

STATE OF TENNESSEE

Office of the Attorney General



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December 20, 2017

The Honorable Mark Green
State Senator
748 Cordell Hull Building
Nashville, Tennessee 37243

Dear Senator Green:

Enclosed is the attached opinion per your request. Please let us know if you have any further questions. As always, we appreciate your assistance and cooperation.

Sincerely,

A handwritten signature in blue ink that reads "Herbert H. Slattery III". The signature is written in a cursive style.

HERBERT H. SLATERY III
Attorney General and Reporter

Enclosure

STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

December 20, 2017

Opinion No. 17-55

Legality of Possessing the Kratom Plant in Tennessee

Question

Does possession of the Kratom plant in its natural botanical form subject a person to potential criminal prosecution under Tennessee law, which makes it a crime to possess mitragynine and 7-hydroxymitragynine in a synthetic form?

Opinion

Possession of the Kratom plant in its natural botanical form should not subject a person to potential criminal prosecution under Tennessee law. The Kratom plant in its natural botanical form is not a prohibited controlled substance under Tennessee law.

ANALYSIS

The Kratom plant has leaves that contain a natural form of mitragynine, a chemical compound that produces opiate-like analgesic effects. *See* David Kroll, *Recreational Drug Kratom Hits the Same Receptors as Strong Opioids*, 94 *Chemical & Engineering News*, 8 (June 6, 2016).

Tennessee prohibits the possession, sale, manufacture, and distribution of capsules, pills, and other products that contain a synthetic form of mitragynine or hydroxymitragynine:

Unless specifically excepted or unless listed in another schedule; it is an offense to knowingly produce, manufacture, distribute, sell, offer for sale, or possess any capsule, pill, or other product composed of or containing any amount of any compound, other than bupropion, which is structurally *derived* from 2-amino-1-phenyl-1-propanone *by modification* in any of the following ways:

(A) Substitution in the phenyl ring to any extent with alkyl; alkylendioxy; haloalkyl; or halide substituents, whether or not further substituted in the phenyl ring by one (1) or more univalent substituents;

(B) Substitution at the 3-position with an alkyl substituent; or

(C) Substitution at the nitrogen atom with alkyl or dialkyl groups, or by inclusion of the nitrogen atom in a cyclic structure.

Tenn. Code Ann. § 39-17-452(a)(1) (emphasis added). Compounds expressly included in this statutory prohibition are mitragynine and hydroxymitragynine. Tenn. Code Ann. § 39-17-452(a)(2)(H). Violations of Tenn. Code Ann. § 39-17-452 are punishable as Class A misdemeanors. Tenn. Code Ann. § 39-17-452(c).


Whether Tenn. Code Ann. § 38-17-452 prohibits possession of a Kratom plant in its natural botanical state is a matter of statutory construction. Criminal statutes are “construed according to the fair import of their terms.” *State v. White*, 362 S.W.3d 559, 576 (Tenn. 2012). “When the meaning of the statutory language is clear, courts apply the plain meaning without complicating the task and apply the statute as written.” *Johnson v. Hopkins*, 432 S.W.3d 840, 848 (Tenn. 2013).

The fair import of the terms of Tenn. Code Ann. § 39-17-452 is that the statute prohibits possession, manufacture, sale, and distribution of products that contain mitragynine or hydroxymitragynine in a *synthetic form* described in Tenn. Code Ann. § 39-17-452(a). Section 39-17-452(a) expressly prohibits only forms of mitragynine and hydroxymitragynine that have been “*derived*”—i.e., that have been obtained from a parent substance—by *modification* of 2-amino-1-phenyl-1-propanone. In other words, the statutory prohibitions apply only to mitragynine or hydroxymitragynine in forms that have been obtained by changing the compound. See definitions of “derive” and “modify” in New Oxford American Dictionary, 3rd ed. Furthermore, the prohibitions apply only to mitragynine and hydroxymitragynine forms that have been changed by modification of the chemical structure of 2-amino-1-phenyl-1-propanone in one of the *specific* ways set forth in Tenn. Code Ann. § 39-17-452(a)(1)(A)-(C).

Thus, it appears that only certain specified man-made, synthetic forms of mitragynine and hydroxymitragynine are controlled substances within the scope of Tenn. Code Ann. § 39-17-452. Mitragynine and hydroxymitragynine occur naturally in the Kratom plant and that have not been derived through one of the modification processes specified in Tenn. Code Ann. § 39-17-452(a) do not fall within the prohibited categories under the statute.¹

¹ In August 2016, the Drug Enforcement Administration published a notice of intent to place Kratom, mitragynine and hydroxymitragynine on the schedule of controlled substances. 81 Fed. Reg. 59929 (2016) (to be codified at 21 C.F.R. §1308). The DEA subsequently withdrew that notice. 45 No. 3 Controlled Substances Hndbk.Newsl. 11 (2017).

In sum, possession of the Kratom plant in its natural botanical form should not subject a person to potential criminal prosecution under Tennessee law. The Kratom plant in its natural botanical form is not a controlled substance under Tennessee law. *See* Tenn. Code Ann. §§ 39-17-406 through 39-17-416; *see also* Tenn. Comp. R. & Regs. 0940-06-01-.01-.13.² And we are aware of no Tennessee statute that expressly criminalizes possession of Kratom plants in their natural botanical form.


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Requested by:

The Honorable Mark Green
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² In this regard, the Kratom plant in its natural botanical form is treated differently from botanical marijuana which, along with its active ingredient, tetrahydrocannabinol (THC) is classified as a Schedule VI controlled substance. *See* Tenn. Code Ann. § 39-17-415(a).