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Possession of Narcotic Drugs Under State and Federal Statutes

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POSSESSION OF NARCOTIC DRUGS UNDER STATE AND FEDERAL STATUTES*

GARY D. KATZ**

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I. INTRODUCTION

Possession is the crucial element in nearly all state or federal legislation governing traffic in narcotic drugs.¹ This survey explores the meaning and implications of possession with regard to state and federal narcotics statutes, and is meant to be a practical compendium to be used by the criminal attorney.

No attempt is made to examine the current constitutional questions regarding the construction or enforcement of state and federal narcotics statutes unless these topics are inextricably enmeshed with the possessory aspects of the statutes under discussion.²

* Since the writing of this article, new federal legislation has been enacted which combines the bulk of the federal narcotics drug law into one act. *Drug Abuse Prevention and Control Act*, 21 U.S.C.A. § 801 *et. seq.* (Supp. 1971). Although the cases and materials discussed herein involve prosecutions under the earlier laws, the concept of possession is germane to both the old and new law, and the subject matter of this article should be applicable to prosecutions under the new Act as well as those begun under the earlier laws.

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1. The term "narcotic drugs" generally includes coca leaves, opium, cannabis, and their compounds and derivatives. The term does not include amphetamines, barbiturates or hallucinogens. See, e.g., UNIFORM NARCOTIC DRUG ACT § 1(14).

2. For a complete discussion of the constitutional questions involved in the enforcement of the various narcotic drug statutes, see Comment, *Marijuana and the Law: The*

A discussion of the current extensive debate over the relative harms and benefits of certain narcotic drugs is also beyond the scope of this survey,³ as is a discussion of other "dangerous" drugs such as barbiturates, amphetamines, or hallucinogens.⁴

II. THE STATUTORY SCHEME

In order to fully understand the role possession plays in the statutory scheme, it is first necessary to understand the history and underlying policies of the present narcotics laws.

A. Regulation and Control by the States

The Uniform Narcotic Drug Act⁵ is in force with various modifications in all jurisdictions except California and Pennsylvania,⁶ and both of these states have statutes which are similar to the UNDA.⁷ The Act was first adopted by the National Conference of Commissioners on Uniform State Laws in 1932, ostensibly to fill the gaps which Congress left in the federal law when it passed the Harrison Act.⁸

The UNDA provides for enforcement by designated state officials and for cooperation by these officials with other agencies which are charged with the enforcement of state and federal narcotics laws.⁹ The Act makes it unlawful for any person to "possess, [or] have under his control, . . . any narcotic drug, except as authorized in [the Act]."¹⁰ The term "narcotic drugs" is defined by the UNDA to include coca leaves, opium, cannabis, every substance neither chemically nor physically distinguishable from them, and any other drugs to which the federal narcotics laws may now apply.¹¹ Certain preparations containing only small quantities of narcotic drugs are specifically exempted from the provisions of the UNDA.¹²

Constitutional Challenges to Marijuana Laws in Light of the Social Aspects of Marijuana Use, 13 VILL. L. REV. 851 (1968); Wallenstein, *Consent Searches*, 4 CRIM. L. BULL. 509 (1968).

3. For a complete discussion of the moral and sociological questions involved, see A. LINDSMITH, *THE ADDICT AND THE LAW* (1965).

4. For a typical statute proscribing possession of these drugs, see 21 U.S.C. § 360(a)(c) (1964). These drugs are defined by § 321(v) to include amphetamines, barbiturates and lysergic acid.

5. 9B UNIF. LAWS ANNOT. 415 (1932). [Hereinafter cited as UNDA]. See chapter 398 of the Florida Statutes.

6. AM. JUR. 2d Desk Book, Doc. no. 129.

7. CAL. HEALTH AND SAFETY CODE §§ 11000-11797 (Deering 1960); PA. STAT. tit. 35, § 780 (1964).

8. National Conference of Commissioners on Uniform State Laws, *Prefatory Comment to Uniform Narcotic Drug Act*, 9B UNIF. LAWS ANNOT. 415 (1932) (the Harrison Narcotic Act of 1914 brought opium and its derivatives such as morphine under federal control).

9. UNDA § 19; FLA. STAT. § 398.21 (1969).

10. UNDA § 2; FLA. STAT. § 398.03 (1969).

11. UNDA § 1(14); FLA. STAT. § 398.02(13) (1969).

12. UNDA § 8; FLA. STAT. § 398.09 (1969). For example, since the compound "paragoric" contains less than the amount of opium prohibited by the Act, it may be purchased without a prescription in jurisdictions where this exception has been retained as part of the Act.

Additionally, the provisions of the Act restricting the possession of narcotic drugs are expressly inapplicable to certain persons or corporations while engaged in certain specified lawful activities in connection with the drugs.¹³

B. Regulation and Control by the Federal Government

The fragmentation of our [federal] statutory scheme for controlling narcotics . . . creates confusion—both for the casual observer and for the interested student. This patchwork of statutes, each governing one phase or piece of the total problem has emerged over half a century, mostly in reaction to the particular problems and needs of a given time. Literally strewn throughout the United States Code, the drug laws have never been compiled, digested, and converted into a single workable package.¹⁴

The last fifty years have produced at least nine major pieces of federal narcotics legislation.¹⁵ The Harrison Narcotic Act¹⁶ (also known as the Narcotics Tax Act) brought opium and its derivatives under control in 1914. In the 1930's, a massive increase in the use of marijuana led to the adoption of the Marijuana Tax Act.¹⁷ Other acts which contain possessory provisions include the Opium Poppy Act,¹⁸ and the Narcotic Drugs Import and Export Act.¹⁹

1. THE NARCOTIC DRUGS IMPORT AND EXPORT ACT

The Narcotic Drugs Import and Export Act provides that in the absence of proof to the contrary, the mere possession of specified drugs²⁰ is sufficient to authorize a conviction for *knowingly* importing or facilitating the transportation or concealment of illegally imported drugs.²¹ The importation of marijuana is expressly prohibited,²² and the mere possession of marijuana has previously been held sufficient to authorize a conviction²³ for *knowingly* importing or facilitating the transportation

13. UNDA §§ 7, 11, and 12; FLA. STAT. §§ 398.08, .12, and .13 (1969). These exceptions are respectively for: (1) certain defined professionals such as doctors, dentists and veterinarians; (2) individuals possessing pursuant to lawful prescriptions; and (3) carriers and warehousemen who have lawful incidental possession of such drugs.

14. M. SONNENREICH, HANDBOOK OF FEDERAL NARCOTIC AND DANGEROUS DRUG LAWS, xiii (1969).

15. *Id.*

16. 26 U.S.C. § 4701-40 (1964).

17. 26 U.S.C. § 4741-62 (1964).

18. 21 U.S.C. § 188 (1964).

19. 21 U.S.C. §§ 171-85 (1964). [Hereinafter cited as NDIEA].

20. For purposes of the NDIEA, 21 U.S.C. § 171 (1964) refers to 26 U.S.C. § 4731 (1964) which defines "Narcotic Drugs" to include opium, isonipecaine, coca leaves, and opiate, any of their compounds and derivatives, and all similar substances.

21. 21 U.S.C. § 174 (1964).

22. 21 U.S.C. § 176(a) (1964).

23. *Id.*, see the discussion of *Leary v. United States*, p. 314 *infra*.

and concealment of illegally imported drugs in the absence of proof to the contrary.

In addition to certain prescribed penalties for the possessory offenses, the NDIEA provides for the seizure and forfeiture of illegally imported narcotic drugs, and for their subsequent disposition.²⁴

2. THE NARCOTICS TAX ACT

The Narcotics Tax Act²⁵ provides that any person who manufactures, produces, or sells narcotic drugs,²⁶ must register with the Secretary of the Treasury or his delegate²⁷ and pay a special occupational tax.²⁸ A further tax is imposed, represented by appropriate stamps on containers or order forms, on narcotics produced in or imported into the United States and sold, or removed for consumption or sale.²⁹ Possession of any original stamped package containing narcotic drugs by a person who has not registered and paid the occupational tax is prima facie evidence of liability to register and pay the tax,³⁰ and such possession is unlawful³¹ unless otherwise exempted.³²

3. THE MARIJUANA TAX ACT

The Marijuana Tax Act³³ imposes a tax upon transfers of marijuana, which must be paid by the transferee.³⁴ By virtue of this legislation, it is unlawful for any person who is a transferee to possess marijuana without paying the tax.³⁵ Proof of possession of marijuana plus failure to produce an official order form is presumptive evidence of guilt.³⁶

The Marijuana Tax Act also provides that any person who manufactures, produces, or deals in marijuana must register with the official in charge of the revenue district in which his place of business is located³⁷ and pay an occupational tax.³⁸ Proof that marijuana is found growing

24. 21 U.S.C. § 173 (1964). See also 21 U.S.C. § 178 (1964) which provides a penalty for possession of smoking opium aboard any vessel bound to or from the United States. 21 U.S.C. § 184 (1964) authorizes seizure and forfeiture of narcotics found on vessels arriving at a port in the United States, when the manifests of the vessels fail to disclose the presence of the drugs.

25. 26 U.S.C. §§ 4701-40 (1964) [hereinafter cited as NTA].

26. 26 U.S.C. § 4721 (1964). For purposes of this Act, narcotic drugs are defined by 26 U.S.C. § 4731 (1964), as opium, isonipicaine, coca leaves, opiate, their compounds and derivatives, and all similar substances.

27. 26 U.S.C. § 4722 (1964).

28. 26 U.S.C. § 4721 (1964).

29. 26 U.S.C. §§ 4701, 4703, and 4771 (1964).

30. 26 U.S.C. § 4723 (1964).

31. 26 U.S.C. § 4724(c) (1964).

32. 26 U.S.C. §§ 4702(a) and (b) (1964) exempt pharmaceutical preparations containing a narcotic, where they are found to possess minor or no addictive qualities, and preparations made from decocainized coca leaves or from leaves which do not contain cocaine.

33. 26 U.S.C. §§ 4741-62 (1964) [hereinafter cited as MTA].

34. 26 U.S.C. § 4741 (1964).

35. 26 U.S.C. § 4744 (1964).

36. *Id.*

37. 26 U.S.C. § 4753 (1964).

38. 26 U.S.C. § 4751 (1964).

on land under the control of the defendant raises a presumption that the defendant should register as a producer and pay the tax.³⁹

III. POSSESSION DEFINED—GENERALLY

Under most state and federal statutes, in order to obtain a conviction, it is necessary to show both a knowledge of the narcotic nature of the thing possessed and an intent to possess it.⁴⁰ However, since such knowledge is seldom susceptible of direct proof, it is generally proved inferentially.⁴¹ The possession necessary to gain a conviction need not be actual⁴² nor need it be exclusive.⁴³ The duration of possession must be of a sufficient length to bring the narcotic under the dominion and control of the defendant,⁴⁴ but actual ownership in the sense of title is not required.⁴⁵

Under some statutes, possession for personal use⁴⁶ and possession of small quantities of certain narcotic drugs is specifically authorized.⁴⁷ Possession of seeds and growing plants is generally prohibited.⁴⁸

The only absolute defenses to a charge of unlawful possession are possession under prescription, lawful possession by professionals (*e.g.*, doctors, dentists, and veterinarians), and possession of exempted preparations containing only small quantities of a narcotic drug.⁴⁹

IV. ELEMENTS OF POSSESSION

A. *Knowledge of Presence of Narcotic and Intent to Possess*

In order to sustain a conviction for possession, the state must at least prove that the defendant knew of the presence of the narcotic drug.⁵⁰ There is a conflict of authority as to whether, in addition to knowledge of the presence of the drug, the defendant must also know of its narcotic nature.⁵¹ The state may also have the additional burden of proving that the defendant had the intent to possess the narcotic.⁵²

39. 26 U.S.C. § 4755(a)(2) (1964).

40. See text, section IV (A) *infra* for a discussion of the elements of possession.

41. See text, section IV (B) *infra* for a discussion of proof of possession.

42. See text, section V (B) *infra* for a discussion of constructive possession.

43. See text, section V (D) *infra* for a discussion of multiple possessors.

44. See text, section V (C) *infra* for a discussion of duration of possession.

45. See text, section V (A) *infra* for a discussion of dominion and control and title.

46. See text, section V (E) *infra* for a discussion of possession for personal use.

47. See text, section V (F) *infra* for a discussion of possession of small quantities of narcotic drugs.

48. See text, section V (G) *infra* for a discussion of possession of seeds and growing plants.

49. See text, section VIII *infra* for a discussion of defenses to a charge of possession.

50. See, *e.g.*, State v. Hunt, 91 Ariz. 149, 370 P.2d 642 (1962); People v. Aguilar, 223 Cal. App. 2d 119, 35 Cal. Rptr. 516 (2d Dist. 1963); Spatavo v. State, 179 So.2d 873 (Fla. 2d Dist. 1965); People v. Embry, 20 Ill. 2d 331, 169 N.E.2d 767 (1960); State v. Nicolosi, 228 La. 65, 81 So.2d 771 (1955).

51. For a case which held that knowledge of the narcotic nature of the thing possessed is essential, see People v. Moller, 177 Cal. App. 2d 379, 2 Cal. Rptr. 223 (1st Dist. 1960). For cases which hold that knowledge of the narcotic nature of the thing possessed is *not*

B. *Knowledge of Possession of Narcotic May be Proven Inferentially*

Since the element of knowledge is rarely ever susceptible of direct proof, it may be proven "by evidence of acts, declarations or conduct of the accused from which the inference may be fairly drawn that he knew of the existence of the narcotics at the place where they were found."⁵³ In one case, evidence which revealed the finding of marijuana in a coat which the defendant admitted was his, sustained the trial court's finding that the defendant had knowledge of the existence of the marijuana in his coat pocket.⁵⁴

In one instance, narcotics officials found the defendant in an apartment in which he and several other people lived and a search of the apartment revealed 30 small bags of narcotics. It was held that when narcotics are found on premises controlled by the defendant, this fact, in and of itself, gives rise to an inference of knowledge of possession.⁵⁵ Other cases have held that the mere possession of a narcotic constitutes substantial evidence which may sustain a finding that the possessor knew of its nature and that he knew he had narcotics in his possession.⁵⁶

V. FACTORS AFFECTING POSSESSION

A. *Dominion and Control*

In order to obtain a conviction for possession of narcotics, it is necessary that the state prove, in addition to the defendant's knowledge of the presence of the narcotics, that the narcotics were under the defendant's immediate dominion and control.⁵⁷ It is not necessary, however, to prove ownership in the sense of title, to sustain a conviction.⁵⁸

essential, *see* *Jenkins v. State*, 215 Md. 70, 137 A.2d 115 (Ct. App. 1957); *State v. Boggs*, 57 Wash. 2d 484, 358 P.2d 124 (1961).

52. *See, e.g.*, *People v. Lunbeck*, 146 Cal. App. 2d 539, 303 P.2d 1082 (2d Dist. 1956); *Broic v. State*, 79 So.2d 775 (Fla. 1955).

53. *People v. Embry*, 20 Ill. 2d 331, 334, 169 N.E.2d 767, 768 (1960).

54. *People v. Contreras*, 211 Cal. App. 2d 641, 27 Cal. Rptr. 619 (2d Dist. 1963).

55. *People v. Nettles*, 23 Ill. 2d 306, 178 N.E.2d 361 (1961), *cert. denied*, 369 U.S. 853 (1961).

56. *People v. Pigrenet*, 26 Ill. 2d 224, 186 N.E.2d 306 (1962). *See also* *People v. Toliver*, 179 Cal. App. 2d 736, 4 Cal. Rptr. 271 (1st Dist. 1960) (where the attempt of the defendant to rid himself of a marijuana cigarette and remove it from his hat established his knowledge of the illegal nature of the cigarette); *People v. Torres*, 140 Cal. App. 2d 751, 295 P.2d 904 (1st Dist. 1956) (where evidence of fresh needle marks on defendant's arm when he was arrested was admissible to show knowledge and to show that defendant had had possession of narcotics found at the scene of his arrest. *But see* *United States v. Landry*, 257 F.2d 425 (7th Cir. 1958) (which held that proof of possession of a narcotic drug may not be established by circumstantial evidence when the undisputed direct proof places that possession in some other person); *People v. Harris*, 358 Mich. 646, 101 N.W.2d 242 (1960) (where evidence that the defendant did not live in an apartment in which a sack containing marijuana was found was sufficient to upset defendant's conviction for illegal possession of marijuana, notwithstanding the defendant's finger print on the sack).

57. *People v. Amos*, 190 Cal. App. 2d 384, 11 Cal. Rptr. 834 (2d Dist. 1961); *Chariott v. State*, 226 So.2d 359 (Fla. 3d Dist. 1969); *People v. Matthews*, 18 Ill. 2d 164, 163 N.E.2d 469 (1959).

58. *Peachie v. State*, 203 Md. 239, 100 A.2d 1 (1953).

B. *Constructive Possession*

To establish a violation of statutes proscribing possession of narcotic drugs, evidence need not show actual physical possession. The required possession may be constructive.⁵⁹ Constructive possession of narcotics, as opposed to physical custody, presupposes a power to exercise dominion and control over narcotics which is susceptible of proof by either direct or circumstantial evidence.⁶⁰ Thus, constructive possession was held to be shown where heroin was found in the only bathroom in the house where the defendant lived,⁶¹ and where narcotics were found in an apartment which the defendant claimed that he shared with three other persons.⁶² The defendant's actual possession of baggage keys and claim checks to luggage found to contain narcotics has also been held to establish constructive possession of the narcotics.⁶³

Constructive possession may also be established by showing the dominance and control over narcotics even though the physical custody of the narcotics remains in an agent who is responsible to the defendant.⁶⁴ However, it is always necessary to show at least an immediate ability to exercise dominion and control.⁶⁵ Mere proximity to the drug,⁶⁶ mere presence on property where it is located,⁶⁷ or mere association with a person who controls the drug or the property on which it is found is insufficient to support a conviction for possession.⁶⁸

On the other hand, one court has stated that a defendant may have placed himself in "such close juxtaposition to the narcotic as to justify the jury in concluding that the same [narcotic] was in his possession."⁶⁹

C. *Duration of Possession*

Possession, as applied to narcotics, means having actual control, care and management of the narcotic and not a mere "passing control,

59. *State v. Worley*, 375 S.W.2d 44 (Mo. 1964); *People v. Fox*, 24 Ill. 2d 581, 182 N.E.2d 692 (1962).

60. *Mack v. United States*, 326 F.2d 481 (8th Cir. 1964).

61. *People v. Dominguez*, 191 Cal. App. 2d 704, 12 Cal. Rptr. 910 (2d Dist. 1961).

62. *People v. McGlory*, 226 Cal. App. 2d 762, 38 Cal. Rptr. 373 (2d Dist. 1964).

63. *United States v. Pardo-Bolland*, 348 F.2d 316 (2d Cir. 1965).

64. *United States v. Rosario*, 327 F.2d 561 (2d Cir. 1964).

65. *People v. Redrick*, 55 Cal. 2d 282, 359 P.2d 255, 10 Cal. Rptr. 823 (1961).

66. *State v. Faircloth*, 181 Neb. 333, 148 N.W.2d 187 (1967) (defendant who had a duffel bag containing marijuana between his legs when the automobile was stopped by a patrolman could be found in possession of the marijuana, but other defendants who were merely in the same automobile could not be found in possession); *People v. Ortiz*, 158 Cal. App. 2d 622, 8 Cal. Rptr. 494 (2d Dist. 1960) (the fact that a defendant was in an automobile in which marijuana was found or from which a narcotic was thrown is not sufficient in itself to convict a particular defendant where there were several persons in the vehicle).

67. *United States v. Contrades*, 196 F. Supp. 803 (D. Hawaii 1961) (defendant's mere presence in an apartment is insufficient to charge him with knowledge that heroin is hidden in the apartment).

68. *Arellanes v. United States*, 302 F.2d 603 (9th Cir. 1962).

69. *Hunt v. State*, 158 Tex. Crim. 618, 619, 258 S.W.2d 320, 321 (1953).

fleeting and shadowy in its nature."⁷⁰ However, where a defendant and others were seated at a table, smoking marijuana from a pipe passed from person to person, it has been held that merely taking a drag from the pipe constitutes illegal possession and that the defendant's control was more than merely fleeting and shadowy in its nature.⁷¹

The length of time a narcotic is under a defendant's control is not usually determinative of the question of possession, and in one case, evidence that the defendant had narcotics in her possession for only twenty-five seconds was sufficient to show possession.⁷²

D. *Multiple Possessors*

To establish unlawful possession of a narcotic drug, it is not usually necessary to establish sole and exclusive possession in any single defendant,⁷³ and the conviction of one or more defendants may rest upon the proof of *joint* illegal possession.⁷⁴

E. *Possession for Personal Use*

It has sometimes been argued that "possess" as used in the narcotic drug statutes does not refer to possession of narcotics kept for the personal use of the possessor.⁷⁵ This argument has been uniformly rebuffed by courts which have reasoned that a person who has a narcotic drug in his possession for *any* reason which is not lawful, is guilty of unlawful possession.⁷⁶

F. *Quantity Possessed*

When the quantity of narcotics possessed is very small, there is a question as to whether a "usable" amount is necessary in order to sustain a conviction for possession. Some courts have held that possession of a narcotic drug is sufficient to sustain a conviction only if the quantity is such as to be usable as a narcotic under the known practice of addicts.⁷⁷ Other courts have steadfastly held that possession of even a

70. *United States v. Landry*, 257 F.2d 425, 431 (7th Cir. 1958).

71. *Eckroth v. State*, 238 So.2d 75 (Fla. 1970) *rev'g* 227 So.2d 313 (Fla. 2d Dist. 1969); *Gaskin v. State*, 365 S.W.2d 185 (Tex. Crim. App. 1963).

72. *Sutton v. State*, 170 Tex. Crim. 617, 343 S.W.2d 452 (1961). *See also State v. Jefferson*, 391 S.W.2d 885 (Mo. 1965) (where needle and syringe with narcotic contents were seen in defendant's right hand for purpose of injection of contents into his person, possession was sufficient for conviction as against the contention that only passing or fleeting control was shown).

73. *Williams v. People*, 136 Colo. 73, 315 P.2d 189 (1957).

74. *Bass v. United States*, 326 F.2d 884 (8th Cir. 1964); *Gallegos v. People*, 139 Colo. 166, 337 P.2d 961 (1961) (evidence showed that one co-defendant handed a package to the other which the other attempted to hide and which package subsequently proved to contain marijuana. The inference reasonably to be drawn from the evidence was that the two men knew the contents of the package and were in joint possession of it).

75. *Gonzales v. People*, 128 Colo. 522, 264 P.2d 508 (1953).

76. *State v. DaVila*, 150 Conn. 1, 183 A.2d 852 (1962); *State v. Reed*, 34 N.J. 554, 170 A.2d 419 (1961).

77. *State v. Moreno*, 92 Ariz. 116, 374 P.2d 872 (1962); *Pelham v. State*, 164 Tex. Crim. 226, 298 S.W.2d 171 (1957) (where it was held that in order to constitute the act of

modicum of an illegal drug is sufficient to sustain a conviction for possession of the drug, and that the amount thus possessed is not required to be usable.⁷⁸ Still other courts have taken the position that if the quantity of a narcotic is so small as not to be susceptible of being identified except by chemical analysis, the defendant cannot reasonably be expected to know of its presence. Therefore, since knowledge of the presence of the narcotic drug is considered an element of the offense, unlawful possession could not be proved.⁷⁹

G. Possession of Seeds and Growing Plants

Possession of seeds and growing plants from which narcotic drugs are manufactured has been generally held to be prohibited.⁸⁰

VI. PRESUMPTIONS ARISING FROM POSSESSION

Certain possessory acts may give rise to a statutory presumption of guilt which is inferred from the fact of possession. For example, under the Narcotic Drugs Import and Export Act, criminal punishment is imposed upon every person who knowingly facilitates the transportation and concealment of marijuana, knowing it to have been imported or brought into the United States contrary to law. The act specifies that a mere showing of possession shall be deemed sufficient evidence to authorize conviction.⁸¹ The same statute provides that all smoking opium possessed within the United States is presumed to have been imported illegally, and thus contrary to the provisions of the Act.⁸²

unlawful possession of marijuana, there must be an amount sufficient to be smoked or put to any other use commonly made thereof and unless the amount of marijuana possessed is such as is capable of being applied to that use, it does not constitute marijuana within the meaning of the statute); *Greer v. State*, 163 Tex. Crim. 377, 292 S.W.2d 122 (1956) (where it was held that under the Uniform Narcotic Drug Act, possession of a small piece of cotton containing a trace of narcotic, such as may have been wiped from a needle following an injection, did *not* authorize conviction for possession under the Act).

78. *People v. Marich*, 201 Cal. App. 2d 462, 19 Cal. Rptr. 909 (2d Dist. 1962) (where, at the time of trial, no substance was visible to the naked eye on a piece of cotton which a forensic chemist testified contained heroin); *Mickens v. People* 148 Colo. 237, 365 P.2d 679 (1961) (where it was held that possession of a modicum of marijuana brings one within the statute forbidding possession of narcotic drugs); *State v. Winters*, 16 Utah 2d 139, 396 P.2d 872 (1964) (where a narcotic drug unlawfully possessed need not be in a usable quantity to sustain a conviction for unlawful possession of a narcotic drug).

79. *People v. White*, 231 Cal. App. 2d 82, 41 Cal. Rptr. 604 (2d Dist. 1964) (presence of narcotic must be reflected in such form as reasonably imputes knowledge to the defendant); *People v. Pippen*, 16 App. Div. 2d 635, 227 N.Y.S.2d 164 (1963).

80. *Massiate v. State*, 365 S.W.2d 802 (Tex. Crim. App. 1963) (Uniform Narcotic Drug Act prohibits possession of the plant *cannabis sativa* L., whether growing or not). *But see State v. Haddock*, 101 Ariz. 240, 418 P.2d 577 (1966) (which held that possession of marijuana seeds which do not contain the narcotic product and which cannot be used to obtain a narcotic effect is not a crime).

81. 21 U.S.C. § 176(a) (1964). This particular presumption has recently been overturned by the United States Supreme Court in *Leary v. United States*, 395 U.S. 6 (1969); *Noted*, 24 U. MIAMI L. REV. 184 (1969).

82. 21 U.S.C. § 181 (1964). This presumption is probably valid under the *Leary* case since almost all opium is in fact grown outside of the United States and there is "sub-

VII. POSSESSION AND SALE

In order to sell narcotic drugs, the seller must first possess it. In spite of the fact that such possession is a necessary element of every sale, the United States Supreme Court has held that each act (sale and possession) is a separate action which is separately punishable.⁸³

VIII. DEFENSES

A. *Lawful Possession by Professionals*

The Uniform Narcotic Drug Act exempts certain professionals such as physicians, dentists, and veterinarians, from the provisions of the Act, provided their possession is "in good faith and in the course of . . . practice."⁸⁴ However, where the handling of a narcotic is for a purpose not connected with such a statutory privilege, possession is unlawful.⁸⁵

B. *Exempted Preparations*

A defense to a charge of unlawful possession under the UNDA is that the preparation possessed is exempted under the Act. The preparations exempted are generally those containing very small amounts of otherwise illegal narcotic drugs. These exemptions are subject to the conditions that the preparation have medicinal qualities other than those of the drug alone, and that the preparation not be sold for the purpose of evading the act.⁸⁶

C. *Possession Under Prescription*

Finally, the UNDA provides that a person may lawfully possess a narcotic drug sold pursuant to a valid authorized prescription. This exception is qualified by a requirement that the drug be kept in its original container.⁸⁷

IX. SUMMARY AND CONCLUSIONS

Under the terms of the UNDA, it is unlawful for any person to possess narcotic drugs, except as authorized by the Act. The prohibition embraces any unauthorized possession, including possession for personal consumption. The duration of possession is of no consequence if there is sufficient proof of actual control and management or the ability to control and manage the drug.

stantial assurance" that the presumed fact (illegal importation) is more likely than not to flow from the proved fact (possession) on which it is made to depend.

83. *Gore v. United States*, 257 U.S. 386 (1958).

84. UNDA § 7; FLA. STAT. § 398.08 (1969).

85. *People v. Marschalk*, 206 Cal. App. 2d 346, 23 Cal. Rptr. 743 (1962) (where a nurse in charge of a mental hospital was using otherwise lawfully possessed narcotics on herself).

86. UNDA § 8; FLA. STAT. § 398.09 (1969).

87. UNDA § 11; FLA. STAT. § 398.12 (1969).

No exception is made as to the possession of narcotics for personal use, and, although a number of courts have expressed the view that the quantity of a drug possessed is not material to the offense of possession, others have held that the amount must be sufficient to be applied to the use commonly made of it.

Some courts have expressed the view that the defendant's knowledge of the character of the substance found in his possession is not an essential element of the offense of possession, but it is generally held that the defendant must be shown to have been aware of the presence and the character of the drug and to have been intentionally and consciously in possession of it.

The possession required for conviction may either be exclusive or shared, and a defendant may be convicted upon a showing of either actual or constructive possession. However, in the absence of other incriminating circumstances, proof of mere proximity to a drug is insufficient to warrant a conviction.

It should be noted, as a practical matter, that the presence of a consumed narcotic in a person's blood stream or respiratory system is *not* constructive possession of a narcotic drug,⁸⁸ and that possession of a narcotic drug by an individual is *not* unlawful if under prescription, provided that the drug is kept in the container in which it was delivered.

In some circumstances, a single transaction involving narcotic drugs may give rise to the violation of more than one statutory provision. Where this occurs, separate offenses are perpetrated, each of which may be subject to prosecution and penalty *e.g.*, for sale *and* possession. Finally, it should be noted that prosecution of a defendant for unlawful possession under a state law does *not* bar a federal prosecution based upon the same possession as two separate offenses are involved.⁸⁹

88. *State v. Reed*, 34 N.J. 554, 170 A.2d 419 (1961) (dictum).

89. *Riddle v. State*, 373 P.2d 832 (Okla. Crim. 1962).