

T H E A D V O C A T E

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The May and June issues of THE ADVOCATE will be devoted largely to the defense of marihuana and other dangerous drug cases at trial. Your comments are welcomed. It must be remembered 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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CROSS-EXAMINATION OF THE MARIHUANA EXPERT

One rarely sees a contested marihuana prosecution in the Army, and rarer still is the presence of an effective cross-examination of the laboratory expert. It can be done, but it is difficult. There are, generally speaking, two types of marihuana experts -- the botanist and the chemist. The latter is the most common in the military, and also the most difficult to cross-examine.

The Botanist

The Army does not usually employ botanists as narcotics experts, consequently they rarely testify for the prosecution. One reason is that it is very difficult to distinguish marihuana from other closely related plants by visual means alone. For example, hops (the dried pistillate cones of humulus lupulus) bear botanic resemblance to

marihuana. See Vagnini, Some Replies to Forensic Queries in Cannabis Identification, 50 J. Crim L, C & P.S. 203 (1959). Both plants have long slender leaves, pinnate (feather-like) as opposed to palmate, and both are in the same genus grouping. Moreover, both have the characteristic little hairs that grow on the underside of the leaves. Thus, the so-called microscopic test is usually determinative only in a negative way. Many botanical text books are available and should aid the defense counsel to exploit this similarity. It should also be noted that if the government's expert witness is a botanist, this should be a tip-off to some weakness in its case. Further investigation would be called for in these cases.

The Chemist

The typical marihuana identification is made in a laboratory by means of chemical tests. These chemical tests are generally regarded as accurate, but there are some distinct limitations which should be explored by counsel either on cross-examination, or before a guilty plea is considered. It should also be borne in mind that it is entirely possible that both the laboratory expert and your client may be mistaken about the presence of marihuana. Too many counsel consider pleas based solely on the admission of the client -- certainly not an expert, and a conclusory laboratory analysis; they fail to investigate the matter further.

Investigative reports from the CID laboratory rarely set forth the type of test used or any of the circumstances surrounding the test. Thus, they are not as valuable to counsel as they otherwise could be. There is nothing prohibiting counsel from contacting the expert directly, and this should be encouraged in all cases.

The normal laboratory analysis includes either the Modified Duquenois Test, or the Beam Test. Both are coloration tests, and both have been known to react to substances other than marihuana. The expert should be examined as to his experiences with these tests on other related plants such as oregano, rosemary, thyme, tobacco, catnip, and on substances such as citral, citronellal, citronellol, and resorcinol. All have been known to react initially as marihuana. See generally Stolman, Progress in Chemical Toxicology. An Army Board of Review, as long

ago as 1954, recognized that chemical tests were not always as positive as some might think. CM 376931, Collins, 17 CMR 433 (1954). Moreover, a Board of Review, in another context, declined to accord much weight to a chemical color test for alkaloids (morphine). CM 366433, Ellibee, counsel to cross-examine extensively as to color perception and the reliability of purely color reaction tests.

There are several tests which are specific, as opposed to general tests for marijuana, and which are relatively foolproof. These tests include thin layer chromatography, gas chromatography, ultraviolet spectrophotometry, and paper chromatography. The normal laboratory analysis however, does not include these tests, and consequently the failure to perform them might provide a fertile area for cross-examination. For a good compendium of laboratory tests used to identify narcotics, see 13 Proof of Facts 391 et seq. (1963). It should be noted that there is at present no known test for potency of marijuana. Asahina, U. N. Bulletin on Narcotics 9:17 (October-December 1957).

Qualifications

Counsel should keep in mind the admonition of seasoned trial lawyers that it is usually desirable to stipulate to your opponents' expertise (assuming you are certain the witness can be so qualified) but reserve your right to qualify your own expert regardless of the prosecution's stipulation. Thus, you may buttress the credibility of your witness by extensive in-court qualification.

CONFRONTING LAY OPINION ON MARIHUANA IDENTIFICATION

In some cases, the government may be reluctant or unable to produce expert testimony on identification, and will seek instead to use lay opinion testimony. Generally speaking, an objection should be lodged at trial to this type of testimony as expert testimony elicited without a proper foundation. CM 385050, Jones, 20 CMR 438 (1955) is helpful in this regard. Cf. United States v. Smith, 3 USCMA 803, 14 CMR 221 (1954)

In the event that an objection is overruled, impeachment would be in order, and the following questions might be appropriate with relevant modification:

Q. How many leaflets does a marihuana leaf usually have?

A. Five to thirteen, most commonly nine.

Q. Are the leaflets odd or even in number?

A. Odd.

Q. What is the shape of the leaflets?

A. Lance-shaped.

Q. What did the edges of the leaflets look like?

A. Serrated (saw-like).

Q. Did the leaflets vary in color from side to side?

A. Dark on top, light on bottom.

Q. Did you notice anything on the surface of the leaflets?

A. Short hairs and mound-like globular protuberances.

Q. What is "manicuring" marihuana?

A. Separating the leaves from the stems and seeds [18 U.S.C. §4761 (1964) excludes stalks and sterilized seeds from its definition of marihuana].

A lay witness should have difficulty in answering these questions. Be ready to call your own rebuttal witness who is familiar with the characteristics of marihuana who can demonstrate the weakness in the government's case.

Demonstrations involving in-court identification of substances as marihuana are risky; your client may be convicted by nothing more than a lucky guess. If you do decide to cross-examine the layman by using this method, some pointers are in order. First, explain to your client all

the risks involved, and offer him the right to veto the tactic. Secondly, the risk of a "lucky" guess can be minimized by increasing the number of sample piles containing marihuana. Thus, if the witness correctly identifies one pile, but fails to identify three others, his credibility will come into serious question. Third, the array of marihuana should contain one pile dark side up, and the other light side up.

THE TRACES PROBLEM

The Court of Military Appeals in United States v. Alvarez, 10 USCMA 24, 27 CMR 98 (1958), refused to invoke the doctrine of de minimis con curat lex in a prosecution for possession of "one gram or less" of marihuana. "If the substance found in the accused's possession is identified as one of the prohibited class the amount possessed is immaterial."

Recent state jurisdictions, however, have assailed the traces problem from two sides: (1) the amount allegedly illegally possessed must be a usable amount and (2) illegal possession must be knowledgeable.

In a prosecution for possession of traces of heroin, the District of Columbia Municipal Court of Appeals held: "If this substance cannot be sold, if it cannot be administered or dispensed, common sense dictates that it is not such a narcotic as contemplated by Congress to be a danger to society, the possession of which is proscribed . . . where there is only a trace of a substance, a chemical constituent not quantitatively determined because of minuteness, and there is no additional proof of its usability as a narcotic, there can be no conviction under §33-402(a)." Edelin v. United States, 227 A.2d 395 (Munic. App. D.C.) (1967); see Pelham v. State, 164 Tex. Cr. App. 226, 298 S.W. 2d 171 (1957); State v. Moreno, 92 Ariz. 116, 374 P.2d 872 (1962) (en banc); Annot. 91 ALR 2d 810, 829-231 (1963).

Seemingly, the question of what measurable amount would be tantamount to "traces" is left open. For example, in a case recently filed with the Court of Military Appeals, the specification alleged possession of .01 grams (less than 1/2800 ounce). CM 419739, Heaston, (petition filed 10 April 1969).

Secondly, the Supreme Court of California in People v. Leal, 413 P.2d 665 (1966) concluded that the "prosecution proved no more than defendant's possession of traces of narcotics and did not show that such residue was usable for sale or consumption." Justice Tobriner's opinion indicates moreover that the "presence of the narcotic must be reflected in such form as reasonably imparts knowledge to the defendant."

In the aggravated "traces" case, one of three motions might be appropriate:

1. A motion to dismiss a specification for failure to state an offense;
2. A motion for a finding of not guilty because of insufficient evidence (amount is insignificant);
3. A motion for a finding of not guilty because of insufficient evidence (element of knowledge not proved).

EXTENUATION, MITIGATION AND PUNISHMENT IN MARIHUANA CASES

While it may not be admissible on the merits of your case, evidence of the nature and effect of marihuana would seem to be admissible and relevant during the presentencing hearing in order to put the marihuana offense into proper perspective. The President's Commission on Law Enforcement and Administration of Justice contains a Task Force Report on Narcotics and Drug Abuse which is helpful in understanding the narcotics problem, and which should be essential for the practicing attorney preparing a marihuana defense. It can be obtained from the Superintendent of Documents, U.S. Government Printing Office, Washington, D. C. 20402 for one dollar. The major recommendation of the commission was to devise and execute a plan of reasearch covernign all aspects of marihuana use. Clearly, we donnot know enough.

The notion that marihuana use inevitably leads to crime or use of addictive narcotics has been largely dispelled. Arguably, alcohol presents a greater social evil, although, as the Supreme Judicial Court of Massachusetts

pointed out, "the effects of alcohol upon the user are known. . . . the legislature is warranted in treating this known intoxicant differently from marihuana. . . ." Commonwealth v. Leis, 243 N.E. 2d 898, 905 (Mass. 1969). See generally Pet & Ball, Marihuana Smoking in the United States, 32 Fed. Prob. 9 (1968). The similarity between alcohol and marihuana should, however, certainly be explored by counsel. Moreover, counsel should be certain that the court members can distinguish marihuana from opiates or other "hard" narcotics.

It has been argued several times that the classification of marihuana with opiates for the purposes of sentencing amounted to cruel and unusual punishment. Commonwealth v. Leis, *supra*; United States v. Ward, 387 F.2d 843 (7th Cir. 1967). In both cases, the courts were not persuaded because they deemed scientific knowledge insufficient. It should be remembered, however, that in both cases a specific statute was involved, whereas in the military, marihuana offenses are prosecuted as conduct prejudicial to good order under Article 134, and punished under an executive order. United States v. Greenwood, 6 USCMA 209, 19 CMR 335 (1955). Presumably an executive order is entitled to less judicial deference than is a statute. See Davis, Administrative Law, §30.08, 550-53.

Counsel who desire to attack the maximum sentence in marihuana cases under the rationale of United States v. Turner, 18 USCMA 55, 39 CMR 55 (1968) (possession of second more than disorder, but punishable by analogy to federal statute only) will find a useful discussion in Oteri & Norris, The Use of Expert and Documentary Evidence in a Constitutional Attack on a State Criminal Statute: The Marihuana Test Case, 56 Calif. L. Rev. 29 (1968).

An analysis of data accumulated by the Records Control and Analysis Division, US Army Judiciary, made by the Defense Appellate Division some months ago should also help place marihuana offenses in their proper perspective. From January to October, 1968, there were 40 general courts-martial limited to either use of possession of marihuana. Twenty-seven of these were tried at one military installation where an unusual problem with marihuana apparently exists. Of these 27, 12 were treated as felonies by the inclusion in the approved sentence of either a dishonorable discharge or

confinement for a year or more. Throughout the rest of the Army, confinement for a year or more was approved only once by a convening authority, and there were no dishonorable discharges approved. Generally speaking, then, marihuana is treated as a misdemeanor regardless of the maximum imposable punishment. The vast majority of marihuana offenses are disposed of in the Army by inferior courts.

THE NEW DANGEROUS DRUG REGULATION

The proliferation of so-called "dangerous drugs" has led to an attempt at regulation by the Army. Prosecutions under Paragraph 18.1, Change 2, Army Regulation 600-50 (15 May 1968) are multiplying. This regulation generally restates the more salient portions of the Federal Drug Abuse Control Amendments of 1965. By adopting the congressional scheme of dealing with the exploding field of drugs, the Army has in essence delegated to the Secretary of Health, Education and Welfare the ability to prescribe the drugs to be proscribed by the regulation.

The regulation prohibits the possession, use, sale or transfer of depressant, stimulant or hallucinogenic drugs. What is meant by "depressant, stimulant, or hallucinogenic drug" is largely determined by the Secretary of Health, Education, and Welfare. See 21 CFR 166. Can the power to proscribe criminal conduct for military personnel be so delegated? Can the Army simply restate a federal statute in this manner and thus effectively raise the maximum punishment from one to two years? It would seem that such a tactic effectively undercuts the rationale of United States v. Turner, 18 USCMA 55, 39 CMR 55 (1968). The entire regulation may be simply precatory in nature, simply exhorting the service member to obey the law. As the Court of Military Appeals has said, such an order "is commendable as a form of counselling, to hold its violation punishment under Article 90 is quite something else." United States v. Bratcher, 19 USCMA 125, 39 CMR 125 (1969). The same may be true under Article 92, Counsel defending dangerous drug cases would be well advised to explore these avenues of approach before trial.

RECENT CASES OF INTEREST TO DEFENSE COUNSEL

BORDER SEARCHES--BODY CAVITIES-- A Border search of body cavities for narcotics must be preceded by "clear indication" or "plain suggestion" that the narcotics are being smuggled. Morales v. United States, 406 F.2d 1298 (9th Cir. 1969).

SELF-INCRIMINATION--The privilege against self-incrimination does not prohibit prosecution for selling narcotics without a written order form. Morales v. United States, 406 F.2d 1135 (3d 1135 (2d Cir. 1969).

GUILTY PLEA-VOLUNTARINESS -- An accused whose guilty plea is induced by misleading advice from his counsel (here as to the binding nature of pretrial agreement) can later challenge the voluntariness of his plea. State v. Rose, (Missouri Supreme Court), 5CrL 2084 (14 April 1969).

GLUE SNIFFING --SPECIFICATION-- A specification alleging that the accused did "wrongfully sniff glue with the intent to become intoxicated" is sufficiently definite to state an offense under Article 134, Uniform Code of Military Justice. NCM 68 3150 Limardo, 21 March 1969. (We doubt that this alleges an offense).

TRIAL COUNSEL ARGUMENT-- An argument on sentence that referred to accused as the "weak link in the chain" and that stated if the accused were not punished, the effects of his behavior would be carried to his whole company was improper and an appeal to assess punishment to meet the needs of local conditions. Sentence reassessed. CM 420049, Jockell, 23 April 1969

MULTIPLICITY--Communicating a treat and assault held multiplicitious for sentence purposes. CM 419890, Lucas, 23 April 1969.

UNCHARGED MISCONDUCT--SENTENCE-- Despite the fact that the trial was held under the 1969 Manual, one member of the Board of Review declined to rely on Paragraph 76a(2) which allows consideration of other acts of misconduct on sentence. In a concurring opinion, he assumed prejudice and joined

the majority in reassessing the sentence. CM 420098,
Daniel, 17 April 1969 (Frazier, J., concurring).
[Majority opinion was a short form decision modifying
sentence].

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