

# **UNCLASSIFIED//LES**

(U) LAW ENFORCEMENT SENSITIVE: The information marked (U//LES) in this document is the property of FBI and may be distributed within the Federal Government (and its contractors), US intelligence, law enforcement, public safety or protection officials and individuals with a need to know. Distribution beyond these entities without FBI authorization is prohibited. Precautions should be taken to ensure this information is stored and/or destroyed in a manner that precludes unauthorized access. Information bearing the LES caveat may not be used in legal proceedings without first receiving authorization from the originating agency. Recipients are prohibited from subsequently posting the information marked LES on a website or an unclassified network.

# **UNCLASSIFIED//LES**



**FBI Criminal Justice Information  
Services (CJIS) Division's  
National Instant Criminal Background  
Check System (NICS) Section**

**Controlled Substances  
18 U.S.C. § 922(g)(3)**

**NICS Legal Analysis Team (LAT)**



# Identifying Firearm Prohibitions in Drug Cases

---



18 U.S.C. § 922(g)(3) prohibits any person:

“who is an unlawful user of or addicted to any controlled substance as defined in Section 102 of the Controlled Substances Act (21 U.S.C. § 802)”;



# “Unlawful User”

An inference of current use may be drawn from evidence of recent use or possession of a controlled substance or a pattern of use or possession that reasonably covers the present time.

Such use is not limited to the use of drugs on a particular day, or within a matter of days or weeks, but rather that the use occurred recently enough to indicate the person is actively engaged in such conduct (i.e., within the past year).



# “Addict”

The term “addict” means any individual who habitually uses any narcotic drug so as to endanger the public morals, health, safety, or welfare, or who is so far addicted to the use of narcotic drugs as to have lost the power of self-control with reference to his addiction.

21 U.S.C. § 802(1)



---

# How the NICS Section Establishes a Controlled Substance Prohibition



# Identity of the Substance

---

- Substance is known:
  - Need to determine whether a controlled substance.
  - [https://www.dea diversion.usdoj.gov/schedules/orangebook/e\\_cs\\_sched.pdf](https://www.dea diversion.usdoj.gov/schedules/orangebook/e_cs_sched.pdf)
- Substance is not known:
  - Refer to the NICS Section standards for state usage of terms on the following slides.



# Substance - Federal Schedule I

---

- Federal Schedule I – No accepted medical use

Examples:

- Heroin
- LSD
- Cocaine
- Methamphetamine
- Marijuana (even with prescription)

An established use of these substances is prohibiting for 1 year.





# Slang Terms

---

- Commonly used slang terms, as recognized by the Drug Enforcement Administration and other law enforcement agencies, can establish the identity of a substance. Examples of slang terms include, but are not limited to; crack, K2, Spice, and Bath Salts.
- Common references of marijuana include, but are not limited to; pot, weed, tetrahydrocannabinol (THC), cannabinoid, hashish, and cannabis.



# Drug Enforcement Administration Chart Example



SUBSTANCE	DEA NUMBER	CSA SCH	NARC	OTHER NAMES
3-Fluoro-N-methylcathinone (3-FMC)	1233	I	N	1-(3-fluorophenyl)-2-(methylamino)propan-1-one (Positional isomer: 2-FMC)
3-Methylfentanyl	9813	I	Y	China White, fentanyl
3-Methylthiofentanyl	9833	I	Y	China White, fentanyl
4'-methyl-alpha-pyrrolidinohexiophenone (MPHP)	7446	I	N	MPHP
4-Bromo-2,5-dimethoxyamphetamine	7391	I	N	DOB, 4-bromo-DMA
4-Bromo-2,5-dimethoxyphenethylamine	7392	I	N	2C-B, Nexus, has been sold as Ecstasy, i.e. MDMA
4-chloro-alpha-pyrrolidinovalerophenone (4-chloro-a-PVP)	7443	I	N	4-chloro-a-PVP
4-CN-CUMYL-BUTINACA (1-(4-cyanobutyl)-N-(2-phenylpropan-2-yl)-1 H-indazole-3-carboxamide)	7089	I	N	4-cyano-CUMYL-BUTINACA; 4-CN-CUMYL BINACA; CUMYL-4CN-BINACA; SGT-78
4-Fluoroisobutyryl fentanyl (N-(4-fluorophenyl)-N-(1-phenethylpiperidin-4-yl)isobutyramide)	9824	I	Y	Para-fluoroisobutyryl fentanyl
4-Fluoro-N-methylcathinone (4-FMC)	1238	I	N	flephedrone; 1-(4-fluorophenyl)-2-(methylamino)propan-1-one (Positional isomer: 2-FMC)
4-Methoxyamphetamine	7411	I	N	PMA
4-Methyl-2,5-dimethoxyamphetamine	7395	I	N	DOM, STP (Positional Isomer: 2,5-Dimethoxy-3,4-dimethylphenethylamine (2C-G))



# Substance - NICS Standard for Identity

---

Includes State Usage of the terms:

- “Controlled Substance”
- “Drugs”
- “Dangerous Drugs”
- “Narcotics”

Does Not Include:

- **Alcohol**
- **Vague terms** such as: “Intoxicants” or “Intoxicating Substance”



# Establishing the Prohibitor

---

Qualifying events within the past year:

- Conviction
- Multiples
- Inference . . .
  - of use
  - of addiction



# Examples

---

- The following are examples of a current user of a controlled substance:
- A person convicted of use or possession of a controlled substance within the past year; or
- A person with multiple arrests for use or possession of a controlled substance within the past five years, if the most recent arrest occurred within the past year; or
- A person found through a drug test to use a controlled substance unlawfully, provided the test was administered within the past year; or . . . (cont'd)



## Examples (continued)

---

- A person who admits to use or possession of a controlled substance within the past year; or
- A current or former military service member who received recent disciplinary or other administrative action based on confirmed drug use. This includes the following: court-martial conviction, non-judicial punishment, or an administrative discharge based on drug use or drug rehabilitation failure.



# “Conviction” Standard

---

- In general, the NICS Section relies upon the definition of conviction in the jurisdiction in which the proceedings were held.
- In accordance with CFR § 478.11, a conviction within the past year DOES NOT include terms that do not establish a conviction.
- Examples of terms which do not establish an adjudication of guilt : probation before judgment, deferred prosecution, pretrial diversion, etc.



# Drug Charge Not Within the Past Year with Conviction in the Past Year

---



ATF has interpreted 27 CFR § 478.11 for “a conviction for use or possession of a controlled substance within the past year” as a conviction within the past year, although the use or possession (or Date of Arrest) may not be within the past year.

If there is a drug arrest charge that is not within the past year, but the drug conviction is within the past year, the conviction can be used as a federal firearm drug prohibition.





# Conviction?



**ARREST: ND0360100 DEVILS LAKE POLICE DEPARTMENT 5/16/2019**

**ATN: 800003773**

**C 1 - DRIVING UNDER THE INFLUENCE 1 CNTS MISDEMEANOR B**

**PROS: P 1a - FILED**

**1 CNTS DRIVING UNDER THE INFLUENCE MISDEMEANOR B**

**MUNICIPAL COURT - RAMSEY COUNTY DL10K467**

**P 2 - ADDED/FILED**

**1 CNTS POSS OF A CONTROLLED SUBSTANCE MISDEMEANOR B**

**MUNICIPAL COURT - RAMSEY COUNTY DL10K468**

**DISP: RELATED PROS(S): 1a PLEAD GUILTY 11/04/2019**

**1 CNTS DRIVING UNDER THE INFLUENCE MISDEMEANOR B**

**MUNICIPAL COURT - RAMSEY COUNTY DL10K467**

**SENTC'D: 10 DYS JAIL, \$625.00 FINE/COSTS.**

**5 DYS SUSPENDED FOR 1 YRS.**

**DISP: RELATED PROS(S): 2 PLEAD GUILTY 11/04/2019**

**1 CNTS POSSESSION OF MARIJUANA MISDEMEANOR B**

**MUNICIPAL COURT - RAMSEY COUNTY DL10K468**

**SENTC'D: 30 DYS JAIL, \$1,000.00 FINE/COSTS.**

**28 DYS, \$800.00 FINE SUSPENDED FOR 1 YRS.**

**1 YRS UNSUPERVISED PROBATION.**



# Inference of Use

## “Who” Actually Possessed the Drug

---

- Possession must be established when more than one individual is arrested for possession of a controlled substance found in his/her vehicle, or his/her home, or its curtilage.
- Evidence must establish “who” was in “actual” possession of the controlled substance when an incident involves more than one suspect.
- Ownership of communal property where a controlled substance was located cannot be used to establish possession by the owner of the property if more than one individual is present and/or charged at arrest.



# Inference of Use “Who” (continued)

---

- In these cases, the NICS Section would look for one of the following:
  - Substance was possessed on subject’s PERSON (i.e. pants they are wearing, in the pocket of jacket, etc.)
  - Subject’s admission that substance located in common area does belong to that subject.



# Inference of Use Identity of Substance

---

- Subject's admission to the identity of the substance
- A field or chemical test administered to establish the substance seized from the defendant was a controlled substance (marijuana, not oregano; cocaine, not powdered sugar; paraphernalia that tests positive for a controlled substance, etc.)



# Notes

---

- Cannot use drug sniffing dog identification or officer experience to identify a controlled substance.
- Even though a guilty plea may be involved, this is not necessarily an admission of use of a controlled substance and may not, by itself, be used as an “inference of current use.”



# Establishing Inference of Use Recap

---

Incident was within past year

+

Substance is a controlled substance

+

Subject possessed or used the substance

---

Inference of use



# Inference of Addiction

---

- A court finding within the past year that the person is addicted to a controlled substance.
- A subject who, within the past year, admits that he/she is addicted to any controlled substance. This admission can be obtained by an incident report, court documentation, or other official source.



# Inference of Addiction (Continued)

- Some valid prescriptions for substances such as buprenorphine (which includes Subxone), methadone, and naltrexone will meet 922(g)(3) because these substances are prescribed based on the subject's underlying addiction to a controlled substance.
- These substances include, but are not limited to, Buprenorphine (aka "Suboxone"), Methadone, and Naltrexone but DO NOT include Naloxone/"Narcan" or other substances by emergency medical personnel for suspected overdose does not establish the prohibition.





# Multiples

---

- The NICS Section can establish a prohibiting event based on a controlled substance arrest within the past year AND another controlled substance arrest within the past five years. This means of establishing 922(g)(3) is known as “multiples” or “multiple controlled substance arrests within the past 5 years, most recent occurring within the past year”.



# Effect of a Non-Conviction in Drug Case for NICS Multiples Purposes



- If a dismissal or other non-conviction is posted to the record, or if completion of terms, automatic dismissal or discharge time frame, etc. has been reached and there are multiple arrests within the past five years and an arrest within the past year, this can be used as a prohibition for 18 U.S.C. § 922(g)(3) for multiple arrests.



# Materials Used to Make a Controlled Substance

---



An arrest or conviction solely involving the possession of materials to make a controlled substance does not constitute a controlled substance arrest for multiples or a conviction within the past year.



# Effect of a Dismissal in Drug Case for NICS Purposes

---



If researching for a disposition on a drug arrest within the past year and find that the charge was dismissed, but also gain knowledge that the individual was positively drug tested, or the substance possessed was field or chemical tested positive for controlled substance residue, this would be a disqualifier for the federal firearm drug prohibition as an inference of recent use or possession.



# Probations Which Include Drug Testing

---



Any subject serving probation who is subject to drug testing requirements as a condition of the probation and who fails that drug test for the use of a controlled substance is prohibited for a period of one year from the date the sample was taken.



# Driving Under the Influence (DUI)/Public Intoxication, etc.

---

In the majority of the states, DUI statutes include driving under the influence of drugs.

The NICS Section researches DUI arrests to determine the substance of intoxication and if any abuse of a controlled substance as defined by federal law has occurred.



# Drug Paraphernalia Within the Past Year

---

If an arrest for drug paraphernalia within the past year is present on an arrest record, the NICS Section researches to determine if the paraphernalia tested positive for residue.

A drug paraphernalia charge within the past year can establish inference if it has been field tested or lab tested positive for residue of a controlled substance.



# Prescription Drugs

---

Prescription drugs may qualify under federal firearms drug prohibition if the prescribed controlled substance is used in a non-prescribed manner. (27 CFR § 487.11)

Prescription drugs may also qualify for federal firearm drug prohibitions if a person has them in his/her possession by unlawful means, such as forging a prescription, stealing a prescription medication, or obtaining a prescription drug by fraud.





# Notes

---

- Evidence of possession of a controlled substance within the past year could constitute a prohibitor even though the individual is actually convicted of a different offense.
- Attempts to possess or use a controlled substance do not meet the standard unless the possession or use was actually accomplished.



# Marijuana

- Federal schedule 1 (regardless of state's treatment of substance)
- Inference and conviction rules still apply, but may be slightly different in application
- Marijuana user cards MEET 922(g)(3) inference of use if the card is active or has been active within the past year
- Marijuana caregiver, dispensary, grower cards do not establish 922(g)(3)



# Inference of Use?

**DOA: 2/21/2019**

AT THIS TIME, MYSELF AND SGT. GEERY #1134 MADE CONTACT WITH AR AND IDENTIFIED OURSELVES AS POLICE OFFICERS VERBALLY AND SHOWED HIM OUT BADGES. SGT. GERRY ASKED FOR AR'S DL. AR PROVIDED THE DL AND GAVE IT TO SGT. GERRY, WHO ASKED HIM TO STEP TO THE BACK OF HIS VEHICLE. WHILE STANDING THERE, I ASKED AR IF HE HAD ANY GUNS, DRUGS, NEEDLES OR KNIVES OR ANYTHING ILLEGAL ON HIM THAT I NEEDED TO BE CONCERNED OF. AR IMMEDIATELY SAID YES. I ASKED HIM WHAT HE HAD. HE TOLD ME POT. I ASKED HIM WHERE THE MARIJUANA WAS AT. HE TOLD ME IN HIS POCKET, AND MOTIONED TO HIS RIGHT PANT LEG. IN AR'S RIGHT FRONT CARGO PANTS POCKET, I LOCATED A PLASTIC BAGGIE OF MARIJUANA THAT HAD A TOTAL PACKAGE WEIGHT OF 26 GRAMS. THIS MARIJUANA WAS LATER BOOKED INTO THE OCPD DRUG LOCKER #09418.

AT THIS TIME I INFORMED AR HE WAS UNDER ARREST FOR POSSESSION OF MARIJUANA AND PLACED HIM IN THE BACK SEAT OF THE PATROL CAR THAT ARRIVED TO ASSIST US. IN



# Inference of Use?



## DOA: 10/01/2019

I asked Adam if he would walk me around the apartment because there were several closed doors. Adam walked me around and in the kitchen on the table I found another plastic container with marijuana in it. Adam walked me into his bedroom and I cleared it. Adam stated he lives there with his girlfriend who was at work. Adam then led me into a spare room and I noticed in plain view a marijuana smoking water bong and a gold marijuana pipe, burnt residue in both. Adam allowed me to check the closet and I found a plastic container on a shelf which contained dirty rubbing alcohol for cleaning his marijuana pipes and on the top lid was loose tobacco and marijuana stems. I then went back in the living room and found another plastic container with marijuana in it and a brown pill bottle with ground marijuana in it in chunk form. I asked Adam if I got everything and he stated that I had. I asked Adam if he had a medical marijuana license and he stated that he did not.



# Inference of Use?

**DOA: 08/15/2019**

RECEIVED RETURN COPY OF INCIDENT REPORT FROM BELLINGHAM SO. THE REPORT SHOWS THE SUBJECT WAS STOPPED FOR SUSPICION OF DWI. SUBJECT WAS QUESTIONED IF HE HAD ANYTHING TO DRINK THIS EVENING AND HE STATED HE HAD A BEER WITH DINNER.

WHEN PATTING THE SUBJECT DOWN THE OFFICER FOUND 3 PILLS IN THE SUBJECT'S FRONT PANTS POCKET. THE SUBJECT ADVISED THE PILLS WERE VICODIN, BUT THE SUBJECT DID NOT HAVE THE PRESCRIPTION WITH HIM. THE SUBJECT ADVISED THAT HE TAKES VICODIN FOR PAIN.



# Inference of Use?

## DOA 10/2/2019



- I ASKED HIM IF THE JAR BELONGED TO HIM.

- HE STATED, "YES."

DAVIS WAS CHARGED WITH DUI, DUI +.08, EXTREME DUI, POSSESSION OF DRUG PARAPHERNALIA AND POSSESSION OF MARIJUANA. HE WAS BOOKED AND HELD FOR COURT.

THE MARIJUANA WAS Poured OUT OF THE GLASS JAR AND WEIGHED (.5 GRAMS). THE GLASS JAR AND MARIJUANA WERE PLACED INTO EVIDENCE AT THE LAKE HAVASU CITY POLICE STATION.

DAVIS SUBMITTED (2) BREATH SAMPLES INTO THE INTOXILYZER 8000 AND IT DETERMINED HIS B.A.C. TO BE .166 AND .170.

DAVIS WAS READ HIS MIRANDA RIGHTS, WHICH HE STATED HE UNDERSTOOD BY ANSWERING, "YES," AND AGREED TO ANSWER FURTHER QUESTIONS. (SEE DUI REPORT FOR THE DUI INTERVIEW)

AFTER ASKING THE INTERVIEW QUESTIONS ON THE BACK PAGE OF THE DUI REPORT, I ASKED HIM WHAT SUBSTANCE WAS LOCATED IN THE JAR THAT FELL OUT OF HIS CAR.

- HE STATED, "MARIJUANA."



# Multiples?

=====  
-----  
Cycle 001  
-----  
=====

Arrest Date 2016-01-01  
Arresting Agency NC0410200 GREENSBORO PD - RECORDS  
Subject's Name STRANGE, STEPHEN  
Offender Id Number GX9051U  
Charge 01  
Charge Literal POSS W I MANUF SELL DEL SCHEDULE VI CONTROLLED  
SUBSTANCE Statute (90-95(A)(1) NC)  
Severity Felony



# Multiples?

===== Cycle 002 =====

Tracking Number        02  
Earliest Event Date    2019-04-12

-----  
Arrest Date            2018-04-12  
Arresting Agency        NC0410000 GUILFORD CO SO - GREENSBORO  
Subject's Name         STRANGE, STEPHEN  
Offender Id Number    GX9873B  
Charge                 01  
Charge Literal         POSSESS MARIJUANA UP TO 1 2 OZ  
Statute                 (90-95(D)(4) NC)  
Severity                 Misdemeanor

-----  
Booking Case Number  
Booking Agency         NC0410000 GUILFORD CO SO - GREENSBORO





# Multiples?

===== Cycle 003 =====

Tracking Number 03

Earliest Event Date 2019-2-05

-----  
Arrest Date 2019-2-05

Arresting Agency NC041000 GUILFORD CO SO - GREENSBORO

Subject's Name STRANGE, STEPHEN

Offender Id Number GY0475G

Charge 01

Charge Literal POSSESS MARIJUANA UP TO 1 2 OZ

Statute (90-95(D)(4) NC)

Severity Misdemeanor



# NICS Indices

NRI: 1577042231 STATUS: ACTIVE EXPIRATION DATE:  
10/29/2020

PCA: C - Unlawful User/Addicted to a Controlled Substance

NAM: STARK, TONY

SEX: M RAC: W

HGT: 600 WGT: 165 EYE: BRO HAI: BRO POB: OKLAHOMA

DOB: 05/30/1990

MIS: UNLAWFUL USE/POSSESSION OF A CONTROLLED  
SUBSTANCE IN OKLAHOMA

ORI: WVNICS001 OCA:

DNY:

DATA-SRC: FBI ARI: OKCS000000000000000000003202 SOR: OK

CREATED-DATE: 11/1/2019

UPDATED-DATE: 11/1/2019



# QUESTIONS?

---

NICS Legal Analysis Team  
NICS\_LegalResearch@fbi.gov

John Francis Keough  
Legal Administrative Specialist  
(304) 625-7461  
jfkeough@fbi.gov