

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

UNITED STATES OF AMERICA v. ROBERT J. BRUNET, BRIAN J. BRUNET, and JAMES D. ESTOPINAL, a/k/a Donnie <hr/>]]]]]]]]	CASE DOCKET NO. 01-010 SECTION: C

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
DEFENDANTS JAMES ESTOPINAL AND BRIAN BRUNET'S
MOTION TO DISMISS THE INDICTMENT**

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

James Estopinal, Robert Brunet, and Brian Brunet bring music to the New Orleans public. It happens that the concerts they promote include electronic music, a genre the media has sometimes portrayed as attracting drugs, much as jazz, reggae, or rock and roll have been associated with drugs at other times. And, according to federal prosecutors, some of the audiences at these electronic music concerts have, in fact, used or sold drugs. But James Estopinal, Robert Brunet and Brian Brunet are not accused of providing drugs, assisting those who provided drugs, or being involved with drugs in any way whatsoever. They merely provide music, which, in the Government's view, is associated with drug use. For that, they have been charged with violating 21 U.S.C. § 856, a provision described by Congress as the Federal Crack House Statute. See P.L. 91-513, Title II, Part D, § 416 (Oct. 27, 1986).

The First Amendment stands as a clear barrier to any governmental effort to silence music promoters. Performance of music is protected by the First Amendment. See Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989). Here, the government has singled out a particular form of music concert based on its content, threatening to pursue any electronic music concert where drugs are present and actually prosecuting these defendants because they hosted concerts where some members of the audience allegedly used drugs. This effort to silence music amounts to an unconstitutional restriction on speech. Moreover, the government runs afoul of the guarantee of equal protection under the law when it decides to selectively target its prosecution on the basis of providing electronic music, while ignoring the many other kinds of concerts and public events in which drugs are equally present. In the end, the mere act of providing music to the public cannot be a crime.

II. FACTUAL BACKGROUND

Robert Brunet manages the State Palace Theater in New Orleans, following a long family tradition of providing movies and live entertainment to the local population. *Aff. of Rene Brunet*

(“Brunet Aff.”), ¶2 and Brunet Aff. Exh. A. His brother, Brian Brunet, assisted him with management of the various events at the Theater, handling such tasks as accounting and gate management. Robert Brunet hired James Estopinal to arrange and promote electronic music concerts – what the government refers to as “raves” – but which are nothing more than musical exhibitions going at which disc jockeys (DJs) perform computer-generated electronic music for a crowd of dancers. Mr. Estopinal is one of the best known, widely popular promoters of electronic music in the southern United States and throughout the nation. The government makes no claim that any of these men engages in any drug related activity whatsoever. See Indictment (attached as Exh. F to Declaration of A. Lemann).

Beyond their central purpose of providing music, defendants in this case have acted within their areas of responsibility to minimize drug use or distribution during their events. The State Palace instituted a zero-tolerance policy that absolutely forbid possessing, selling or using drugs on the premises. Brunet Aff., ¶3. Signs throughout the venue announced this policy, as well as an offer that free tickets were to be given to anyone who turned in a person with drugs. Id. Security guards refused to admit people who appeared to be intoxicated. Id. Over the past several years, the defendants arranged for many arrests due to their zero-tolerance policy. Id., ¶4. This includes the arrests of security guards who were found to be selling drugs. Id.

The defendants also invited the DEA into the State Palace Theater, helping them dress as undercover “ravers” and allowing them to dress as security guards. Id., ¶5. Additionally, they had an arrangement whereby anyone caught with drugs would be detained, then the DEA and New Orleans Police Department (NOPD) would be notified of the situation, and asked to arrest the detainee. Id. The defendants enforced their zero-tolerance policy, repeatedly detaining those caught with drugs and arranging for their arrests. Id.

However, agents from the DEA and officers from the NOPD repeatedly ignored the notifications, and on more than one occasion, the detainee had to be released after the drugs were

destroyed, because no one came to arrest them. Id., ¶6. Furthermore, the defendants on multiple occasions requested the service of an NOPD detail to assist in the prevention of drug use at their rave concerts, but their requests were denied. Id. Specifically, on January 22, 1999, the Superintendent of Police Richard Pennington wrote to Robert Brunet, “in response to your earlier letter concerning authorization of off duty paid details involving New Orleans Police Officers for events at the State Palace Theater.” Brunet Aff., Exh. B. Superintendent Pennington wrote that the requested authorization “will continue to be denied” under a recent departmental policy. Id.

Despite the history of efforts to cooperate with law enforcement, the DEA decided to conduct a prolonged undercover investigation of electronic music concerts at the State Palace Theater. Federal agents secured a search warrant for the Theater on August 25, 2000 (Lemann Dec., Exh. D), and executed it shortly thereafter. The search turned up no evidence of defendants’ involvement with drug activity. Nonetheless, defendants were indicted on January 12, 2001 for alleged violation of the Crack House Statute, 21 U.S.C. § 856(a)(2).

The Crack House Statute prohibits any individual from the following acts: “manage or control any building, room, or enclosure, either as an owner, lessee, agent, employee, or mortgagee, and knowingly and intentionally rent, lease, or make available for use, with or without compensation, the building, room, or enclosure for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.” 21 U.S.C. § 856(a)(2). The crux of the charge against the defendants is that they knowingly made the State Palace Theater available for the use and sale of ecstasy and LSD.

The owner of any venue where a concert takes place knows that a concert involves some risk of injury from overheating, exhaustion or fights, as well as some risk that some members of the audience may suffer the effects of drugs or alcohol. For these reasons, the State Palace ensured that medical personnel were on hand to assist or transport anyone in need. The government suggests that this reasonable precaution – one taken for sports events, festivals, and

many other public gatherings – reveals defendants’ connivance in running a drug operation. Equally absurd, the government points to the fact that defendants sold bottled water at an event involving thousands of energetic dancers as evidence of a crime. Likewise, the provision of glow sticks or toleration of pacifiers suggests nothing criminal. These are among the hallmarks of electronic dance culture, not “paraphernalia” as the government charges.¹ The government’s stance is akin to charging that any concert permitting tie-dyed clothing or dreadlocks is guilty of marijuana-related crimes. Finally, the government takes issue with the fact that an individual member of the audience handed out literature detailing factual information about ecstasy and other drugs. As with provision of medical personnel, this literature aims to reduce the risk of injury from drugs, and does nothing to suggest defendants’ involvement with illegal drug activity. Indeed, government agencies regularly publicize truthful, factual information about drugs, including a discussion of the drugs intended effects and potential dangers, in order to discourage drug use generally, but also to encourage safer or more moderate use among those who refuse to abstain entirely.

Despite the fact that defendants are conscientious, responsible providers of music, the government has targeted them as part of a broader campaign directed at electronic music concerts. The details of the expressive function of these concerts and of DEA’s campaign against them reveal that the DEA campaign will do little to deter drug use or improve safety, but is certain to trample the First Amendment rights of defendants, many other concert promoters

¹ Defendants have not been, and could not be, charged with violating 21 U.S.C. § 863, which criminalizes the sale of drug paraphernalia. That statute defines drug paraphernalia as “any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance.” Thus, a syringe for injecting heroin or a pipe for smoking marijuana would be paraphernalia; a glow stick or pacifier would not.

throughout the nation, and the millions who attend such concerts solely for the purpose of listening to the music.

A. Electronic Music Concerts Provide Unique, Professional Music Exhibitions.

Electronic music concerts date back to 1961, when the Columbia/Princeton Electronic Music Center began giving public performances. Middle Tennessee State University Recording Industry Management Program, History of Electronic Music, available at <http://www.mtsu.edu/~dsmitcherim419/history/history.html>. Other important centers for electronic music in this era were Bell Laboratories, which sponsored composer James Tenney's Analog #1: Noise Study (1961) and the University of Michigan Electronic Music Studio, which was organized in 1963. By the late 1960's, popular releases such as Morton Subotnick's The Silver Apples of the Moon (1967), and Wendy Carlos's Switched-on Bach (1968) inspired public interest in electronic music, which grew as the technology developed and more artists incorporated electronic instruments into their work. See Joel Chadabe, The Electronic Century Part III: Computers and Analog Synthesizers, *Electronic Musician*, April, 2000 at 86. Though it has grown more popular with time, electronic music remains a significant field of academic study. Many universities today support programs in electronic music, with significant centers at Michigan, the University of Texas, the University of Illinois, the University of Indiana, MIT, and the University of Iowa, to name just a few. Electronic music has its own magazines, such as Computer Music, Future Music, Electronic Musician, Keyboard, and Mix. It also has its own culture, which one music scholar describes as characterized by "an idealistic rhetoric of political democracy" and a strong faith in technology and in public participation in technological innovation. Paul Theberge, Any Sound You Can Imagine: Making Music/Consuming Technology 152-53 (1997).

Electronic music concerts provide a critical arena for artistic expression. The DJ (disk jockey) assumes the central role of performer at an electronic music concert, leading the music community and music critics to recognize DJs as serious artists. DJs bring crates of vinyl LPs,

CDs, and tapes (digital and analog) from venue to venue and – with the creative ear and musical literacy of a jazz improvisationist – splice, intersperse and synthesize cuts of music across genres and generations to create a new whole that is greater than the sum of its parts, that responds to the mood of the moment, and that may never be replicated again in exactly the same way.

Describing their craft, Professor Robin Kelly wrote that “[t]he DJ... simultaneously mirrors and deconstructs improvisational practices usually associated with jazz. These turntablists... literally make new music from old records by mixing, cutting and altering original recordings, manipulating records by hand to change pitch, to create rhythmic effects and to milk the groove itself for new sounds by “scratching.” Robin D.G. Kelly, The DJ Moves into a New Arena, N.Y. Times, May 28, 2000, §2, at 23. New York Times art critic Simon Reynolds explained that a disc jockey “doesn't simply synchronize tracks by tempo but combines them according to musical key, arrangement and dynamics.” Simon Reynolds, New Invader on the Dance Floor, N.Y. Times, Nov. 29, 1998, §2, at 35.

DJs make up the driving force behind the evolution of electronic music: “DJs... developed the ears of nearly everyone else and led the music almost everywhere it has gone.” Book Review Desk, And Bear in Mind, N.Y. Times, Sept. 10, 2000, § 7, at 42. In describing one genre of electronic music that DJs often perform at electronic music concerts, art critic Simon Reynolds noted that its “melodramatic expressiveness often makes it verge on being a computer-era update of 19th-century symphonic music.” Simon Reynolds, supra.

Much like the familiar stars of rock, country or jazz, electronic music DJs “are now international celebrities, jetting across the globe with turntables and boxes of vinyl records in tow ... While they are hardly mainstream brand names, some of the top-name DJs ... [receive] fees of up to \$70,000.” Geoff Boucher, Giant Rave Keeps the Focus on Music, Los Angeles Times, Sept. 4, 2000 at F3.

Defendants have brought world class musical talent to the State Palace Theater, with DJs from across the country and the globe, including British DJ Paul Oakenfold, considered to be the “world’s number one DJ,” as well as German DJ Paul van Dyk, known as an electronic music “pioneer.” Simon Reynolds, supra. If one could analogize to more traditional genres, the talent brought to the State Palace is akin to concerts by The Rolling Stones and The Beatles or Miles Davis and John Coltrane. It is no surprise that thousands of fans of electronic music travel from across the Southeast to attend the concerts at issue in this case, given that “the DJ... draw[s] ravers to an event.” Timothy R. Weber, Raving in Toronto: Peace, Love, Unity and Respect in Transition, 2, J. Youth Stud. 317, 333 (1999); see also Erica Weir, Raves: a review of the culture, the drugs and the prevention of harm, 162 Can. Med. Assn. J. 1843 (2000), available at <http://www.cma.ca/cmaj/vol-162/issue-13/1843.htm> (“DJs, often regarded as performing artists in much the same way as those who create the music, can be the main draw for raver attendance.”).

Beyond the obvious expressive quality of music performances, an electronic music concert also provides a forum for expression by audience members. New York Times critic Shayna Samuels describes the electronic music concert scene as “probably the most significant and innovative American youth dance culture today... Ravers ... are as devoted to their dancing as ballerinas are to theirs ... rave dancing requires dancers to possess tremendous passion and discipline ...” Shayna Samuels, They Also Dance Who Party the Night Away, N.Y. Times, Aug. 20, 2000, § 2, at 9.

Even the government understands that an electronic music concert is not simply a “crack house” or “just a venue for drug purchases,” as DEA officials sometimes claim. Rather, the Indictment in this case describes a “rave” as “an all night dance event . . . characterized by loud, rapid tempt (“techno music”), 140 to 200 beats per minute, light and laser shows, smoke or fog,

and psychedelic screen images.” Indictment, ¶4 (emphasis added). Even the prosecution’s definition of “rave” centers on modes of expression – music, dance and visual arts.²

B. Federal Prosecutors and the DEA Erroneously Equate Electronic Music Concerts with Ecstasy.

Federal prosecutors and the DEA, reacting to growing public concern about ecstasy (MDMA), have devised a strategy that targets not the users or sellers of the drug, but rather the promoters of concerts of one particular genre of music which, in the stereotyped view of the DEA, is associated with ecstasy use.³ The DEA’s strategy does not cause a merely incidental curtailment of protected speech; rather, the chilling of speech (i.e., the elimination of electronic music concerts) is the explicit goal of the federal enforcement strategy, as made clear by DEA statements provided in detail below.

Recently, an outburst of media coverage associates ecstasy with electronic music concerts. See, e.g., Donna Leinwand, Gary Fields, Feds Crack Down on Ecstasy Health Fears, USA Today, Apr. 19, 2000, at 1A; John Cloud, The Lure of Ecstasy, Time, Jun. 5, 2000, at 62; Matthew Klam, Experiencing Ecstasy, N.Y. Times, Jan. 21, 2001, §6, at 38. Professor Philip

² In a similar vein, George Cazenavette, the head of the New Orleans DEA office, described rave concerts as “parties known for loud techno music and dancing,” George J. Cazenavette, DEA Congressional Testimony (May 30, 2000), <http://www.usdoj.gov/dea/pubs/cngrtest/ct053000.htm>. This description was repeated by DEA agents in several Congressional hearings. See Richard A. Fiano, DEA Congressional Testimony (Jul. 25, 2000), <http://www.usdoj.gov/dea/pubs/cngrtest/ct072500.htm>; John Andrejko, DEA Congressional Testimony (Sep. 18, 2000), <http://www.usdoj.gov/dea/pubs/cngrtest/ct091800.htm>.

³ Beyond the putative drug association, electronic music is equally associated with more benign consumer products. Popular electronic music tracks are used in advertisements for sneakers, department stores and automobiles. David Browne, Licensed to Shill: Call it selling out, but thanks to alt-rock and techno, television advertisements never sounded so good, Entertainment Weekly, January 12, 2001, at 79. For instance, a Ford Motors press release explains their choice of music for the Ford Focus campaign: “With techno music moving beyond the underground club scene, Ford brings back the origins of this cutting edge style. . . . Techno kids are forward thinkers that scream and dance and so are Focus buyers.” New Ford Focus Commercial Features Ground Breaking Juan Atkins’ Techno Hit, PR Newswire, Wednesday, November 8, 2001.

Jenkins describes this media sensationalism and public response as “a classic moral panic, based on exaggerated fears and misused evidence.” Philip Jenkins, Ecstasy and Synthetic Panics, 1, J. Cog. Lib. 7 (2000), available at <http://www.alchemind.org/3JCL/3JCL7.htm>.

The DEA has both succumbed to the media hype and furthered the panic over ecstasy, as evidenced by the DEA Administrator’s Congressional testimony that “[t]he magnitude of the current MDMA problem cannot be understated. The media coverage alone is indicative of the impact this drug has had on the United States.” Donnie R. Marshall, DEA Congressional Testimony (Jul. 6, 2000), available at http://www.usdoj.gov/dea/pubs/cngrtest/ct070600_01.htm. Another DEA Agent, Michael Braun, claimed that “from the law enforcement side, MDMA, is the biggest threat that [the DEA has] ever faced.” Richard G. Boire, Adventures in the Rave Trade, 1, J. Cog Lib 69 (2000), available at <http://www.alchemind.org/2JCL/2JCL69.htm>.

The DEA claims that ecstasy poses a unique threat, requiring unprecedented law enforcement strategies, because the current federal sentencing guidelines for ecstasy are more lenient⁴ than are the guidelines for other drugs, such as methamphetamines. As explained by the Special Agent in charge of DEA’s New Orleans office:

The New Orleans Field Division [of the DEA] has recognized that enforcement operations which target... drug distribution at the raves are different from the enforcement efforts required to combat other illicit drugs... This is largely due to strict federal sentencing guidelines for drug thresholds that make it difficult to prosecute ... drug trafficking at the federal level... The DEA is continually working to revise strategies...

George J. Cazenavette, DEA Congressional Testimony (May 30, 2000), available at <http://www.usdoj.gov/dea/pubs/cngrtest/ct053000.htm>.

⁴ Congress has already addressing the issue of ecstasy sentencing guidelines with the “Ecstasy Anti-Proliferation Act of 2000,” which directs the federal Sentencing Commission to amend the guidelines “to provide for increased penalties such that those penalties reflect the seriousness of these offenses and the need to deter them.” P. L. 106-310, § 3663 (Oct. 17, 2000).

Dissatisfied with current federal ecstasy sentencing guidelines, and feeling pressure from the media and the public, the DEA is targeting electronic music concert promoters throughout the country, instead of going after those who are actually involved with drugs. Rather than apply federal law as written, the DEA has revised its strategy, ignoring drug dealers,⁵ and is instead prosecuting electronic music concert promoters, whom the government does not accuse of providing drugs, assisting anyone in providing drugs, or of being directly involved with drugs in any way whatsoever. The government's chosen tool in its targeting of people who provide music, is the federal Crack House Statute, which imposes up to 20 years imprisonment and a \$500,000 fine. 21 U.S.C. § 856. In the 15 years since its passage, the statute has only been applied to individuals who actually distributed or manufactured drugs, or who were directly assisting those who did so. See infra at 16, n.8.

By the DEA's own admission, the present prosecution forms part of a larger plan to shut down the "rave scene" by threatening any other concert promoter who chooses to include electronic music on his or her playbill. U.S. Attorney Eddie Jordan predicted ominously that other cities would follow New Orleans' example, since "word of this indictment has spread across the country." G. Filosa, Rave promoters face narcotics charges, The Times-Picayune, A-15 (Jan. 13, 2001), attached as Exh. A to Lemann Dec. DEA Agent George Cazenavette similarly warned that the arrests "send a clear message to anyone else operating these things [rave concerts] anywhere in the country that you're not bulletproof." Rave Indictments Come Down, WWL 870am, available at <http://www.wwl.com/pages/20550.asp>, attached as Exh. C to Lemann Dec.

As anomalous as it may seem to use the Crack House Statute against music providers, this is the adopted strategy of the federal prosecutors and the DEA. In a videotape played at the

⁵ Although the prosecution's evidence claims that agents purchased drugs over 50 times during its investigation, they arrested not a single person for possession or distribution of drugs.

DEA's recent conference on ecstasy, DEA Agent David Gavin claimed that "raves are just a venue for drug purchases. They are no more than analogous to a crack house in which you go, buy the drugs, and go out the back door." Richard G. Boire, Report on the DEA's National Ecstasy & Club Drugs Conference, Center for Cognitive Liberty and Ethics, 4, Aug. 9, 2000. Yet this claim is entirely unsubstantiated and could not be further from the facts of this case.

This notion of equating a form of music with a particular drug is not new. But the strategy of prosecuting the purveyors of music sets a frightening precedent, one that would have given the government license to eliminate jazz, rock, punk, and many other kinds of music in years past. An attack on electronic music concerts is an attack on a form of artistic expression. Simply stated, "[r]aves could not exist without dancing or electronic music." Shayna Samuels, supra. Without electronic music concerts, an entire genre of music would likely go unheard.

This concept of targeted prosecution, selecting defendants based on their exercise of a fundamental right, runs afoul of the most basic notion of fairness and equal protection. As President George W. Bush stated in his recent address to Congress: "Too many of our citizens have cause to doubt our Nation's justice when the law points a finger of suspicion at groups, instead of individuals. All our citizens are created equal and must be treated equally." G. Bush, Address to Congress (2/27/01), available at <http://www.whitehouse.gov/news/releases/2001/02/20010228.html>.

C. Drug Activity is Present at Many Public Gatherings, Including Concerts Involving Various Genres of Music.

As with any concert of any genre of music, drug use may be present at electronic music concerts. But the mere fact of attending a concert hardly amounts to proof of drug use. One researcher observes that "although drugs are being used at these parties, they aren't necessarily the main reason to go." Substance Abuse Network of Ontario, Snapshot of Raving in Toronto Released by Addiction and Mental Health Services Corporation (Jun. 10, 1998),

<http://sano.arf.org/rave.htm>. The primary reasons for attending electronic music concerts are the “dancing and music” as well as the “unique and non-judgmental atmosphere.” Id.⁶ Those who attend these concerts “pride themselves on their lack of pretension and their open acceptance of themselves and their community.” Erica Weir, supra.

Many concert attendees do not use ecstasy; equally, many ecstasy users have nothing to do with electronic music. Though no comparable study has occurred in the United States, a study in Scotland showed that only 3.3% of ecstasy use occurs at licensed “rave” concerts, while 59% takes place in traditional nightclubs, and 24.6% takes place inside a home or house party. Alasdair J.M. Forsyth, Places and Patterns of Drug Use in the Scottish Dance Scene, 91 *Addiction* 511, 515 (1996). Thus, abolishing electronic music concerts would scarcely reduce ecstasy use, while in large part eliminating this entire form of expression.

Drug use has also been commonly reported in many other venues, such as college campuses, prisons and homeless shelters. M.E. Bennett, et al., Drinking, Binge Drinking, and Other Drug Use among Southwestern Undergraduates: Three-year Trends, 25, *Am. J. Drug Alcohol Abuse* 331 (1999); S.M. Gore, et al., Cost Implications of Mandatory Drugs Tests in Prisons, 26, *Lancet* 348 (1996); H.J. Liberty, et al., Dynamic Recovery: Comparative Study of Therapeutic Communities in Homeless Shelters for Men, 15 *J. Subst. Abuse Treat.* 401 (1998).

⁶ Similar observations were recently printed in the New Orleans press, describing the observations of a documentary film maker:

Director Jon Reiss had never been to a rave before he made the 1999 documentary “Better Living Through Circuitry,” a whirlwind look inside the U.S. rave scene. What he found behind the flash and the noise amazed him. “I was amazed at how many kids weren't doing drugs, weren't drinking and were vociferous against drugs. There was a whole thing of self-educating.” Yes, there were drugs circulating, but no more than at any other music scene, Reiss said.

G. Filosa, Use of crack law on raves questioned, *The Times-Picayune*, A-1 (Feb. 12, 2001), attached as Exh. B to Lemann Dec.

Again, one can scarcely imagine prosecutions of the managers of these properties, despite the common and known drug use occurring in their facilities.

D. Ecstasy Use Does Not Pose Unique Dangers Beyond Other Illegal Substances.

Both the media and the DEA. have contributed “exaggerated fears and misused evidence” to current views of ecstasy. Jenkins, supra. DEA Agent Christopher Giovino warned that “[ecstasy] could be worse than cocaine. We just don’t know.” Chitra Ragavan, Cracking down on Ecstasy, U.S. News and World Report, Feb. 5, 2001, at 14.

However, cocaine is a “powerfully addictive drug of abuse.” Nat’l Inst. On Drug Abuse, Crack and Cocaine, available at <http://www.nida.nih.gov/infobox/cocaine.html>. Ecstasy is not addictive except in rare circumstances. Karl L.R. Jansen, Ecstasy (MDMA) Dependence, 53 Drug Alc. Dep. 121 (1999). LSD, another drug sometimes associated with rave concerts, is also not addictive. Nat’l Inst. On Drug Abuse, LSD, available at <http://www.nida.nih.gov/infobox/lsd.html>.

Ecstasy has been extensively studied since the 1970s, when it was used by psycho-therapists to treat patients. Richard H. Schwartz & Norman S. Miller, MDMA (Ecstasy) and the Rave: A Review, 100 Ped. 705, 706 (1997). The DEA placed ecstasy as a schedule I drug in 1984, despite the fact that a “federal judge who initially reviewed the evidence recommended placing the drug in the permissive schedule III... Many medical experts and therapists were prepared to testify about the drug’s positive properties.” Jenkins, supra.

Responding to sensationalized coverage of ecstasy in the British media, an editorial in the New Scientist explained that,

In Britain, it is estimated that at least half a million people have taken ecstasy and that around a million tablets are consumed each week... Over the past ten years, six people a year are thought to have died as a result of taking ecstasy in Britain... Even pursuits such as mountain climbing, skiing and horse riding kill more people... Six deaths a year from ecstasy are six too many, but it seems pretty clear that the short-term dangers are not as great as media and many public figures portray them.

Editors, Press the panic button, New Scientist, Jan. 25, 1997 at 3.

E. Prohibiting Electronic Music Concerts Would Drive them Underground and Make Drug Problems Worse.

Dr. Erica Weir, who has thoroughly studied electronic music concerts, found that most people who attend electronic music concerts do so for a period of about two years, after which they simply stop going. Erica Weir, supra, at 1847. Dr. Weir argues that electronic music concerts should not be banned, as such “bans may prolong the popularity of the rave scene and make rave-related problems more difficult to control...” Michael J. Rieder, Some Light from the Heat: Implications of Rave Parties for Clinicians, 162 Can. Med. Assn. J. 1829, (2000), available at <http://www.cma.ca/cmaj/vol-162/issue-13/1829.htm>

“Rave” concerts were originally held, often illegally, in “clandestine locations,” including old warehouses and farmer’s fields. Erica Weir, supra, at 1844. Holding electronic music concerts in legal spaces ensures that “buildings meet safety and health standards [and provide] adequate security.” Id., at 1846. Professor Philip Jenkins warned that “[i]f you want more deaths stemming from the use of club drugs, then... drive the club scene further underground.” Jenkins, supra.

III. ARGUMENT

A. Legal Standard for Motion to Dismiss.

Defendants move to dismiss the indictment defense under F. R. Crim. P. 12(b). Where, as here, the very fact of the prosecution violates defendants’ constitutional rights, dismissal is the appropriate relief. See United States v. Seuss, 474 F.2d 385, 387 (1st Cir. 1973). Furthermore, the indictment must be dismissed because it is not authorized by the Crack House Statute, 21 U.S.C. § 856(a)(2), which provides the sole substantive basis for the prosecution. In order for that statute to comport with the First Amendment, it cannot be construed to permit the present

prosecution.⁷ Where, as here, the facts alleged in an indictment do not constitute a crime under a proper interpretation of a criminal statute, the indictment must be dismissed. See United States v. Meacham, 626 F.2d 503, 509 (5th Cir. 1980) (prosecution for conspiracy to attempt not authorized by statute); United States v. Robinson, 811 F. Supp. 1174, 1176 (S.D. Miss. 1993) (indictment failed to allege facts constituting violation of federal income tax laws).

B. The Prosecution of Defendants, Promoters of Electronic Music Events, Violates the First Amendment’s Guarantee of Free Speech.

The prosecution of Robert J. Brunet, Brian J. Brunet, and James D. Estopinal under 21 U.S.C. § 856(a)(2) infringes defendants’ free speech rights in violation of the First Amendment to the U.S. Constitution. This unprecedented⁸ application of the Crack House Statute and the

⁷ “[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.” DeBartolo v. Florida Gulf Coast Building & Constr. Trades Council, 485 U.S. 568, 575 (1988) (citing NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 499-501, 504 (1979)).

⁸ In the 15 years since its passage, every application of this statute has involved owners or managers of property who in some way assisted the manufacture, storage, distribution, or use of drugs. The majority of cases under the statute specifically involve the operation of a literal crack house. e.g., United States v. Morgan, 117 F.2d 849 (5th Cir. 1997); United States v. Verners, 53 F.3d 1400 (9th Cir. 1995); United States v. Cabbell, 35 F.3d 1255 (8th Cir. 1994); United States v. Banks, 987 F.2d 463 (7th Cir. 1993); United States v. Church, 970 F.2d 401 (7th Cir. 1992); United States v. Roberts, 913 F.2d 211 (5th Cir. 1990). Beyond these cases, every other case has involved a defendant who was directly involved in the sale or production of drugs. e.g., United States v. Becker, 230 F.3d 1224 (10th Cir. 2000) (defendant manufactured methamphetamine in his home); United States v. Meshack, 225 F.3d 556 (5th Cir. 2000) (defendant restaurant owner arranged and negotiated drug purchases, ran conspiracy to distribute cocaine, used business to conceal drug trafficking); United States v. Moore, 184 F.3d 790 (8th Cir. 1999) (defendant unloaded drug shipments, used his home for storage facility in drug conspiracy); United States v. Bilis, 170 F.3d 88 (1st Cir. 1999) (defendant bar owner purchased drugs, warned drug dealers of police surveillance); United States v. Soto-Silva, 129 F.3d 340 (5th Cir. 1997) (defendant handled money for drug trafficking enterprise, smuggled drugs, and provided his property for packaging); United States v. Gibson, 55 F.3d 173 (5th Cir. 1995) (defendant manufactured and possessed methamphetamine with intent to sell); United States v. Cooper, 966 F.2d 936 (5th Cir. 1992) (defendant distributed crack out of his private club); United States v. Clavis, 956 F.2d 1079 (11th Cir. 1992) (defendant used his home for temporary storage of drugs, distribution to drug sellers); United States v. Lancaster, 968 F.2d 1250 (D.C.

government’s broadly publicized threats against other providers of electronic music violate the Constitution because they impermissibly limit the rights of these defendants and other consumers and exhibitors of electronic music to engage in protected expression.

As long recognized by the Supreme Court, “[m]usic, as a form of expression and communication, is protected under the First Amendment.” Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989). The government’s prosecution has both the effect and the purpose of shutting down concerts, of eliminating a form of expression which the government claims is associated with drug use. “[T]he chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure.” Dombrowski v. Pfister, 380 U.S. 479, 487 (1965).

Indeed, where the government targets a particular genre of music, even one popularly associated with drug use, the First Amendment stands as a barrier to such content-based restrictions. A city’s attempt to ban all hard rock concerts because the concerts “attract narcotics users to the community” was rejected as a violation of concert promoters’ First Amendment liberties. Cinevision v. City of Burbank, 745 F.2d 560, 566 (9th Cir. 1984). Because “all—political and non-political—musical expression, like other forms of entertainment, is a matter of first amendment concern”, id. at 569, “a general fear that state or local narcotics or other laws will be broken by people attending the concerts cannot justify a content-based restriction on expression.” Id. at 572. Censorship cannot be used as a tool to prevent drug use,

Cir. 1992) (defendant arranged for drug sales on his property); United States v. Tamez, 941 F.2d 770 (9th Cir. 1991) (defendant used car dealership for cocaine trafficking, used cocaine, and purchased cars for business with proceeds from illegal drug activity); United States v. Chen, 913 F.2d 183 (5th Cir. 1990) (defendant motel owner alerted drug sellers of police presence, stored drugs on premises, loaned money for the purchase of drugs for resale); United States v. Onick, 889 F.2d 1425 (5th Cir. 1989) (defendant Tolliver manufactured and distributed drugs out of his apartment). In this case, the prosecution does not allege that the defendants assisted illegal drug activity in any way, but simply that it took place on property that they either owned or controlled.

rather “law enforcement officers can deal adequately and effectively with unlawful activity ... at the time it occurs. That is a proper exercise of the police power; censorship is not.” Id. Yet, arresting these defendants and charging them with a 20 year felony for promoting an electronic music concert censors both them and all other promoters of similar music, none of whom can host a concert while guaranteeing that no drug use will occur.

Non-criminal activity cannot be transformed into criminal activity simply because a venue owner plays music believed to be associated with criminal activity. In Torries v. Hebert, 111 F.Supp.2d 806 (W.D. La. 2000), the court ruled that the confiscation of rap compact discs and the issuance of criminal charges against owners of a skating rink where rap music was played violated the owner’s First Amendment rights. The court noted that the seizure of the compact discs and the prosecution of the rink owners for contributing to the delinquency of a juvenile were presumptively invalid content-based restrictions on expression that are subject to strict scrutiny review. Id. at 817. The government’s interests in preventing harm to children may have been substantial, but “that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.” Id. (citing Wooley v. Maynard, 430 U.S. 705, 716 (1977)). Because the actions of the police and prosecutor violated the defendants’ First Amendment liberties, the court ordered the return of the compact discs and declared the prosecution invalid. Id. at 824.

Given that exhibitions of electronic music are protected by the First Amendment, the government can only criminalize the holding of a concert if it can prove a compelling interest that cannot be achieved through some means less restrictive of expression. See Sable Communications of Cal. Inc. v. FCC, 492 U.S. 115, 126 (1989). Although the prevention of illegal drug activity can in certain circumstances provide a compelling governmental objective, the prosecution of concert providers is by no means the least restrictive way to accomplish this objective – nor is this avenue a particular sensible means of rooting out drug problems. The

government here has made a point of not arresting any drug users or dealers, though they claim that government agents actually purchased drugs numerous times and presumably could have arrested the drug sellers.

Pursuing the individuals actually engaged in illegal drug activity is far less restrictive of First Amendment freedoms because it would not diminish the speech rights of defendants and all others who wish to attend electronic music concerts. By prosecuting the defendants in this case, the government is effectively preventing them from offering any “rave” events. Furthermore, the government apparently intends that, by targeting of rave promoters for prosecution, there will ensue a substantial chilling effect on other individuals who would consider promoting raves. The result of this prosecution will be a substantial limitation on the rights of expression of electronic music providers and listeners nationwide.

C. The Government May Not Target Speech as the Means of Controlling Drug Activity.

Defendants Robert J. Brunet, Brian J. Brunet, and James D. Estopinal have no connection whatsoever to drug activity. Among the many New Orleans venues in which drug use exists, the government has targeted them based solely upon their particular form of protected expression. The basis for this prosecutorial selection violates the Constitution’s guarantee of equal protection under the law.

Expressive forms of music have long been associated in the popular imagination with drug use – 1920’s jazz and marijuana, 1960’s psychedelic rock and LSD, 1980’s punk and speed. More recently, we hear of “raves” and ecstasy. Apparently persuaded by this popular perception, the DEA has now equated an electronic music concert with running a crack house, and so the government has specifically targeted defendants based upon the particular genre of music they provide to the public. What the government has not considered is the fact that the First Amendment protects defendants’ provision of this music.

Equal protection prohibits selective prosecution on the basis of the exercise of constitutional rights. “[J]ust as discrimination on the basis of religion or race is forbidden by the Constitution, so is discrimination on the basis of the exercise of protected First Amendment activities.” United States v. Falk, 479 F.2d 616, 620 (7th Cir. 1973).⁹

Where the prosecution is grounded upon the content of speech (i.e., the genre of music), the equal protection violation is all the more acute. See Cinevision, 745 F.2d at 566 (striking down attempt to ban “hard rock” concerts because of their perceived connection to drug use). This Court should not hesitate to follow the example of 227 Book Center v. Codd, 381 F. Supp. 1111 (S.D.N.Y. 1974), where the court acknowledged that a New York City policy of selectively prosecuting adult book store owners, rather than all forms of obscenity, would violate equal protection. Id. at 1118. The holding of 227 Book Center is equally applicable to the prosecution of rave promoters over promoters of other music events. A rave and a rock concert differ only in the form of protected expression they promote, and the prosecution of one over the other based on that difference constitutes a violation of equal protection.

A prosecution must be dismissed upon a showing that other persons similarly situated were not prosecuted, and that the selective prosecution was based on discrimination on the basis of race, religion, or the exercise of constitutional rights. See Wayte v. United States, 470 U.S. 598, 608-609 (1985). The defendants here having made a prima facie showing of discriminatory prosecution, the burden shifts to the government to prove a proper motive. See United States v. Steele, 461 F.2d 1148, 1152 (9th Cir. 1972).

There can be no question that the U.S. Attorney has singled out these defendants for prosecution. Numerous studies suggest that drug use is a common occurrence at virtually all

⁹ Although the Fourteenth Amendment’s Equal Protection Clause does not directly apply to the federal government, the tenets of equal protection apply fully to the federal government through the Fifth Amendment requirement of due process. Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

rock concerts, at many other clubs, and in many other venues. See discussion supra at 12-13. Under the government's novel application of the Crack House Statute, virtually all owners of clubs and concert venues, as well as promoters of music events, are potentially liable – not to mention the person who manages other institutions where drug use commonly occurs: prisons, high schools, and college dormitories, to name a few. Of the thousands of similarly situated individuals, only these three defendants have been prosecuted.¹⁰

The requirement of discriminatory purpose – that defendants were targeted based upon constitutionally protected activity – is also satisfied in this case, because the government has chosen these defendants for prosecution on the basis of their exercise of their constitutional right to hold events for the performance of electronic music. Current press has drawn significant attention to the issue of drug use at raves. However, the Drug Enforcement Administration has equated raves with drug use and has singled out these defendants for prosecution not because of the unique severity of the drug problem at raves, but because of the type of music and form of expression that characterizes these events.

The government cannot hide behind the argument that drug use occurred at defendants' concerts and that it can punish drug use wherever it is detected. First, defendants themselves are not alleged to be involved in drug use in any way. But more to the point, this is the very argument rejected in United States v. Crowthers, 456 F.2d 1074 (4th Cir. 1972). There, a group of protesters arrested in front of the Pentagon argued that they were targeted because of their religious views. The government countered with the claim that, although it tolerated many other protesters, these particular defendants were unusually noisy. But, upon finding the group to be no more noisy than numerous other protests, the court held that, “[i]n choosing whom to

¹⁰ As noted above, supra at 16 n.8, the Crack House Statute has never been applied in circumstances like those present here. All previous reported prosecutions have involved defendants who either distributed or manufactured drugs themselves or directly assisted those who did so, i.e., they ran a crack house or a similar venture. The selection of the defendants here is literally unique.

prosecute, it is plain that the selection is made not by measuring the amount of obstruction or noise but because of governmental disagreement with ideas expressed by the accused.” Id. at 1079.

In this prosecution, the government’s possible motives for selecting these rave promoters over all other promoters of music events are equally lacking in validity. The drug use is typical of that at rock concerts or other music events, and it resembles in no way the operation of a crack house. The prosecution of these defendants must be tied to the form of the expression they promote and not to any legitimate government purpose.¹¹

In this case, the government has not selected defendants for prosecution on the basis of any legitimate criteria. In Wayte, the defendant, through his speech, had clearly identified himself as a violator of the law. In this case, the defendants’ speech (i.e., the music they provide and their actual words) has not expressed any such intent. Rather, the government has targeted them by using electronic music and dance as a proxy for illegal drug activity.

In this case, there is a wealth of evidence that the government has equated raves with illegal drug activity. Numerous statements by the Drug Enforcement Agency illustrate that the defendants’ protected expression has been used as a proxy for drug use and sales. In addition, the contention that these defendants have been targeted because of any unprotected activity is unsupported. There is no evidence that drug use at the raves promoted by defendants is either more common or more dangerous than drug use at other music events. Rather, defendants have been targeted because of the genre of music that they promote and the unsubstantiated association of that genre with rampant drug use.

¹¹ This is not a case of the government selecting defendants based upon their expressed intent to violate the law. See Wayte v. United States, 470 U.S. 598 (1985). There, the Court upheld the prosecution of individuals who failed to register for the draft, where among those targeted were some who made public their refusal to register. The basis of prosecution was not the expression of opposition to the draft; it was merely the fact that draft resisters had identified themselves as law breakers. Id. at 613.

D. Prosecution under the Crack House Statute Violates Defendants' Due Process Rights.

The prosecution of these defendants despite a lack of evidence that they assisted illegal drug activity at the State Palace Theater violates due process. In Scales v. United States, 367 U.S. 203 (1961), the Supreme Court, holding that mere membership in the Communist Party could not constitute a criminal offense under the due process clause, noted that
In our jurisprudence, guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity..., that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment. Id. at 224-25.

A number of other cases illustrate the general principle that punishment can only attach to individuals who have engaged in some blameworthy conduct. In particular, the Supreme Court has held that it is unconstitutional to penalize innocent persons for the blameworthy acts of others. In Plyler v. Doe, the Court held that the denial of public education benefits to children of illegal aliens violated due process because it amounted to the punishment of children for the wrongs of their parents, 457 U.S. 202 (1982). Similarly, in Weber v. Aetna Cas. & Surety Co., 406 U.S. 164, 175 (1972), the Court held that denying worker's compensation benefits to illegitimate children violates due process because the penalization of children for the wrongful acts of their parents is "contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing."

The Fifth Circuit recognized an individual's substantive due process right to be free from punishment in the absence of personal guilt in St. Ann v. Palisi, 495 F.2d 423 (5th Cir. 1974). In that case, a public school suspended two minor children as a result of their mother's assault on the school's assistant principal. The Fifth Circuit held that the children could not be punished for the misconduct of their mother, stating that "[f]reedom from punishment in the absence of personal guilt is a fundamental concept in the American scheme of justice." Id. at 425.

In this prosecution, defendants are not charged with participating in the sale or use of illegal drugs on their property. The prosecution has made no allegation that defendants either sold or used or aided and abetted the sale or use of controlled substances. In fact, not only did defendants not assist the sale and use of drugs, but they also took a number of affirmative steps, including enlisting the help of New Orleans police and cooperating with DEA investigations, to prevent drug use at the State Palace Theater. This prosecution, therefore, is entirely based on the defendants' association with persons who are engaged in illegal drug activity. As Scales and St. Ann illustrate, punishment on these grounds alone is constitutionally impermissible.

E. The Crack House Statute, as Interpreted by the Government, Is Unconstitutionally Vague and Overbroad.

The government's policy of utilizing the Crack House Statute to prosecute providers of music who engage in no drug activity raises serious constitutional concerns. On its face, the statute provides no suggestion that it is capable of the interpretation offered here by the government. The statute itself can survive constitutional scrutiny on vagueness grounds only if this Court disallows the government's interpretation. See supra at 15 n.7 (discussing doctrine of constitutional avoidance).

"Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." NAACP v. Button, 371 U.S. 415, 433 (1963). It is a basic First Amendment principle that "we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). When policies have "uncertain meanings," affected persons will "steer far wider of the unlawful zone" than they would "if the boundaries of the forbidden areas were clearly marked." Baggett v. Bullitt, 377

U.S. 360, 372 (1964) (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)).¹² The Supreme Court has expressly held: “Free speech may not be so inhibited.” Baggett, 377 U.S. at 372.

Further, “if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.” Grayned, 408 U.S. at 108. Where a law has “no articulated standards” or “objective factors” such that it vests “unbridled discretion in a government official,” it is facially unconstitutional under the First Amendment. Forsyth County v. Nationalist Movement, 505 U.S. 123, 133 (1992) (striking down ordinance requiring variable fee to be set by administrator for assemblies on public property).

Moreover, case law makes clear that “the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” Kolender v. Lawson, 461 U.S. 352, 357 (1983) (emphasis added); see also Colautti v. Franklin, 439 U.S. 379, 390 (1979) (ruling that “a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,” or that “is so indefinite that it encourages arbitrary and erratic arrests and convictions,” is void for vagueness) (internal citations and quotation marks omitted). If “a statute’s literal scope,” the Supreme Court has found, “is capable of reaching expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of specificity than in other contexts.” Smith v. Goguen, 415 U.S. 566, 573 (1974). When a “law interferes with the right of free speech or of association, a more stringent vagueness test should apply.” Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982).

¹² The Government's policy is so sweeping that it is facially invalid because, “if left in place, [it] may cause persons whose expression is constitutionally protected to refrain from exercising their rights for fear of criminal sanctions.” Massachusetts v. Oakes, 491 U.S. 576, 581 (1989).

Here, the government's enforcement policy is vague and overbroad. The government maintains that mere fact that drug use occurs, coupled with a venue manager or promoter's knowledge of that drug use, creates criminal liability. The fact that the manager or promoter takes steps to prevent drug use is irrelevant. Indeed, any measure taken to address the dangers of drug use (e.g., having medical personnel on hand) is taken as a sign of criminal liability. This sweeping formulation criminalizes virtually every concert in the nation, and thereby curtails the First Amendment rights of every concert provider and audience member. Knowing that no concert provider can guarantee the complete absence of drugs, the only way to avoid criminal liability would be to cancel electronic music concerts altogether. It is precisely this damage to free expression to which the First Amendment stands as a steadfast barrier.

F. Dismissal Should Be with Prejudice.

The government has stated that, unless defendants enter a guilty plea by March 7, 2001, it intends to dismiss the instant indictment for the purpose of seeking more onerous charges from the grand jury. See Letter from A. Winters (Jan. 25, 2001), attached as Exh. E to Lemann Dec. Pursuant to Fed. R. Crim. P. 48(a), the government may not dismiss without leave of the Court, allowing "the courts to exercise discretion over the propriety of a prosecutorial motion to dismiss." United States v. Welborn, 849 F.2d 980, 983 (5th Cir. 1988) (quoting United States v. Salinas, 698 F.2d 348, 351 (5th Cir. 1982)). This Court's role in reviewing the prosecution's request for dismissal "prevents harassment of a defendant by charging, dismissing and recharging without placing a defendant in jeopardy." Id. (citation and quotation omitted). The defendants do not object to the government dismissing the indictment with prejudice; however, the defendants do object to dismissal without prejudice.

IV. CONCLUSION

For the reasons stated above, the indictment of Brian J. Brunet and James D. Estopinal should be dismissed with prejudice.

Respectfully submitted:

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CERTIFICATE

I hereby certify that a copy of the above document has been served upon the U.S.
Attorney by hand delivery, this 6th day of March, 2001.

Arthur A. Lemann III