James A. Washington, an Unsung Hero

The Judge Who Ruled That Marijuana Use Could Be Justified by “Medical Necessity”

By O’Shaughnessy’s News Service


The Facts of the Case

Here are the facts as recounted by Judge Washington in his decision:

“The government has established, and the defendant has not attempted to refute, that on about August 21, 1975, police officers in the course of their normal duties noticed what they believed to be cannabis plants on the rear porch and in the front windows of defendant’s residence... A warrant was issued and a search of the premises conducted on August 25, 1975. Several plants and a dried substance later identified as marijuana were seized and defendant’s arrest followed.”

“At trial, the government’s evidence demonstrated that the substance seized at defendant’s residence was marijuana, possession of which is prohibited by D.C. Code Section 33-402, thus establishing all the elements of the crime charged. Moreover, defendant admitted that he knew the marijuana in question and that it was intended for his personal consumption. He further testified that he knew that possession and use of cannabis are restricted by law. “Defendant nonetheless sought to exonerate himself through the presentation of evidence tending to show that his possession of the marijuana was the result of medical necessity. Over government objection of irrelevancy, defendant testified that he had begun experiencing visual difficulties as an undergraduate in the late 1960s. In 1972 a local ophthalmologist, Dr. Benjamin Fine, diagnosed defendant’s condition as glaucoma, a disease of the eye characterized by the excessive accumulation of fluid causing increased intraocular pressure (IOP), distorted vision and, ultimately, blindness. “Dr. Fine treated defendant with an array of conventional drugs, which stabilized his glaucoma’s pressure but only for a short time, so he was forced to try other drugs which at best could only be described as palliative. “Defendant then learned of the existence of marijuana and the potential benefits which it offered to individuals suffering from glaucoma. “Defendant’s decision to use marijuana was conditioned on its potential benefits for his condition. He was not interested in using marijuana to obtain a ‘high’. “The defendant’s medical condition made it impossible for him to continue to use the array of conventional drugs, which had finally stabilized his glaucoma’s pressure, and he feared that if he discon- tinued their use, his condition would worsen. “Defendant appealed to Judge Washington’s decision in O’Shaughnessy’s. By 1974, defendant’s IOP could no longer be controlled by these medi- cations. By 1974, defendant’s IOP could no longer be controlled by these medications, which had been used as a treatment for the eye disease and were no longer effective as defendant’s tolerance increased. “Defendant’s condition was not amenable to any other treatment. “Defendant was advised that surgery offers only a slim possibil- ity in his case, and that treatment with conventional medications was ineffective, and also that surgery, while offering some hope of preserving the vision which remained to defendant, also carried significant risks of immediate blindness. “The results of the experimen- tal program indicated that the ingestion of marijuana from Schedule One: “Marijuana was one of the safest therapeutically active substances known to man.”

JAMES A. WASHINGTON in 1955. This was the only photo we could obtain (courtesy Missouri-Sinai Research Center, Howard University Archives).

“Liquor manufacturers and distributors, still recovering from the effects of Prohibition, were interested in eradicating the potential competition from a drug often used for recreational purposes. In addition, criminalizing marijuana simplified the task of eliminating the competition for jobs during the Depression posed by the principal users of the drug, Mexican migrant laborers.”—Judge James A. Washington

Similarly, no alternative course of action would have secured the desired result through an illegal channel. Because of defendant’s tolerance, treatment with other drugs has become ineffective, and surgery involves only a slim possibility of favorable results coupled with a significant risk of immediate blindness. Neither the origin of the compelling circumstances nor the existence of a more acceptable alternative prevents the successful assertion of the necessity defense.

The question of whether the evil avoided by defendant’s action is less than the evil inherent in his act is more difficult. It requires a balancing of the interests of this defendant against those of the government. While defendant’s wish to preserve his sight is too obvious to necessitate further comment, the government interests require a more detailed examination.

“Medical evidence suggests that the prohibition is not well founded....”

How’s that for a soundbite?

Washington’s decision continued: “Reports from the President’s Commission and the Department of Health, Education and Welfare have concluded that there is no conclusive scientific evidence of any harmful effects from the use of marijuana. According to the most recent HEW study, research has failed to establish any substantial...
physical or mental impairment caused by marijuana. Reports of chromosome damage, reduced immunity to disease, and psychosis are unconfirmed; actual evidence is to the contrary.

“Marijuana does not appear to be physically addictive or to cause the user to develop a tolerance requiring more and more of the drug for the same effects.”

“Furthermore, unlike the so-called hard drugs, marijuana does not appear to be physically addictive or to cause the user to develop a tolerance requiring more and more of the drug for the same effects. The current HAW report also notes the possibility of valid medical uses for this drug...”

The Court finds that this defendant does not fall within the third limitation to the necessity defense. The evil he sought to avert, blindness, is greater than that he performed to accomplish it, growing marijuana in his residence in violation of the District of Columbia Code. While blindness was shown by competent medical testimony to be the otherwise inevitable result of defendant’s disease, no adverse effects from the smoking of marijuana have been demonstrated...”

Wide applicability
Judge Washington could have ended his decision at this point, but he went on to assert its applicability to other necessity-defense cases. He projected and refuted an argument that would deny the necessity defense based on the literal wording of the DC Code section, which makes no reference to extenuating circumstances. He also discussed whether a defendant should have to prove necessity “beyond a reasonable doubt” and concluded that “by a preponderance of the evidence” was sufficient.

As John Karr put it, “Judge Washington made an effort to find for Randall in every important way.”

Add Recollections from Karr
“Randall came to me through Alice O’Leary, who was an employee of a client of mine at the time, a company called The American Theater. Her story was very touching: ‘My boyfriend has this problem. He’s been hounded for growing marijuana on our back porch on Capitol Hill and he’s going blind from glaucoma.’ So I said ‘Okay, bring him in...”

“He told me his very interesting story. So I called a Dr. Brown either at NIH or NIMH and said, ‘What’s current on the use of marijuana as a medicine?’ And he said there were three programs ongoing that NIH knew about. One, I think, in Alabama; one in North Carolina; and one out at the Jules Stein Institute [UCLA]. He said one involved a THC solution delivered intramuscularly; one program reduced it to a pill taken orally; and the one in California was doing it by smoking marijuana.

“So I called the people in North Carolina and I think it was Alabama and they said that their results were very mixed. But Dr. Hepler at UCLA said ‘I got this program going and it looks like a real winner.’ So we sent Randall out to UCLA and Hepler tested him.

Alice was the real driver in this thing because she was very concerned about him.

“He had no money for the defense. In fact, we never got paid for this. It may have been Alice who put together enough money for the trip. She was the real driver in this thing because she was very concerned about him. Anyway, he went out there for about 10 days and Hepler said ‘It’s a winner.’ I asked Hepler if he would come and testify. We advanced the money for that, I think it was 13 hundred bucks but it didn’t matter because at this point we were all excited about the case... Sure enough, he came and he was a terrific witness.

“There were some amusing moments in the trial. I remember the delivery of one of the plants from the FBI storeroom to the courtroom, wrapped as if it was a gift from a florist. It reminded me of a revue by the old comedy team, Olsen and Johnson, which began with a hotel bellhop crossing the stage and calling out ‘Plant for Mrs. Jones. Plant for Mrs. Jones.’ At the end of each act he would reappear and the plant would have gotten larger and larger and larger... The FBI agent carefully unwrapped the plant, which was now withered, and the prosecutor asked him to roll a joint from it, which he did. This was to prove that it was a usable amount of marijuana...

“At one point I asked my contact at NIMH, Dr. Brown, whether there was a program to get him marijuana legally. And he said you’ve got to get an ‘Investigational New Drug’ approval from the FDA. We called FDA and they sent us the forms and we helped Randall fill them out and send them back and eventually an Investigational New Drug license was issued. And for I don’t remember how long, Randall would show up at Morton’s Drug Store in the 300 block of Pennsylvania Avenue Southeast, three blocks from the Capitol of the United States, and pick up his weekly supply of marijuana. Which looked like an olive-drab pack of cigarettes with a band around it saying ‘Property of the United States of America.’ I remember it vividly because it was just so perfect.

“I called FDA and was told that it was grown in Mississippi and processed and packaged in North Carolina, where all the cigarettes are processed and packaged...”

“Judge Washington was not only very bright, but he was willing to make a decision that might be unpopular or might be on the leading edge of the law.”

–Paul Smollar

PS.
Attorney Paul Smollar, who worked with Karr on U.S. v. Randall, recalls: “As a memento, Bob took two cigarettes out of the first pack he received from the government, removed the marijuana, and framed the papers—one for each of us to commemorate our victory in court’...

Medical necessity” was then a new argument. It had been argued before in criminal cases, but never in connection with marijuana. John is a very creative thinker and an excellent trial lawyer. And he had a good working relationship with Judge Washington. They respected one another. Judge Washington was not only very bright, but he was willing to make a decision that might be unpopular or might be on the leading edge of the law. His decision for Randall was far ahead of its time.

Some 35 years after Judge Washington found for Randall, attorney Robert Raich framed a “medical necessity” argument on behalf of the Oakland Cannabists Buyers Club in a case that went to the U.S. Supreme Court. Raich was unaware of Judge Washington’s decision in support of Randall. “I wish I had known about it,” he told us. “It was scholarly, well-reasoned and well written. It would have incorporated it... I wish we had more such judges these days.”

Far ahead of his time
Judge James A. Washington died in 1998 at the age of 83. His obituaries made reference to his five-year stint in the War Division of the Justice Department, joining the Howard faculty in 1946, while he did as a lawyer in connection with Brown v. Board of Education and other cases leading to the end of public-school segregation in 1954, and a terrible fall that confined him to a wheelchair for the last 20 years of his life. His decision in U.S. v. Randall recognizing a marijuana user’s medical-necessity defense was too far ahead of its time to be recognized as a signal achievement.