

T H E A D V O C A T E

A Monthly Newsletter for Military Defense Counsel

Defense Appellate Division, US Army Judiciary
Washington, D.C. 20315

Vol. 1 No. 4

June 1969

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This is the second of two issues devoted largely to the defense of marihuana and other dangerous drug cases at trial. It should be noted that the views expressed in THE ADVOCATE are personal to the Chief, Defense Appellate Division, and do not necessarily represent those of the United States Army or of The Judge Advocate General.

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THE APPLICATION OF LEARY V. UNITED STATES TO THE MILITARY

On 19 May 1969, the United States Supreme Court reversed the conviction of Timothy F. Leary for (1) smuggling marihuana into the United States, (2) transporting and facilitating the concealment of illegally imported marihuana and (3) transporting, receiving and facilitating the concealment of marihuana without paying the transfer tax. Leary v. United States, 37 U.S.L.W. 4397 (U.S. 19 May 1969).

At first blush, the case seems to have no direct application to the military because it was decided under federal statutes, whereas most marihuana cases in the military are prosecuted not with reference to the federal laws but as disorders prejudicial to good order and discipline. This view of Leary is, we submit, too restrictive, and we urge military defense counsel to read and study the opinion and to ponder its application in the military.

The Leary decision had two thrusts. First, the Court held that the Fifth Amendment prohibited prosecution for failure to pay a transfer tax since payment or attempted payment would identify the applicant as a non-registered transferee who had not already paid the occupational tax imposed by another federal law, and which would render him liable to prosecution under the Uniform Drug Act in state courts. Secondly, the Court ruled that the statutory presumption raised by mere possession that the possessor knows the marihuana to be illegally imported is an unwarranted and unconstitutional presumption.

The decision has two rather obvious applications to the military. First, the 1951 Manual did not specifically recognize the offense of "wrongful transfer of marihuana", but the offense was recognized by the Court of Military Appeals to be chargeable under Article 134 of the Uniform Code of Military Justice as a violation of 26 U.S.C. §4742 (1964). United States v. Blair, 10 USCMA 161, 27 CMR 235 (1959). This statute prohibits transfers without a written order form on a blank issued by the Secretary or his delegate. The Supreme Court addressed itself to this very section: "If read according to its terms, the Marihuana Tax Act compelled petitioner to expose himself to a 'real and appreciable' risk of self-incrimination, within the meaning of our decisions in Marchetti, Grosso and Haynes. Sections 4741-4742 require him, in the course of obtaining an order form, to identify himself not only as a transferee of marihuana but as a transferee who had not registered and paid the occupational tax under §4751-4753." Leary, supra at 4399.

This language suggests that the death knell may have been sounded for the offense of "wrongful transfer of marihuana" in the military (now found officially in the table of maximum punishments.) For if the offense is bottomed on a federal statutory scheme now unconstitutional, the military offense should fall along with the federal law.

Third, the Manual presumption that "possession or use of marihuana . . . may be inferred to be wrongful unless the contrary appears" (Paragraph 213b,) is now subject to attack. In United States v. Greenwood, 6 USCMA 209, 19 CMR 335 (1955), the Court of Military Appeals discussed the Manual presumption and noted it was "based upon a provision found in 21 U.S.C. §174, which denounces the fraudulent or knowing importation of narcotic drugs into the United States.

See Legal and Legislative Basis, Manual for Courts-Martial, United States, 1951, page 294." Greenwood, supra at 338. It would seem that if the underlying federal presumption of knowledge of illegal importation no longer has legal vitality, the military presumption which rests upon it is likewise unsupported. It must be remembered that mere possession of marihuana is not a federal offense -- it is only the receiving of knowingly imported marihuana which is prohibited and this was proved by evidence of mere possession. Since, as the Supreme Court noted, "one in possession of marihuana is [not] more likely than not to know that his marihuana was illegally imported", the military presumption seems to be predicated on an unwarranted assertion.

The lessons to be learned are that the adequate defense of a marihuana case today often requires contesting the issues in the case. Effective assistance of counsel demands at least familiarity with the problems involved in United States v. Leary, supra.

MULTIPLICITY IN MARIHUANA PROSECUTIONS

The Court of Military Appeals recently had occasion to address itself to the question of multiplicity for sentencing purposes of wrongful use and wrongful possession of marihuana. In United States v. Mirault, No. 21,636, USCMA, CMR (14 May 1969) the Court held that the facts of that case did not establish that the wrongful use and wrongful possession arose out of the same transaction. But more importantly, the Court noted that "a person smoking a marihuana cigarette should not be sentenced for both possession and use of the same quantity." Thus, the Court distinguished possession of marihuana in the nature of a stockpile from possession in the sense of holding it while drawing smoke from it.

Consequently, if an accused is being prosecuted for both possession and use of marihuana arising out of the very same transaction -- that is, one act of smoking -- the law officer must now instruct the court that the two offenses are unitary for punishment purposes.

A SELECTED BIBLIOGRAPHY ON MARIHUANA IDENTIFICATION

The April 1968 issue of the Journal of Forensic Sciences (Vol. 13, No. 2) contained a list of recent additions to a bibliography on cannabis. This bibliography contained a list of over one hundred publications dealing with marihuana. From that list we have extracted several we feel would be of

particular interest to defense counsel in preparing for cross-examination of the marihuana expert [see THE ADVOCATE, Vol. 1, No. 3]. All of these publications, we are informed, are found in the Library of Congress, but we cannot speculate as to their availability to defense counsel in the field.

1. Gaoni & Mechoulam, Isolation, Structure and Partial Synthesis of an Active Constituent of Hashish, 86 Journal of the American Chemical Society 1646 (1964).
2. Heaysman et al., The Application of Gas Chromatography to the Examination of the Constituents of Cannabis sativa L. 92 Analyst 1096, 450-54 (1967).
3. Irudayasamy et al, An Improved and Rapid Test for Detection of Marihuana with Diazotized p-nitroaniline, 3:7 Indian Journal of Chemistry 327-28 (1965).
4. Lerner et al., Narcotic Analysis, A Simple Approach (Opium and Marihuana), 8:1 Journal of Forensic Sciences 126 (1963).
5. U.S. Internal Revenue Service, Alcohol and Tobacco Tax Division Laboratory, Methods of Analysis (Marihuana p. 105) Publication No. 341. (Rev. 12-66).

ROBBINS REHEARINGS: A WARNING

In United States v. Robbins, 18 USCMA 86, 39 CMR 86 (1969), the Court held that when it authorizes a rehearing, the original convening authority must first be given the option of ordering a rehearing or dismissing the charges, and that retrial anywhere else before this occurs is void.

Recently the Court reaffirmed this doctrine in United States v. Landrum, No. 20,960, USCMA, CMR (29 May 1969). Counsel at a Robbins rehearing in the future, should, however, pay close attention to Chief Judge Quinn's concurring opinion in Landrum. While the majority indicated in Robbins that the defect was a jurisdictional one, the Chief Judge in Landrum noted that there was no defect where the accused is a "willing, and perhaps even an eager, participant" in the nonconforming retrial. Judge Darden did not participate in Landrum.

The lesson is patent: If the retrial is being held before a convening authority other than the original, counsel should object to the retrial in order to insure that the accused will gain the benefits of Robbins, supra. In the absence of an objection, the Court might well hold that the deviation from the remand was nonprejudicial, or waived error.

APPEAL AND REVIEW OF SPECIAL AND SUMMARY COURT-MARTIAL CONVICTIONS

New Article 69 of the Uniform Code of Military Justice is the only change made by the Military Justice Act of 1968 which became effective last October. [Article 73 became effective at the same time, but had retroactive effect for two years] This article makes it possible now to appeal previously unappealable special and summary court-martial convictions to The Judge Advocate General. We are informed that although the commissioners who review these cases for The Judge Advocate General report a very high rate of convictions that are set aside, there are still relatively few convictions being appealed.

For your convenience, we set forth the criteria for review under new Article 69, and a guideline for appeal.

The Judge Advocate General now has the power to vacate or modify the findings or sentence or both, in whole or in part, in any court-martial case (including special or summary courts) which has been finally reviewed but which has not been reviewed by a Board of Review. The grounds for review are (1) newly discovered evidence, (2) fraud on the court, (3) lack of jurisdiction over the accused or the offense, (4) or any error prejudicial to the substantial rights of the accused. This last ground has been interpreted to comprehend any error which would be determined reversible by the two other military appellate tribunals.

Applications must be in writing, and must be signed under oath or affirmation by the accused, or by a person possessing the power of attorney of the accused for that purpose [This has been interpreted to exclude attorneys at law] or a person with the authorization of a court of law to sign for the accused as his representative.

The application should be typewritten, double spaced, and should contain the following information:

a. Name and service number and SSAN of the accused, type of court-martial, date and place of trial, command conducting the trial and the present address of the accused;

b. Sentence as approved or affirmed, and any subsequent reduction by clemency or otherwise;

c. Copy of the court-martial orders, if available;

d. Statement of specific facts and basis for relief -- related to one of the four grounds for relief in the statute;

e. Relief requested;

f. Any other documentary or other evidence pertinent to the facts. [Presumably the commissioners give broad latitude for inclusion and consideration of extra-record evidence].

We have also been informed that the commissioners and The Judge Advocate General will not feel limited by the errors assigned by the accused, but instead will review the entire record for any error prejudicial to his rights. Thus, formality and specificity in pleading, while certainly desirable and ultimately helpful, are not sine qua nons to effective appellate review at this level.

Applications for review may be submitted directly to Headquarters, U.S. Army Judiciary, Office of The Judge Advocate General, Washington, D.C., 20315, or if the accused is still a member of the unit in which he was tried, to the Staff Judge Advocate Office which performed the initial review of his case.

We heartily encourage use of the new Article 69 review. It seems to be a great step forward in military justice at the inferior court level, but to be effective, it must be used.

NEW APPROACHES TO IN-SERVICE CONSCIENTIOUS OBJECTION

On occasion, officers and noncommissioned officers tend to rebuff soldiers seeking to file applications under AR 635-20 for conscientious objector status. Thereafter these same soldiers may be given order which directly conflict with their conscientious beliefs. The legality of such orders, and of punishment for other related offenses is clearly in grave doubt.

In CM 416356, Sigmon, 2 January 1968 an attempt was made to submit an application for conscientious objector status

supported by documents attesting to Sigmon's strong religious beliefs. However, the personnel sergeants to whom he attempted to deliver the application refused to accept it. Therefore, no formal application was ever submitted. Sigmon was ordered to board a bus to Travis Air Force Base, California, for onward transportation to Vietnam. He refused because of conscience conflict. He was then tried and convicted of wilfully disobeying the order to board the bus and missing the movement of his aircraft through design.

The majority of the board of review found that orders which are lawful on their face, but founded in unlawful governmental action, are also unlawful. The refusal to accept the application for conscientious objector status which then, by regulation, prohibited transfer of the applicant until final action was taken by the Department of the Army on application vitiates a conscience-related conviction. Stated another way, a soldier has a right to file an application for conscientious objector status, and when that right is abridged by official action, subsequent military offenses arising out of the conflict between military duties and conscience are not prosecutable. The board set aside the findings and sentence and dismissed the Charges.

The minority opinion would have ordered a rehearing because the law officer did not submit the issue of the order's legality to the court-martial.

In addition, if a soldier (1) makes known to his commanding officer or to personnel officials having responsibilities over conscientious objector applications that he holds religious views which are inconsistent with military duties, (2) is neither assisted nor advised by these officials on how to exercise his right to file as a conscientious objector, and (3) thereafter is ordered to perform any of the inconsistent duties, he may contest the legality of the order or other offense involved at trial. [The order, or other offense, must arise out of inconsistency between belief and military duties. Generally speaking, one could not use this defense against conviction for violating an order to, say, get a haircut. See CM 419106, Kent, 27 November 1968].

The government has the burden of establishing beyond a reasonable doubt that the accused was not officially misadvised of his right to file as a conscientious objector when the issue is raised. This should include how, when and where to file. See CM 420053, Sanders (decided 2 May 1969).

SOME COMMENTS ON O'CALLAHAN V. PARKER

The decision of the Supreme Court in O'Callahan v. Parker, 37 U.S.L.W. 4465, (U.S. 2 June 1969) leaves open many questions as to its scope. No longer is it sufficient for the government to establish that an accused was an active military member at the time of his offense and trial for it to exercise court-martial jurisdiction over him. In addition, there must be some "relationship between the offense and identifiable military interests;" that is, the crime to be under military jurisdiction must be "service connected." What constitutes service connection for purposes of court-martial jurisdiction is largely left open.

Clearly, there is an absence of court-martial jurisdiction when a civilian-type crime is committed by a soldier wearing civilian clothing while on a pass or leave status off-post against a civilian victim during peacetime and within the territorial limits of the United States. These are the facts in O'Callahan. It should also be clear that a court-martial does have jurisdiction over obviously military offenses such as unauthorized absences, mutiny and disobedience.

While the Court's opinion is broad and sweeping in its condemnation of the military justice system, a careful reading of its underlying historical analysis and the accompanying footnotes suggests some possibilities as to where the line may be drawn. For example, the pre-revolutionary practices in England are described as not recognizing general military jurisdiction to try soldiers for ordinary crimes committed "in the British Isles", or "in Britain." Carrying this forward, it may be that the newly recognized limitations on military jurisdiction apply only to civilian-type crimes committed in the United States and its territories, where the alternative of trial by American civilian courts is available. The Court also infers that a special military interest exists in prosecuting offenses such as desertion, assaults or thefts from other soldiers, stealing government property, abuses of military position such as plundering civil populations or abusing women while on duty, and acts committed in wartime in the immediate theater of operations. O'Callahan, supra at n. 14.

The military defense counsel, however, should not consider this list as conclusive, but only as suggestive as to where the line may eventually be drawn. For example, stealing

military property (Article 108, UCMJ) probably is a cognizable military offense, but stealing government property (Article 109, UCMJ) without more being shown, may not be enough to establish military jurisdiction.* Also the Court infers that based upon 18th Century customs, all officer cases might have sufficient military significance to warrant court-martial jurisdiction. Could this distinction between the rights of officers and enlisted men withstand an attack on the basis of equal protection? We doubt it.

The Supreme Court also described the case before it as dealing with a peacetime offense and "not with authority stemming from the war power. Civil courts were open." O'Callahan, supra at 4469 (emphasis added). Thus, the Court was not referring to "peace" and "war" in the sense that the Court of Military Appeals recently addressed that issue when it held the statute of limitations on unauthorized absence offenses suspended as of the date of the Gulf of Tonkin resolution. United States v. Anderson, 17 USCMA 588, 38 CMR 386 (1968). Military jurisdiction over otherwise civilian offenses committed within the United States and its territories exists only when the civilian courts are not open and available. See Ex Parte Milligan, 71 U.S. (4 Wall.) 2 (1866).

Thus, more is involved in O'Callahan than oversimplified distinctions between off-post and on-post offenses. The mere fact that an offense such as marijuana possession occurred on post may not render it sufficiently service-connected. The full implications of O'Callahan await further consideration, discussion and analysis. The Army alone has several cases awaiting decision by the Court of Military Appeals involving O'Callahan-type issues. Because the decision is constitutional, it also opens the door to closer scrutiny by federal courts of the entire military justice system.

In future issues of THE ADVOCATE, we will discuss other implications of O'Callahan, and we will keep counsel informed of other federal and military opinions in this area. Your comments are solicited.

* Chapter 7, AR 27-10, dated 26 November 1968 sets forth a "Memorandum of Understanding between the Departments of Justice and Defense Relating to the Investigation and Prosecution of Crimes Over Which the Two Departments have Concurrent Jurisdiction." The jurisdiction described therein probably is no longer "concurrent," but rests solely with civilian authorities. On the other hand, the principles discussed there may give some preliminary guidelines as to what offenses are not "service-connected." This memorandum will be more closely analyzed in a future issue of THE ADVOCATE.

THE OPENING STATEMENT AS A TRIAL TACTIC WHEN THE
VOLUNTARINESS OF A CONFESSION IS CONTESTED

After an adverse out-of-court ruling on the admissibility of a confession, the evidence relating to voluntariness is generally presented to the court only when the accused's testimony will conflict with the prosecution's evidence tending to establish voluntariness. The accused is at a disadvantage since the court hears the prosecution's version before hearing the accused's testimony.

Without an advance awareness of the defense version, the court members cannot critically evaluate the prosecution evidence at the time it is presented. This is often a serious disadvantage in cases involving a complex issue of credibility created by apparently irreconcilable accounts by several witnesses.

The disadvantage can be minimized by the use of an opening statement that informs the court members of (1) the grounds for the contest of voluntariness, and (2) a brief synopsis of what the defense evidence will establish with respect to the issue. Of course, the defense should first ask permission to make its opening statement immediately before the prosecution presents its evidence. See Paragraph 48h and 44g (2), 1969 Manual.

RECENT DECISIONS OF INTEREST TO DEFENSE COUNSEL

ARGUMENT OF TRIAL COUNSEL -- In a trial for desertion terminated by apprehension the trial counsel may not comment to the court that the accused had been on orders to report to a unit located in Vietnam. The remark was prejudicial error and was not cured by the law officer's instructions to disregard. CM 419365, Wilson (9 May 1969).

USE OF ARTICLE 32 TESTIMONY AT TRIAL -- Despite lack of objection, Article 32 testimony of government witness may not be used at trial in absence of a positive showing by the proponent that the witness was actually unavailable or unattainable to testify in court. Despite Paragraph 145b of the 1969 Manual, failure to object is not waiver. CM 419310, Anderson (7 May 1969). But cf. United States v. Shaffer, No. 21,650, USCMA, CMR, (23 May 1969).



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