controlled substance classified in Schedules I, II, III, IV or V, or a controlled substance analogue in any building used primarily for classroom instruction in a school or on any premises located within one thousand (1,000) feet of any school building used primarily for classroom instruction shall be guilty of a Class D felony, unless a more severe penalty is set forth in this chapter, in which case the higher penalty shall apply. The measurement shall be taken in a straight line from the nearest wall of the school to the place of violation.

(2) The provisions of subsection (1) of this section shall not apply to any misdemeanor offense relating to naphthylprovalerone, 3,4-methylenedioxypyrovalerone, 3, 4-methylenedioxymethlcathinone, or 4-methylmethcathinone, synthetic cannabinoid agonists, piperazines, or salvia.

KRS 218A.1412 Trafficking in controlled substance in first degree – Penalties

(1) A person is guilty of trafficking in a controlled substance in the first degree when he or she knowingly and unlawfully traffics in:

(a) Four (4) grams or more of cocaine;
(b) Two (2) grams or more of heroin or methamphetamine;
(c) Ten (10) or more dosage units of a controlled substance that is classified in Schedules I or II and is a narcotic drug or a controlled substance analogue;
(d) Any quantity of lysergic acid diethylamide; phencyclidine; gamma hydroxybutyric acid (GHB), including its salts, isomers, salts of isomers and analogues; or flunitrazepam, including its salts, isomers, and salts of isomers; or
(e) Any quantity of a controlled substance specified in paragraph (a), (b), or (c) of this subsection in an amount less than the amounts specified in those paragraphs.

(2) The amounts specified in subsection (1) of this section may occur in a single transaction or may occur in a series of transactions over a period of time not to exceed ninety (90) days that cumulatively result in the quantities specified in this section.

(3) (a) Except as provided in paragraph (b) of this subsection, any person who violates the provisions of this section shall be guilty of a Class C felony for the first offense and a Class B felony for a second or subsequent offense.

(b) Any person who violates the provisions of subsection (1)(e) of this section shall be guilty of a Class D felony for the first offense and a Class C felony for a second offense or subsequent offense.

KRS 218A.1413 Trafficking in controlled substance in second degree – Penalties

(1) A person is guilty of trafficking in a controlled substance in the second degree when:

(a) He or she knowingly and unlawfully traffics in:

1. Ten (10) or more dosage units of a controlled substance classified in Schedules I and II that is not a narcotic drug; or specified in KRS 218A.1412; or

2. Twenty (20) or more dosage units of a controlled substance classified in Schedule III; but not, naphthylprovalerone, 3,4-methylenedioxypyrovalerone, 3, 4-methylenedioxymethlcathinone, or 4-methylmethcathinone, synthetic cannabinoid agonists, piperazines, salvia, or marijuana;

(b) He or she knowingly and unlawfully prescribes, distributes, supplies, or sells an anabolic steroid for:

1. Enhancing human performance in an exercise, sport, or game; or
2. Hormonal manipulation intended to increase muscle mass, strength, or weight in the human species without a medical necessity; or

(c) Any quantity of a controlled substance specified in paragraph (a) of this subsection in an amount less than the amounts specified in that paragraph.

(2) (a) Except as provided in paragraph (b) of this subsection, any person who violates the provisions of subsection (1) of this section shall be guilty of a Class D felony for the first offense and a Class C felony for a second or subsequent offense.

(b) Any person who violates the provisions of subsection (1)(c) of this section shall be guilty of:

1. A Class D felony for the first offense, except that KRS Chapter 532 to the contrary notwithstanding, the maximum sentence to be imposed shall be no greater than three (3) years; and
2. A Class D felony for a second offense or subsequent offense.

KRS 218A.1414 Trafficking in controlled substance in third degree – Penalties

(1) A person is guilty of trafficking in a controlled substance in the third degree when he or she knowingly and unlawfully traffics in:

(a) Twenty (20) or more dosage units of a controlled substance classified in Schedules IV or V; or

(b) Any quantity of a controlled substance specified in paragraph (a) of this subsection in an amount less than the amount specified in that paragraph.

(2) (a) Any person who violates the provisions of subsection (1)(a) of this section shall be guilty of a Class A misdemeanor for the first offense and a Class D felony for a second or subsequent offense.

(b) Any person who violates the provisions of subsection (1)(b) of this section shall be guilty of:

1. A Class A misdemeanor for the first offense, subject to the imposition of presumptive probation; and
2. A Class D felony for a second or subsequent offense, except that KRS Chapter 532 to the contrary notwithstanding, the maximum sentence to be imposed shall be no greater than three (3) years.

KRS 218A.1415 Possession of controlled substance in first degree – Penalties

(1) A person is guilty of possession of a controlled substance in the first degree when he or she knowingly and unlawfully possesses:

(a) A controlled substance that is classified in Schedules I or II and is a narcotic drug;

(b) A controlled substance analogue;

(c) Lysergic acid diethylamide;

(d) phencyclidine;

(e) Gamma hydroxybutyric acid (GHB), including its salts, isomers, salts of isomers and analogues; or

(f) Flunitrazepam, including its salts, isomers, and salts of isomers.

(2) Possession of a controlled substance in the first degree is a Class D felony subject to the following provisions:

(a) The maximum term of incarceration shall be no greater than three (3) years, notwithstanding KRS Chapter 532;

(b) For a person's first or second offense under this section, he or she may be subject to a period of:

1. Deferred prosecution pursuant to KRS 218A.14151; or

2. Presumptive probation;

(c) Deferred prosecution under paragraph (b) of this subsection shall be the preferred alternative for a first offense; and

(d) If a person does not enter a deferred prosecution program for his or her first or second offense, he or she shall be subject to a period of presumptive probation, unless a court determines the defendant is not eligible for presumptive probation as defined in KRS 218A.010(37).

KRS 218A.1416 Possession of controlled substance in second degree – Penalties

(1) A person is guilty of possession of a controlled substance in the second degree when he or she knowingly and unlawfully possesses: a controlled substance classified in Schedules I or II which is not a narcotic drug; or specified in KRS 218A.1415; or, a controlled substance classified in Schedule III; but not lysergic acid diethylamide, naphthylprovalerone, 3,4-methylenedioxypyrovalerone, 3, 4-methylenedioxymethlcathinone, or 4-methylmethcathinone, phencyclidine, synthetic cannabinoid agonists, piperazines, salvia, or marijuana.

(2) Possession of a controlled substance in the second degree is a Class A misdemeanor.

KRS 218A.1417 Possession of controlled substance in third degree – Penalties

(1) A person is guilty of possession of a controlled substance in the third degree when he or she knowingly and unlawfully possesses a controlled substance classified in Schedules IV or V.

(2) Possession of a controlled substance in the third degree is a Class A misdemeanor.

KRS 218A.1418 Theft of a controlled substance – Not considered theft under KRS Chapter 514

(1) A person is guilty of theft of a controlled substance when he or she unlawfully takes or exercises control over a controlled substance belonging to another person with the intent to deprive him thereof.

(2) Theft of a controlled substance is a Class D felony.

(3) The acts specified in this section shall not constitute theft under KRS Chapter 514.

KRS 218A.1422 Possession of marijuana – Penalty – Maximum term of incarceration

(1) A person is guilty of possession of marijuana when he or she knowingly and unlawfully possesses marijuana.
(2) Possession of marijuana is a Class B misdemeanor, except that, KRS Chapter 532 to the contrary notwithstanding, the maximum term of incarceration shall be no greater than forty-five (45) days.

KRS 218A.1427 Possession of synthetic cannabinoid agonists or piperazines-Penalty – Maximum term of incarceration

(1) A person is guilty of possession of synthetic cannabinoid agonists or piperazines when he or she knowingly and unlawfully possesses synthetic cannabinoid agonists or piperazines.
(2) Possession of synthetic cannabinoid agonists or piperazines is a Class B misdemeanor, except that, KRS Chapter 532 to the contrary notwithstanding, the maximum term of incarceration shall be no greater than thirty (30) days.

KRS 218A.1431 Definitions for KRS 218A.1431 to 218A.1435 and KRS 218A.141

As used in KRS 218A.1431 to 218A.1438 and KRS 218A.141, the following definitions apply:

(1) "Manufacture" means the production, preparation, propagation, compounding, conversion, or processing of methamphetamine, or possession with intent to manufacture, 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, except that this term does not include activities:

    (a) By a practitioner incident to administering or dispensing of a controlled substance in the course of his professional practice; or

    (b) By a practitioner, or by his authorized agent under his supervision, for the purpose of, or incident to, research, teaching, or chemical analysis; or

    (c) By a pharmacist incident to dispensing of a controlled substance in the course of his professional practice.

(2) "Methamphetamine" means any substance that contains any quantity of methamphetamine, including its salts, isomers, and salts of isomers.
(3) "Traffic" means to distribute, dispense, sell, transfer, or possess with intent to distribute, dispense, or sell methamphetamine.

KRS 218A.1432 Manufacturing methamphetamine – Penalties

(1) A person is guilty of manufacturing methamphetamine when he knowingly and unlawfully:

    (a) Manufactures methamphetamine; or

    (b) With intent to manufacture methamphetamine possesses two (2) or more chemicals or two (2) or more items of equipment for the manufacture of methamphetamine.

(2) Manufacture of methamphetamine is a Class B felony for the first offense and a Class A felony for a second or subsequent offense.

KRS 218A.1437 Possession of a methamphetamine precursor

(1) A person is guilty of unlawful possession of a methamphetamine precursor when he or she knowingly and unlawfully possesses a drug product or combination of drug products containing ephedrine,

pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or salts of isomers, with the intent to use the drug product or combination of drug products as a precursor to manufacturing methamphetamine or other controlled substance.

(2) (a) Except as provided in paragraph (b) of this subsection, possession of a drug product or combination of drug products containing more than nine (9) grams of ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or salts of isomers, within any thirty (30) day period shall constitute prima facie evidence of the intent to use the drug product or combination of drug products as a precursor to methamphetamine or other controlled substance.(b) The prima facie evidence referred to in paragraph (a) of this subsection shall not apply to the following persons who lawfully possess a drug product or combination of drug products listed in subsection (1) of this section in the course of legitimate business:

1. A retail distributor of drug products or wholesaler of drug products or its agent;

2. A wholesale drug distributor, or its agent, issued a permit by the Board of Pharmacy;

3. A pharmacist licensed by the Board of Pharmacy;

4. A pharmacy permitted by the Board of Pharmacy;

5. A licensed health care professional possessing the drug products in the course of carrying out his or her profession;

6. A trained chemist working in a properly equipped research laboratory in an education, government, or corporate setting; or

7. A common carrier under contract with any of the persons or entities set out in subparagraphs 1. to 6. of this paragraph.

(3) Unlawful possession of a methamphetamine precursor is a Class D felony for the first offense and a Class C felony for each subsequent offense.

KRS 218A.1438 Distribution of a methamphetamine precursor

(1) Notwithstanding KRS 218A.1442, a person is guilty of unlawful distribution of a methamphetamine precursor when he or she knowingly and unlawfully sells, transfers, distributes, dispenses, or possesses with the intent to sell, transfer, distribute, or dispense any drug product or combination of drug products containing ephedrine, pseudoephedrine, or phenylpropanolamine, or any of their salts, isomers, or salts of isomers, if the person knows that the purchaser intends that the drug product or combination of drug products will be used as a precursor to methamphetamine or other controlled substance, or if the person sells, transfers, distributes, or dispenses the drug product or combination of drug products with reckless disregard as to how the drug product or combination of drug products will be used.

(2) Unlawful distribution of a methamphetamine precursor is a Class D felony for the first offense and a Class C felony for each subsequent offense.

(3) In addition to the criminal penalty specified in subsection (2) of this section, or in lieu of the criminal penalty specified in subsection (2) of this section, any person who traffics in or transfers any drug product or

combination of drug products specified in subsection (1) of this section intentionally or recklessly with knowledge of or reason to know that the drug product or combination of drug products will be used to illegally manufacture methamphetamine or other controlled substance shall be liable for damages in a civil action for all damages, whether directly or indirectly caused by the sale or trafficking or transfer of the drug product or drug products.

(a) Damages may include, but are not limited to:

1. Any and all costs of detecting, investigating, and cleaning up or remediating unlawfully operated laboratories or other facilities for the illegal manufacture of methamphetamine or other controlled substance;

2. Costs of prosecution of criminal cases arising from the illegal sale, transfer, distribution, manufacture, or dispensing of a controlled substance or their precursors;

3. Court costs and reasonable attorney's fees for bringing this civil action;

4. Consequential damages; and

5. Punitive damages.

(b) A civil action to recover damages against a person or persons violating this section may be brought by the Attorney General, an attorney of the Justice and Public Safety Cabinet, or by any Commonwealth's attorney in whose jurisdiction the defendant may be shown to have committed an act specified in this section.

(c) All moneys collected pursuant to such civil action shall be distributed in the following order:

1. Court costs and reasonable attorney's fees for bringing this civil action;

2. The reimbursement of all reasonable costs of detecting, investigating, cleaning up or remediating the laboratory or other facility utilized for manufacture of methamphetamine underlying the present judgment;

3. The reasonable costs of prosecution of criminal cases arising from trafficking in or transfer of a precursor for the illegal manufacture of methamphetamine giving rise to the present judgment; and

4. All remaining moneys shall be distributed to the General Fund.

KRS 218A.1439 Trafficking in or transferring a dietary supplement

(1) A person is guilty of trafficking in or transferring a dietary supplement, when he or she traffics in or transfers any dietary supplement product containing ephedrine group alkaloids, except as provided in this section.

(2) The prohibition in subsection (1) of this section shall not apply to:

(a) A practitioner or pharmacist licensed in this Commonwealth who is practicing within his or her scope of practice and who prescribes or dispenses, or both, dietary supplement products containing ephedrine alkaloids in the course of the treatment of a patient under the direct care of the prescribing practitioner, except that a licensed

practitioner or registered pharmacist shall not prescribe or dispense dietary supplement, products containing ephedrine group alkaloids for purposes of weight loss, body building, or athletic performance enhancement;

(b) Dietary supplement products containing ephedrine group alkaloids that are sold or distributed directly to a licensed practitioner or registered pharmacist, when the dietary supplement products containing ephedrine group alkaloids are used solely for the purpose of the treatment of patients under the direct care of the practitioner;

(c) Dietary supplement products containing ephedrine group alkaloids that are sold or distributed directly to a licensed practitioner or registered pharmacist for resale to a patient for whom the products have been prescribed under paragraph (a) of this subsection; or

(d) Dietary supplement products containing ephedrine group alkaloids that are not for resale in this Commonwealth and that are sold or distributed directly to businesses not located in this Commonwealth.

(3) Trafficking in or transferring a dietary supplement is:

(a) For the first offense, a Class A misdemeanor; and

(b) For a second or subsequent offense, a Class D felony.

KRS 218A.1441 Controlled substance endangerment to a child in the first degree

(1) A person is guilty of controlled substance endangerment to a child in the first degree when he or she knowingly causes or permits a child to be present when any person is illegally manufacturing a controlled substance or methamphetamine or possesses a hazardous chemical substance with intent to illegally manufacture a controlled substance or methamphetamine under circumstances that place a child in danger of serious physical injury or death, if the child dies as a result of the commission of the offense.

(2) Controlled substance endangerment to a child in the first degree is a Class A felony.

KRS 218A.1442 Controlled substance endangerment to a child in the second degree

(1) A person is guilty of controlled substance endangerment to a child in the second degree when he or she knowingly causes or permits a child to be present when any person is illegally manufacturing a controlled substance or methamphetamine or possesses a hazardous chemical substance with intent to illegally manufacture a controlled substance or methamphetamine under circumstances that place a child in danger of serious physical injury or death, if the child receives serious physical injury as a result of the commission of the offense.

(2) Controlled substance endangerment to a child in the second degree is a Class B felony.

KRS 218A.1443 Controlled substance endangerment to a child in the third degree

(1) A person is guilty of controlled substance endangerment to a child in the third degree when he or she knowingly causes or permits a child to be present when any person is illegally manufacturing a controlled substance or methamphetamine or possesses a hazardous chemical

substance with intent to illegally manufacture a controlled substance or methamphetamine under circumstances that place a child in danger of serious physical injury or death, if the child receives physical injury as a result of the commission of the offense.

(2) Controlled substance endangerment to a child in the third degree is a Class C felony.

KRS 218A.1444 Controlled substance endangerment to a child in the fourth degree

(1) A person is guilty of controlled substance endangerment to a child in the fourth degree when he or she knowingly causes or permits a child to be present when any person is illegally manufacturing a controlled substance or methamphetamine or possesses a hazardous chemical substance with intent to illegally manufacture a controlled substance or methamphetamine under circumstances that place a child in danger of serious physical injury or death, if the child is not injured as a result of the commission of the offense.

(2) Controlled substance endangerment to a child in the fourth degree is a Class D felony.

KRS 218A.1450 Trafficking in salvia-Penalty

(1) A person is guilty of trafficking in salvia when he or she knowingly and unlawfully traffics in salvia for human consumption.

(2) Trafficking in salvia is a Class A misdemeanor.

KRS 218A.1451 Possession of salvia-Penalty – Maximum term of incarceration

(1) A person is guilty of possession of salvia when he or she knowingly and unlawfully possesses salvia for human consumption.

(2) Possession of salvia is a Class B misdemeanor, except that, KRS Chapter 532 to the contrary notwithstanding, the maximum term of incarceration shall be no greater than thirty (30) days..

KRS 218A.1452 Cultivation of salvia-Penalty

(1) A person is guilty of salvia cultivation when he or she knowingly and unlawfully plants, cultivates, or harvests salvia with the intent to sell or transfer it of human consumption.

(2) Salvia consumption is a Class A misdemeanor.

KRS 218A.1453 Trafficking in substituted cathinones - Penalty

(1) A person is guilty of trafficking in naphthylprovalerone, 3,4-methylene-dioxypyrovalerone, 3, 4- methylene-dioxymethlcathinone, or 4- methylmeth-cathinone when he or she knowingly and unlawfully traffics in naphthylprovalerone, 3,4-methylenedioxypyrovalerone, 3, 4-methylenedioxymethlcathinone, or 4-methylmethcathinone.

(2) Trafficking in naphthylprovalerone, 3,4-methylenedioxypyrovalerone, 3, 4-methylenedioxymethlcathinone, or 4-methylmethcathinone is a Class A misdemeanor.

KRS 218A.1454 Possession of substituted cathinones - Penalty

(1) A person is guilty of possession of naphthylprovalerone, 3,4-methylenedioxypyrovalerone, 3, 4-methylenedioxymethlcathinone, or 4-methylmethcathinone when he or she knowingly and unlawfully possesses naphthylprovalerone, 3,4-methylenedi-oxypyrovalerone, 3, 4- methylenedioxy-

methlcathinone, or 4-methylmethcathinone.

(2) Possession of naphthylprovalerone, 3,4-methylenedioxypyrovalerone, 3, 4- methyl-enedioxymethlcathinone, or 4- methyl-methcathinone is a Class B misdemeanor, except that, KRS Chapter 532 to the contrary notwithstanding, the maximum term of incarceration shall be no greater than thirty (30) days.

KRS 218A.1455 Manufacturing substituted cathinones - Penalty

(1) A person is guilty of manufacturing naphthylprovalerone, 3,4-methylenedioxypyrovalerone, 3, 4-methylenedioxymethlcathinone, or 4-methylmethcathinone when he or she knowingly and unlawfully manufactures naphthylprovalerone, 3,4-methylenedioxy-pyrovalerone, 3, 4- methylenedioxy-methlcathinone, or 4-methylmethcathinone.

(2) Unlawfully manufacturing naphthyl-provalerone, 3,4-methylenedioxypyrovalerone, 3, 4- methylenedioxymethlcathinone, or 4-methyl-methcathinone is a Class A misdemeanor.

KRS 218A.410 Property subject to forfeiture

(1) The following are subject to forfeiture:

(a) Controlled substances listed in Schedule I that are possessed, transferred, sold, or offered for sale in violation of this chapter are contraband and shall be seized and summarily forfeited to the state.

(b) Controlled substances listed in Schedule I, which are seized or come into the possession of the state, the owners of which are unknown, are contraband and shall be summarily forfeited to the state.

(c) Species of plants from which controlled substances in Schedules I and II may be derived which have been planted or cultivated in violation of this chapter, or of which the owners or cultivators are unknown, or which are wild growths, may be seized and summarily destroyed or forfeited to the state. The failure, upon demand by the law enforcement agency or its authorized agent, of the person in occupancy or in control of land or premises upon which the species of plants are growing or being stored, to produce an appropriate registration, or proof that he is the holder thereof, constitutes authority for the seizure and forfeiture of the plants.

(d) All substances, machinery, or devices used for the manufacture, packaging, repackaging, or marking, and books, papers, and records, and all vehicles owned and used by the seller or distributor for the manufacture, distribution, sale, or transfer of substances in violation of KRS 218A.350 shall be seized and forfeited to the state. Substances manufactured, held, or distributed in violation of KRS 218A.350 shall be deemed contraband.

(e) All controlled substances which have been manufactured, distributed, dispensed, possessed, being held, or acquired in violation of this chapter.

(f) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this chapter.

(g) All property which is used, or intended for use, as a container for property described in paragraph (e) or (f) of this subsection.

(h) All conveyances, including aircraft, vehicles, or vessels, which are used,

or intended for use, to transport, or in any manner to facilitate the transportation, for the purpose of sale or receipt of property described in paragraph (e) or (f) of this subsection, but:

1. No conveyance used by any person as a common carrier in the transaction of business as a common carrier is subject to forfeiture under this section unless it is proven beyond a reasonable doubt that the owner or other person in charge of the conveyance is a consenting party or privy to a violation of this chapter;
2. No conveyance is subject to forfeiture under this section by reason of any act or omission established by the owner thereof to have been committed or omitted without his or her knowledge or consent;
3. A forfeiture of a conveyance encumbered by a bona fide security interest is subject to the interest of the secured party if he or she neither had knowledge of nor consented to the act or omission;
4. The forfeiture provisions of this paragraph shall not apply to any misdemeanor offense relating to marijuana, naphthylprovalerone, 3,4-methylenedioxypyrovalerone, 3, 4-methylenedioxymethlcathinone, or 4- methylmethcathinone, synthetic cannabinoid agonists, piperazines, or salvia.

(i) All books, records, and research products and materials, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this chapter.

(j) Everything of value furnished, or intended to be furnished, in exchange for a controlled substance in violation of this chapter, all proceeds, including real and personal property, traceable to the exchange, and all moneys, negotiable instruments, and securities used, or intended to be used, to facilitate any violation of this chapter; except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by him or her to have been committed or omitted without his or her knowledge or consent. It shall be a rebuttable presumption that all moneys, coin, and currency found in close proximity to controlled substances, to drug manufacturing or distributing paraphernalia, or to records of the importation, manufacture, or distribution of controlled substances, are presumed to be forfeitable under this paragraph. The burden of proof shall be upon claimants of personal property to rebut this presumption by clear and convincing evidence. The burden of proof shall be upon the law enforcement agency to prove by clear and convincing evidence that real property is forfeitable under this paragraph.

(k) All real property, including any right, title, and interest in the whole of any lot or tract of land and any appurtenances or improvements, which is used or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this chapter excluding any misdemeanor offense relating to marijuana, naphthylprovalerone, 3,4-methylenedioxypyrovalerone, 3, 4-methylenedioxymethlcathinone, or 4-methylmethcathinone, synthetic

cannabinoid agonists, piperazines, or salvia except that property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by the Commonwealth to have been committed or omitted with the knowledge or consent of the owner.

(2) Title to all property, including all interests in the property, forfeit under this section vests in the Commonwealth on the commission of the act or omission giving rise to forfeiture under this section together with the proceeds of the property after the time. Any property or proceeds subsequently transferred to any person shall be subject to forfeiture and thereafter shall be ordered forfeited, unless the transferee establishes in the forfeiture proceeding that he or she is a subsequent bona fide purchaser for value without actual or constructive notice of the act or omission giving rise to the forfeiture.

(3) If any of the property described in this section cannot be located; has been transferred to, sold to, or deposited with a third party; has been placed beyond the jurisdiction of the court; has been substantially diminished in value by any act or omission of the defendant; or, has been commingled with any property which cannot be divided without difficulty, the court shall order the forfeiture of any other property of the defendant up to the value of any property subject to forfeiture under this section.

KRS 218A.992 Enhancement of penalty when in possession of a firearm at the time of commission of offense

(1) Other provisions of law notwithstanding, any person who is convicted of any violation of this chapter who was at the time of the commission of the offense in possession of a firearm, shall:

(a) Be penalized one (1) class more severely than provided in the penalty provision pertaining to that offense if it is a felony; or

(b) Be penalized as a Class D felon if the offense would otherwise be a misdemeanor.

(2) The provisions of this section shall not apply to a violation of KRS 218A.210 or KRS 218A.1450, KRS 218A.1451, KRS 218A.1452, KRS 218A.1453, KRS 218A.1454, or 218A.1455.

Selected Case Law Summaries

U.S. v. Fellers
124 S.Ct. 1019 (2004)

FACTS: Police went to Fellers' home with a warrant for his arrest, following an indictment. When they arrived, they asked if they could come in and speak with Fellers. They were let in, and they talked with Fellers for a while without mentioning the arrest warrant. At no time during the conversation at his house was Fellers given his Miranda warnings. The officers deliberately elicited incriminating statements from him before executing the warrant and arresting Fellers. He was subsequently Mirandized at the jail.

ISSUE: Should the suspect have been Mirandized prior to the non-custodial interrogation when he had already been indicted and a warrant issued for his arrest?

HOLDING: Yes.

DISCUSSION: The Court held that a suspect's 6th Amendment rights attached at the start of official proceedings against him. When Fellers was indicted, his 6th Amendment rights attached at that moment related to the offense charged, but no others. To interrogate such a person, even though they are not in custody,

an officer must Mirandize them prior to interrogation.

Berghuis (Warden) v. Thompkins
130 S.Ct/ 2250 (2010)

FACTS: A shooting occurred in Southfield (Michigan) on January 10, 2000. Morris died from multiple gunshot wounds; France survived and later testified. Thompkins, the suspect, fled, but was apprehended a year later in Ohio.

Southfield officers traveled to Ohio to question Thompkins, who was "awaiting transfer to Michigan." At the beginning of the interrogation, Officer Helgert provided Thompkins with his Miranda[1] rights, in writing. The officer had Thompkins read the last provision of the warnings out lout to ensure that Thompkins could read and presumably understand English. Helgert read the other four warnings to Thompkins and Thompkins signed the form. There was conflict in the record as to whether Thompkins was asked, or verbally confirmed, that he understood his rights.

During the ensuing 3 hour interrogation, "at no point … did Thompkins say that he wanted to remain silent, that he did not want to talk with the police, or that he wanted an attorney." He was "largely silent," but did occasionally give a limited verbal response, such as yes, no or a comment such as "I don't know." He also refused a peppermint and mentioned that the chair he was sitting on was hard. Toward the end of the interrogation, one of the officers asked Thompkins if he believed in God and Thompkins's eyes "welled up with tears." Thompkins agreed he prayed to God. Officer Helgert then asked him, "Do you pray to God to forgive you for shooting that boy down?" Thompkins responded "yes" and looked away. He refused to give a written confession and the interrogation ended some 15 minutes later.

Thompkins was charged with murder, assault and related firearms offenses. He moved for suppression of his statements, arguing that he had invoked his Fifth Amendment rights and that interrogation should have then ended.[2] The trial court denied the motion.

Thompkins was convicted and appealed. The Michigan appellate courts denied his argument that the statements should have been suppressed, holding that he had "not invoked his right to remain silent." Thompkins filed a petition for habeas corpus in the U.S. District Court, which also rejected his claim, stating that the state court's decision was not "contrary to, or involved an unreasonable application of clearly established federal law."[3] "The District Court reasoned that Thompkins did not invoke his right to remain silent and was not coerced into making statements during the interrogation."

Thompkins appealed to the U.S. Court of Appeals for the Sixth Circuit, which reversed. The Sixth Circuit "acknowledged that a waiver of the right to remain silent need not be express, as it can be 'inferred from the actions and words of the person interrogated.'"[4] However, it's recitation of the facts indicated that it believed that "Thompkins was silent for two hours and forty-five minutes" and that silence offered a "clear and unequivocal message to the officers: Thompkins did not wish to waive his rights." (The Court also ruled in his favor on an unrelated assistance-of-counsel issue.) The Warden (as the respondent in a habeas petition) requested certiorari and the U.S. Supreme Court granted review.

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

[2] Michigan v. Mosley, 423 U.S. 96 (1975).

[3] 28 U.S.C. §2254(d)(1).

[4] North Carolina v. Butler, 441 U.S. 369 (1979).

ISSUE: Must a suspect invoke his right to remain silent in an unambiguous and unequivocal manner?

HOLDING: Yes

DISCUSSION: The Court reviewed the history of the Miranda ruling and noted that all of the parties conceded "that the warning given in this case was in full compliance with these requirements." Instead, the dispute in this case "centers on the response – or nonresponse – from the suspect" following the warnings being given. Thompkins argued that he remained silent "for a sufficient period of time so the interrogation should have 'cease[d]' before he made his inculpatory statement."[5] However, the Court noted, in Davis v. U.S., it had "held that a suspect must do so 'unambiguously.'"[6]

The Court continued:

> The court has not yet stated whether an invocation of the right to remain silent can be ambiguous or equivocal, but there is no principled reason to adopt different standards for determining when an accused has invoked the Miranda right to remain silent and the Miranda right to counsel at issue in Davis.

Further, it ruled that "there is good reason to require an accused who wants to invoke his or her right to remain silent to do so unambiguously." Such a requirement avoids forcing law enforcement officers "to make difficult decisions about an accused's unclear intent and face the consequences of suppression 'if they guess wrong.'"[7]

The Court then considered whether, in fact, Thompkins waived his right to remain silent.

The Court continued:

> The waiver inquiry "has two distinct dimensions": waiver must be "voluntary in the sense that it was the produce of a free and deliberate choice rather than intimidation, coercion, or deception," and "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."[8]

Decisions since Miranda demonstrate "that waivers can be established even absent formal or express statements of waiver that would be expected in, say, a judicial hearing to determine if a guilty plea has been properly entered." The prosecution, as such, "does not need to show that a waiver of Miranda rights was express." Instead, an "implicit waiver" is "sufficient to admit a suspect's statement into evidence."[9] It is to the prosecution to make an adequate showing that the accused understood Miranda rights, as given. Once that is done, however, "an accused's uncoerced statement establishes an implied waiver of the right to remain silent."

Further:

> Although Miranda imposes on the police a rule that is both formalistic and practical when it prevents them from interrogating suspects without first providing them with a Miranda warning, it does not

[5] Mosley, supra.
[6] 512 U.S. 452 (1994).
[7] See Moran v. Burbine, 475 U.S. 412 (1986).
[8] Id.
[9] Butler, supra.

> impose a formalistic wavier procedure that a suspect must follow to relinquish those rights.

Miranda rights can be waived through more informal means than a "typical waiver on the record," which generally requires a verbal invocation. The Court found no "contention" on the record that Thompkins did not understand his rights, but instead, found "more than enough evidence in the record" that he did. His response to the officer's final question was a "course of conduct indicating waiver" of the right to remain silent – he could have remained silent or invoked his Miranda rights at that time, or any time earlier, ending the interrogation. The fact that would have been three hours after the warning was given was immaterial and "police are not required to rewarn suspects from time to time." This is further confirmed in that he gave "sporadic answers to questions throughout the interrogation." The Court found no evidence of coercion or threat, as neither, the length of time nor the conditions of the interrogation were not such as would put him in physical or mental distress. Appealing to his religious beliefs (moral and psychological pressures) did not make the interrogation improper.[10]

Thompkins also contended that the police could not question him until they obtained a waiver, but again, the Court noted that Butler foreclosed this line of argument.

The Court stated:

> Interrogation provides the suspect with additional information that can put his or her decision to waive, or not to invoke, into perspective. As questioning commences and then continues, the suspect has the opportunity to consider the choices he or she faces and to make a more informed decision, either to insist on silence or to cooperate. When the suspect knows that Miranda rights can be invoked at any time, he or she has the opportunity to reassess his or her immediate and long-term interests. Cooperation with the police may result in more favorable treatment for the suspect; the apprehension of accomplices; the prevention of continuing injury and fear; beginning steps towards relief or solace for the victims; and the beginning of the suspect's own return to the law and the social order it seeks to protect.

The Court affirmed that in order for a statement (under interrogation) to be admissible, the accused must have been properly given, and understood, the Miranda warnings. The Court would then look for an express or implied waiver but the Court agreed that officers need not obtain a waiver before commencing an interrogation.

The Court agreed that the statements were admissible and reversed the decision of the Sixth Circuit on the issue. The Court also ruled on an unrelated question with respect to jury instructions, and found no prejudice to Thompkins. The Court remanded the case to the lower court to deny the habeas petition.

Horton v. California
469 U.S. 128 (1990)

FACTS: Officers executed a search warrant at Horton's home. Horton was a suspect in an armed robbery. The robbers were described by the victim as having been armed with a "machine gun" and a stun gun. The warrant

[10] Oregon v. Elstad, 470 U.S. 298 (1985).

failed to list the weapons, but only listed the stolen jewelry. While executing the warrant, the officers found weapons that matched the description of what the victim had said the robbers used. The weapons were seized, even though they were not listed on the warrant.

ISSUE: May evidence or contraband that is seen in "plain view" be seized without a warrant?

HOLDING: Yes, if it meets the test of plain view.

DISCUSSION: The Court held that officers may seize evidence or contraband without a warrant under circumstances it defined as plain view. (1) The officer must lawfully be in the location he is at when he observes the item. (2) The officer must immediately have probable cause to believe it is evidence of a crime. (3) The officer may seize it without a warrant if he has lawful access to the item. Here, the officers were lawfully on the premises pursuant to the search warrant. They immediately had probable cause to believe the weapons they saw were evidence of a crime as they matched the description given by the victim. They had right of access to the weapons because they were in a location where the officers had access due to the search warrant

Hudson v. Michigan
126 S.Ct. 2159 (2006)

FACTS: Officers entered Hudson's dwelling to execute a search warrant. The state of Michigan conceded that the officers had not waited a reasonable amount of time after knocking and announcing before they entered. Michigan argued that the penalty for such a failure should not be suppression of the evidence.

ISSUE: Is the appropriate penalty for failing to properly knock and announce suppression of the evidence when the officers had what was otherwise a valid warrant?

HOLDING: No.

DISCUSSION: The Court strongly reaffirmed that the requirement to knock and announce is a constitutional requirement, and must be fulfilled. However, the Court held that hereafter the remedy for failure to knock and announce would no longer be application of the exclusionary rule. The Court noted that the warrant was supported by probable cause and valid in all respects, and it made little sense to suppress evidence that the police would have been entitled to seize had they waited a few seconds more. Therefore, the remedy for a failure to properly knock and announce will hereafter be limited to civil liability under 42 U.S.C. § 1983.

Chimel v. California
395 U.S. 752 (1969)

FACTS: Officers went to Chimel's home with a warrant for his arrest on charges of theft of old collectible coins. He was arrested in the living room, and the officers then searched the rest of the house and outbuildings without a search warrant. They found various pieces of evidence during the search. Chimel wanted the evidence suppressed.

ISSUE: Is the search of an arrestee's entire house justified incident to his arrest?

HOLDING: No.

DISCUSSION: When an arrest is made, it is reasonable to search his person for any weapons or evidence he may have on him. Likewise, the officer may search the area within the arrestee's immediate control. In most buildings, that will be the entire room in

which he is arrested. If he has a weapon hidden in the room he is arrested in, he may be able to access it and attack the officer if he has a brief distraction. The same logic does not apply to the entire structure the arrest takes place in.

Carroll v. U.S.
267 U.S. 132 (1925)

FACTS: Prohibition agents stopped Carroll on the road between Detroit and Grand Rapids, Michigan. They had probable cause to believe Carroll was smuggling illegal liquor in his vehicle. They did not have a warrant. Taking a knife, they cut his back seat apart, and discovered 68 bottles of illicit whiskey. Carroll sought suppression of the evidence, arguing the search without a warrant was in violation of the 4th Amendment.

ISSUE: May officers make a warrantless search of a vehicle in a public place if they have probable cause to believe it is or contains evidence of or instrumentalities of a crime?

HOLDING: Yes.

DISCUSSION: The Court held the situation was analogous to a warrantless search of a ship in harbor by customs officials. In such cases, customs agents had long been permitted to make warrantless searches of ships in harbor so long as they had probable cause to believe the ship was carrying contraband. The warrantless searches were permitted in such cases because the ship was mobile, and could leave port before the agents got back with a search warrant and would be therefore out of reach. Similarly, a vehicle is mobile, and if an officer had to go to the judge to get a warrant, it could be gone and out of the jurisdiction before the officer got back. The vehicle has to be in a public place, which is simply a location where the owner/operator of the vehicle has no reasonable expectation of privacy. The Vehicle Exception Search requires the same probable cause that an officer would need to get a warrant. It is not a lower standard. An officer is allowed to do a complete search of the vehicle, interior, trunk, under the hood, everything and everywhere.

Illinois v. Caballes
543 U.S. 405 (2005)

FACTS: Caballes had been stopped for a traffic violation. There was no reasonable suspicion to believe that he was engaged in drug trafficking. A canine officer nearby heard the stop called in, and went over there on his own volition. He arrived while Caballes was still dealing with the officer who stopped him. The dog alerted on the vehicle, and a search revealed contraband.

ISSUE: Is a sniff by a drug canine, which reveals nothing but the presence of contraband, during a lawful stop a search?

HOLDING: No.

DISCUSSION: The Court held that there was no privacy interest in the air surrounding the vehicle. So long as the vehicle was lawfully stopped, there was not an issue. However, the Court also made it clear that, absent reasonable suspicion, an officer cannot compel a person to wait for the drug dog. Dragging out the stop to give a drug dog time to arrive would be an unlawful seizure, and any drugs found would be suppressed as a result.

Michigan v. Sitz
496 U.S. 444 (1990)

FACTS: Michigan State Police was conducting a sobriety checkpoint pursuant to established guidelines. All drivers passing through the checkpoint would be stopped and examined for evidence of impairment. If there were

evidence, they would be taken aside and processed. If not they were sent on their way.

ISSUE: Is a brief stop of a motorist to check for drunk driving permissible?

HOLDING: Yes.

DISCUSSION: The Court held that such checkpoints were indeed seizures within the meaning of the 4th Amendment. However, it determined that such stops were reasonable, given the limited intrusion on law-abiding citizens and the great state interest in stopping drunk driving.

Warden of Maryland Penitentiary v. Hayden, 387 U.S. 294, 87 S.Ct. 1642 (1967)

FACTS: About 8 a.m. on March 17, 1962, an armed robber entered the business premises of the Diamond Cab Company in Baltimore, Maryland. He took $363 and ran. Two cab drivers in the vicinity, attracted by the shouts of "hold-up", followed the man to 2111 Cocoa Lane. One driver notified the company dispatcher by radio that the man was a Negro about 5'8" tall, wearing a light cap and dark jacket, and that he had entered the house on Cocoa Lane. The dispatcher relayed the information to the police who were proceeding to the scene of the robbery. In less than five minutes, the police arrived at the house. An officer knocked and announced their presence. Mrs. Hayden answered the door, and the officers told her they believed that a robber had entered the house, and asked to search the house. She offered no objection. (The court held that the issue of consent by Mrs. Hayden for the entry need not be decided because the officers were justified in entering and searching for the felon, for his weapons and for the fruits of the robbery.)

The officers spread out through the first and second floors and the cellar in search of the robber. Hayden was found in an upstairs bedroom feigning sleep. He was arrested when officers on the first floor and in the cellar reported that no other man was in the house. Meanwhile, an officer was attracted to an adjoining bathroom by the noise of running water, and discovered a shotgun and a pistol in a flush tank; another officer, who was "searching the cellar for a man or the money" found in a washing machine a jacket and trousers of the type the fleeing man was said to have worn. A clip of ammunition for the pistol and a cap were found under the mattress of Hayden's bed, and ammunition for the shotgun was found in a bureau drawer in Hayden's room. All of these items were introduced against Hayden at his trial.

ISSUES:
1) Were the entry into the house and the search for the robber, without a warrant, legal?
2) Even if the search was lawful, was the seizure of the items of clothing ("mere evidence") legal?

HOLDINGS:
1) Yes
2) Yes

DISCUSSION:
1) When police were informed that armed robbery had taken place and that a suspect had entered a certain house less than five minutes before they reached it, officers acted reasonably when they entered the house and began to search for the suspect and for weapons which he had used in robbery or which might be used against them.

The permissible scope of the search was as broad as reasonably necessary to prevent danger that suspect at large in house might resist or escape.

The Fourth Amendment does not require police to delay in course of investigation if to do so would gravely endanger their lives or the lives of others. Speed here was essential, and only a thorough search of the house for persons and weapons could have insured that Hayden was the only man present and that the police had control of all weapons that could be used against them or to effect escape.

2) Language of the Fourth Amendment does not support distinction between "mere evidence" and instrumentalities, fruits of crime, or contraband.

Terry v. Ohio, 392 U.S. 1 (1968)

FACTS: Cleveland Police Detective Martin McFadden had been a policeman for 39 years, a detective for 35 years, and had been assigned to his beat in downtown Cleveland for 30 years. At approximately 2:30 p.m. on October 31, 1963, Officer McFadden was patrolling in plain clothes. Two men, Chilton and Terry, standing on the corner of Huron Road and Euclid Avenue, attracted his attention. McFadden had never seen the men before and he was unable to say precisely what first drew his eye to them. His interest aroused, Officer McFadden watched the two men. He saw one of the men leave the other and walk past some stores. He paused and looked in a store window, then walked a short distance, turned around and walked back toward the corner, pausing once again to look in the same store window. Then the second man did the same. This same trip was repeated approximately a dozen times. At one point, a third man approached them and engaged them in conversation. This man then left. Chilton and Terry resumed their routine for another 10-12 minutes, then left to meet with the third man.

Officer McFadden testified that he suspected the men were "casing a job, a stick-up," and that he feared "they may have a gun." Officer McFadden approached the three men, identified himself and asked for their names to which the men "mumbled something." Officer McFadden grabbed Terry, spun him around and patted down the outside of his clothing. In the left breast pocket of Terry's overcoat, Officer McFadden felt a pistol, which he retrieved. Officer McFadden proceeded to pat down Chilton, felt and retrieved another revolver from his overcoat. Officer McFadden patted down the third man, Katz, but found no weapon. Chilton and Terry were charged with carrying concealed weapons. (Chilton died before his conviction could be appealed.) Both were convicted, and appealed, and the appellate courts affirmed the conviction. Upon appeal, the U.S. Supreme Court accepted certiorari.

ISSUES: 1) May an officer stop an individual briefly on reasonable suspicion that they are involved in illegal activity?

2) May an individual be frisked if the officer has reasonable suspicion that they are armed and present a danger?

HOLDINGS: 1) Yes
2) Yes

DISCUSSION: The Constitution forbids not all searches and seizures, but unreasonable searches and seizures. There is a "seizure" whenever police officer accosts an individual and restrains his freedom to walk away, and "search" when officer makes careful exploration of outer surfaces of person's clothing to attempt to find weapon.

> In justifying a particular intrusion, an officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts,

> that reasonably warrants that intrusion. Those facts must be judged against an objective standard of whether the facts available to officer at moment of seizure or search would warrant man of reasonable caution in belief that action taken was appropriate. Intrusions must be based on more than hunches. Simple good faith on the part of the officer is not enough.

A police officer who had observed persons go through series of acts, each of them perhaps innocent in itself, but when taken together warranted further investigation, was discharging legitimate investigative function when he decided to approach them. The officer in this case had reasonable cause to believe that defendants were contemplating a crime, and thus had cause to stop and speak to them. Because he suspected them of intent to commit armed robbery on the business, there was cause to believe they may be armed, thus the officer had cause to search them for weapons. McFadden did not exceed the reasonable scope of a proper search in patting down their outer clothing,

The sole justification for an officer's search of a person whom he has no cause to arrest is protection for officer and others nearby, and it must be confined in scope to intrusion reasonably designed to discover weapons. Although the facts of the Terry case involved a pat down of the outer clothing, the language of the court's decision did not limit a frisk to the outer clothing, such as a coat. The court said, "...it must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby. "The scope of the search must be strictly tied to and justified by the circumstances that rendered its initiation permissible."

The U.S. Supreme Court affirmed the decision.

See also: *U.S. v. Reed, 220 F.3d 476 (6th Cir. 2000)*

U.S. v. Harris, 192 F.3d 580 (6th Cir. 1999)

Pitman v. Com., 896 S.W.2d 19 (Ky.App., 1995)

Com. v. Banks, 68 S.W.3d 347 (Ky., 2001)

U.S. v. Mesa, 62 F.3d 159 (6th Cir. 1995) – Terry traffic stop

U.S. v. Freeman, 209 F.3d 464 (6th Cir. 2000) - Terry traffic stop

Adkins. v. Com., 96 S.W.3d 779 (Ky. 2003)

Ybarra v. Illinois
444 U.S. 85 (1979)

FACTS: Officers executed a search warrant at the Aurora Tap Tavern for controlled substances. The warrant specified that Greg the bartender could also be searched. When officers executed the warrant, they lined up everybody who was in the bar and patted them down. The officer who patted down Ybarra felt a cigarette pack in his pocket that felt as if something other than cigarettes was in it. After patting down the others, he returned to Ybarra, and removed the cigarette pack from him. It contained heroin. Ybarra argued the officers had no right to frisk him in the first place, and wanted the evidence suppressed.

ISSUE: May officers do a precautionary frisk of persons who happen to be at the scene when a search warrant is served, absent any reasonable suspicion that the person may be armed and dangerous?

HOLDING: No.

DISCUSSION: The Court held that the mere fact of a person's presence at the scene of execution of a search warrant does not, without more, justify a *Terry* frisk. To do otherwise would be to do away with the requirement of an individualized reasonable suspicion that the person was armed and

dangerous. Just as a search warrant does not give you the right to search everybody who happens to be there when officers arrive, neither does it justify a frisk.