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D.C. Superior Court

CRIMINAL LAW & PROCEDURE
Medical Necessity

Defendant is not guilty of possession of marijuana because of defense of medical necessity where he shows that ingestion of marijuana smoke had beneficial affect on his eye condition, normalizing intraocular pressure and lessening visual distortions.

UNITED STATES v. RANDALL, Super. Ct. D.C. Crim. No. 65923-75, November 24, 1976. *Opinion* per Washington, J. *John Karr* for defendant. *Richard Stolker* for United States.

WASHINGTON, J.: On August 27, 1975, defendant Robert C. Randall was arrested and charged with possession of a dangerous drug, LSD, and of a narcotic, marijuana, in violation of Sections 33-702(a)(4) and 33-402 respectively of the District of Columbia Code. Defendant moved to suppress these items as evidence, alleging that they were the fruit of an illegal search. After argument, the motion was granted with respect to the LSD, and the associated charge subsequently dismissed; the motion was denied with respect to the marijuana. An additional pre-trial request, a motion to dismiss on constitutional grounds, was withdrawn. The case came for trial by the Court on July 20 and 22, 1976, after the completion of which this matter was taken under advisement. Post trial briefs were invited, and a memorandum on behalf of the defendant was received on September 14. Having been recessed between September 17 and October 20, and after further delay occasioned by the illness of the trial judge, the Court pursuant to due deliberation and upon consideration of defendant's post trial submission, now renders this decision.

FACTS

The facts are not in dispute. The government has established, and the defendant has not attempted to refute, that on or 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. On the basis of these observations and a field test which confirmed the presence of THC, the active ingredient of marijuana, a warrant was issued and a search of the premises conducted on August 23, 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[1] by D.C. Code Section 33-402, thus establishing all the elements of the crime charged. Moreover, defendant admitted that he had grown the marijuana in question and that it was intended for his personal consumption. He further testified that he knew that possession and use of this narcotic 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 1960's. 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, distorted vision and, ultimately, blindness. Dr. Fine treated defendant with an array of conventional drugs, which stabilized the intraocular pressure when first introduced but became increasingly ineffective as defendant's tolerance increased. By 1974, defendant's intraocular pressure could no longer be controlled by these medicines, and the disease had progressed to the point where defendant had suffered the complete loss of sight in his right eye and considerable impairment of vision in the left.

Despite the ineffectiveness of traditional treatments, defendant during this period nonetheless achieved some relief through the inhalation of marijuana smoke. Fearing the legal consequences, defendant did not inform Dr. Fine of his discovery, but after his arrest defendant participated in an experimental program being conducted by ophthalmologist Dr. Robert Hepler under the auspices of the United States Government. Dr. Hepler testified that his examination of the defendant revealed 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 experimental program indicated that the ingestion of marijuana smoke had a beneficial effect on defendant's condition, normalizing intraocular pressure and lessening visual distortions.

OPINION

This is a case of first impression in this jurisdiction, one which raises significant issues. Consequently, the Court recognizes its responsibility to set forth clearly and in some depth its understanding of the applicable law. The legal questions presented by this case can be stated as follows:

1. Does the common law recognize the defense of necessity in criminal cases? If so, what are its parameters?
2. Have the elements of a necessity defense been established here?

These questions will be dealt with separately in the discussion which follows.

I. *Does the common law recognize the defense of necessity in criminal cases? If so, what are its parameters?*

Although the defense of necessity was seldom raised successfully at common law,[2] the existence of such a defense has been recognized by legal scholars since the turn of the twentieth century. Professor Courtney Kenny has noted, for example, that the same logic which prevents the imposition of civil liability in situations in which one has harmed the person or property of another in order to avoid a greater harm may also be applicable in certain criminal cases.[3]. Similarly, Clark and Marshall in their treatise on criminal law note several situations in which the necessity defense may be raised to criminal charges.[4] This common law defense is also recognized by such legal scholars as William L. Burdick,[5] Rollin F. Perkins,[6] and M. Cherif Bassouini.[7] More recently, the necessity defense has been considered in leading law reviews,[8] in modern reference works,[9] cases,[10] the Model Penal Code and the various state laws which have been revised under its influence.[11] While a consensus has not been reached concerning the specific contours of the defense, there is substantial unanimity in the belief that such a defense exists.

As Clark and Marshall, *supra*, note:

> An act which would otherwise be a crime may be excused if the person accused can show that it was done only in order to avoid consequences which could not otherwise be avoided, and which, if they had followed, would have inflicted upon him, or upon others whom he was bound to protect, inevitable and irreparable evil.[12]

Necessity is the conscious, rational act of one who is not guided by his own free will. It arises from a determination by the individual that any reasonable man in his situation would find the personal consequences of violating the

(Cont'd. on p. 2251 - Necessity)

1. As noted hereinafter, marijuana is not totally prohibited under D.C. Code 33-402 *et seq.* However, in view of the federal proscription, the Court notes that marijuana cannot be possessed legally in the District of Columbia.

2. As Judge Leventhal noted in *United States v. Moore*, 486 F.2d 1139, 158 U.S. App. D.C. 375, 417 (D.C. Cir. 1973), the common law defense of necessity has been "more discussed than litigated".

3. C. Kenny, *Outlines of Criminal Law* 68-70 (1907).

4. W. Clark and W. Marshall, *Treatise on the Law of Crimes* 104 et seq. (4th ed. 1940).

5. W. Burdick, *The Law of Crime* 260 (1946).

6. R. Perkins, *Perkins on Criminal Law* 951 (2nd ed. 1969).

7. M. Bassouini, *Criminal Law and its Processes* 108 et seq. (1969).

8. See, for example, Fletcher, *The Individualization of Excusing Conditions*, 47 S. Cal. L. Rev. 1274 (1974), and Note, *Justification: The Impact of the Model Penal Code on Statutory Reform*, 75 Colum. L. Rev. 914 (1975).

9. See, for example, 1 R. Anderson, Wharton's Criminal Law and Procedure 403-405 (1957), 21 Am Jr 2d *Criminal Law* §99.

10. Some sample cases will be discussed hereinafter.

11. Model Penal Code, §3.01 and 3.02, and Comment (Tent. Draft No. 8, 9, 10, 1958).

12. W. Clark and W. Marshall, note 4, *supra*.

TABLE OF CASES

D.C. Superior Court

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

UNITED STATES MAGISTRATES' SCHEDULE FOR JANUARY, 1977

U.S. Magistrate LAWRENCE S. MARGOLIS

Civil trials, pretrials and motions; probation violation hearings; sentences; counsel appointments, arraignments and sub-arraignments.

U.S. Magistrate JEAN F. DWYER

Preliminary hearings, misdemeanor pleas, trials and sentences; civil trials, pretrials, and motions as available; Federal Reservation Sanity Hearings; traffic summons and trials; back-up Magistrate for emergency arrest and search warrants.

U.S. Magistrate HENRY H. KENNEDY, JR.

Bail in felony and misdemeanor cases and bail for Judges' Bench Warrants; civil trials, pretrials, and motions as available; Magistrate for arrest and search warrants including emergency night and weekend warrants; probation violation hearings and misdemeanor sentences.

BELL BOY NUMBER 626-2206

No preliminary hearings are scheduled for January 7th and 10th.

DISPOSITIONS

Number, Parties, Demand Amount, Action Taken and Attorneys

BY THE CLERK

CA8596-75 Knoll International, Inc. v. Yettekov Wilson. Acct., $1,510.61. Default judg., $1,420.61. Baylinson & Kudysh

FAMILY DIVISION
DOMESTIC RELATIONS BRANCH
NEW CASES

Number, Parties, Grounds and Attorney for Plaintiff

D3931-76 Sidberry, Barbara v. Lionell Dwight. Vol. Sep. A. T. Moss

D3932-76 Jackson, Lonie M. v. Marcellus W. Vol. Sep. A. T. Moss

D3933-76 Alabi, Jewyll R. v. Rasheed. Vol. Sep. R. W. Johnson

D3934-76 Baumgardner, Cornelius v. Angela. Vol. Sep. R. C. Liotta

D3935-76 Syring, David Lee v. Jean K. Vol. Sep. H. A. Calevas

D3936-76 Weisberg, Paul S. v. Tamara Levin. Vol. Sep. J. W. Karr

D3937-76 Matthews, Brenda R. v. John T. Vol. Sep. E. Sayles

D3938-76 Grey, Sterlon v. Patricia R. Vol. Sep. E. Sayles

D3939-76 Hall, Alma Marie v. Robt. V. Vol. Sep. J. D. Green

D3940-76 Henderson, Hunion v. Lucy. Vol. Sep. M. D. Haden

D3941-76 Savin, Charlotte L. v. L. Andrew. Vol. Sep. A. S. Clarke

D3942-76 Phillips, Ethelmae L. v. James O. Vol. Sep. R. W. Rifkin

D3943-76 Blue, Anita Y. v. Prentice Lee. Vol. Sep. J. E. Lappin

D3944-76 Sias, Willie Mae v. Joseph O. Vol. Sep. J. E. Lappin

D3945-76 Uznanski, June C. v. Henry K. T. Vol. Sep. R. H. Myers, Jr.

D3946-76 Jackson, Brenda J. v. Jerome Ray. Vol Sep. S. C. Jackson

D3947-76 Haney, Sandra L. v. Gregory F. Vol. Sep. S. H. Lang

D3948-76 Moore, Alonzo v. Sanders, Hattie. Vol. Sep. S. J. Levine

D3949-76 Moore, Alonzo v. Cantey, Lizzie Ruth. Vol. Sep. S. J. Levine

BAR ASSOCIATION OF THE D.C.

NOTICE

The REAL PROPERTY LAW COMMITTEE will hold an EAT-N-LEARN Luncheon at 12:00 noon on Wednesday, January 19, 1977. The luncheon will be held in the Board of Directors room of the Bar Association, 1819 H Street, N.W., Room 300.

Our guest will be:

LOUIS W. COYNE, President
Coyne Mortgage Associates

His topic will be:

The Availability of Money and the Role of a Mortgage Banker

All members of the bar association are welcome. For reservations please call the bar office at 223-1480.

DIXON INTRODUCES LOTTERY LEGISLATION

Councilman Arrington Dixon, D-Four, has announced his introduction of the Quick Buck and Tax Relief Act of 1976, a bill to legalize several forms of gambling, including, but not limited to bingo, numbers, on and off track betting, raffles and similar games of chance in the District.

This bill does not create a separate lottery commission as in many states, but would create a District of Columbia Lottery Administration which would be managed by an Administrator housed within the Department of Finance and Revenue. The purpose of this legislation, says Dixon, "is to provide an additional source of revenue for the District Government while providing a sound form of tax relief for District Residents."

Generally, the bill follows Maryland Lottery Law. Advised that the Maryland Lottery reached a record $2 million per week sales in September, Dixon expressed his concern that D.C. was losing thousands of dollars in possible revenue to neighboring jurisdictions.

The Director of the Department of Finance and Revenue is authorized to promulgate rules and regulations to carry out the purpose of the legislation and also delegate this authority to the Administrator of the Lottery Administration. All monies received from the gross sales of lottery tickets less the commission of authorized selling agents are placed in a special account known as the Lottery Fund. Under a scheme to be devised by the administrator, all ticket sales will be split between the District Government and the winners. Both daily and non-daily tickets are authorized to be sold, and ticket agents are directed to receive up to 5% of the purchase price of their gross sales and are also entitled to a special 1% windfall in certain cases to encourage sales.

Citing this as, "an effort to substantively address the grave and burdensome tax crisis currently facing District Residents," Dixon admits, "I realize that this does not provide the plenary answer to our tax problem, but everyone can use a 'quick buck' now and then, even the District Government."

NECESSITY

(Cont'd. from p. 2249)

law less severe than the consequences of compliance.[13] While the act itself is voluntary in the sense that the actor consciously decides to do it, the decision is dictated by the absence of an acceptable alternative. Unlike compulsion or duress, necessity arises from the press of events rather than through the imposition on the actor of the will of another person.[14]

Traditionally, the defense of necessity has been characterized as being either a justification of or an excuse for criminal activity.[15] As a justification, the concept has been used to negate the criminal nature of a prohibited activity. This position is based upon a conception of criminality as a combination of a prohibited act and an evil state of mind.[16] Where the criminal act was compelled by outside circumstances rather than through the exercise of the actor's free will, the requisite criminal intent is considered to be lacking. Thus, although the prohibited act has been committed, the elements of the crime are incomplete and the actor as well as anyone similarly situated must be relieved of criminal responsibility.

Necessity has also been seen in the law as a form of excuse. Under this view, criminal responsibility arises upon the performance of every willed action, regardless of the underlying reason for the choice.[17] The actor may be excused from punishment for public policy reasons, but not because he was without blame. Thus, although guilt is established punishment is not required because of extenuating circumstances which mitigate the seriousness of the offense. Under this theory, the necessity defense must be applied on a case by case basis rather than by reason of a general rule.

Common to both of these views is the belief that punishment should not be visited upon one who did not act of his own free will. Penalizing one who acted rationally to avoid a greater harm will serve neither to rehabilitate the offender nor to deter others from acting similarly when presented with similar circumstances. This point is implicitly recognized by the three traditional limitations on the applicability of the necessity defense. The defense will not shield an actor from criminal responsibility if:

13. C. Kenny, note 3, *supra.*

14. Three situations in which the necessity defense is not applicable should be noted. First, the defense cannot shield one who acts in violation of law out of a belief that the law is morally wrong. The constraints of one's conscience are not sufficient external circumstances for the purposes of this defense. Second, the compelling circumstances must actually exist; a mistake of fact, no matter how reasonable, defeats the defense. Thus a person who seeks the shelter of the necessity defense accepts the risk that he has perceived the situation incorrectly. Third, although it has been suggested that this aspect is ripe for change, it is still the law that necessity cannot justify the taking of an innocent human life.

15. See the discussion of justification and excuse in Note, *Justification: The Impact of the Model Penal Code on Statutory Reform*, 75 Colum. L. Rev. 914 (1975).

16. C. Kenny, note 3, *supra*, at p.33.

17. R. Perkins, note 6, *supra*, at p.749.

1. The duress or circumstance has been brought about by the actor himself;
2. The same objective could have been accomplished by a less offensive alternative which was available to the actor; or
3. The evil sought to be averted was less heinous than that performed to avoid it.[18]

In brief, the necessity defense may not be raised unless the actor was reasonably compelled by circumstances to commit the proscribed act. It is unfair to excuse one who has brought the compelling situation upon himself, and it is violative of public policy to grant an exemption from punishment for behavior more detrimental to society than the consequences the actor seeks to avoid, or for behavior which is not the least offensive alternative. The application of these principles is well illustrated by the case law.

The first limitation, that necessity cannot serve as a defense where the compelling circumstances have been brought about by the accused, is a significant component of the decision in *United States v. Moore*, 486, F.2d 1139, 158 U.S. App. D.C. 375 (D.C. Cir. 1973). Appealing from a conviction in the District Court for possession of heroin in violation of two federal statutes, defendant did not dispute that the government had established all the elements of the offenses charged. Instead, he urged that because of his heroin addiction, he lacked capacity to choose to act otherwise, and therefore that his conviction should be vacated because the requisite criminal intent was absent. While none of the opinions represented a majority of the nine judges, the concurring opinions by Judge Wilkey, joined by Judges MacKinnon and Robb, and by Judge Leventhal joined by Judge McGowan, noted appellant's role in causing his addiction. Since drug dependence was a condition which the appellant had freely brought upon himself, he could not escape criminal sanctions by showing that he had been impelled by addiction to commit the prohibited acts.

The second limitation, that necessity cannot be raised where there is a less stringent alternative, was demonstrated in *Bice v. State*, 109 Ga. 117, 34 S.E. 202 (Ga., 1899). Convicted of a violation of a statute prohibiting the transporting of liquor to a church, defendant appealed, alleging, *inter alia*, medical necessity. Defendant admitted that liquor was contained in his carriage, which was parked in the vicinity of a church while he and his wife attended services, but contended that this proximity was necessary because the intoxicant was being used by his wife, for medicinal purposes pursuant to the instructions of her physician. The court noted the legal use of liquor in the treatment of such disorders as heart disease and colic but upheld the conviction, stating:

> If one should unfortunately be subject to any of these ills, he must either stay at home, or, if he wishes to provide against sudden attacks, take with him some other kind of medicine.[19]

The third limitation, that the harm avoided must be more serious than that performed to escape it, was a factor in the decision in *People v. Brown*, 70 Misc. 2d 224, 333 N.Y.S. 2d 342 (1972). Defendants, inmates at the facility known as the Tombs, had been convicted of rioting and seizing control of the prison. On appeal, the prisoners alleged that they had acted in protest of the crowded and inhumane conditions which prevailed at the facility, and that this justification should shield them from criminal penalties. The court disagreed, however, noting that the harm to society inherent in permitting this transgression among convicted criminals was more potentially damaging than their grievances.

In sum, the necessity defense has been recognized at common law as one which arises where the actor is compelled by external circumstances to perform the illegal act. Provided that the case does not fall within the scope of the three limitations, necessity constitutes a defense to criminal liability.

II. *Has necessity been established in the instant case?*

In the case at bar, defendant alleges that he is suffering from glaucoma, an incurable eye disease which results inevitably in loss of sight. While conventional medications and surgery offer little hope of improvement, defendant contends that the inhalation of marijuana smoke has a beneficial effect on his condition, relieving the symptoms and retarding the progress of the disease. Defendant therefore asserts that he should not be visited with the criminal consequences of possession of the proscribed narcotic marijuana. The Court finds upon these facts that the defendant has established the basic elements of the traditional necessity defense. It remains to consider whether he is barred from asserting it by one of the limitations.

A brief consideration reveals that of the three limitations, only the third poses any threat to this defendant's use of this defense. While the exact cause of defendant's glaucoma is unknown, neither the government nor any of the expert witnesses has suggested that the defendant is in any way responsible for his condition. Similarly, no alternative course of action would have secured the desired result through a less illegal channel. Because of defendant's tolerance, treatment with other drugs has become ineffective, and surgery offers 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 in this case.

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's interests require a more detailed examination.

One of the oldest recognized drugs, marijuana was not regulated in the United States until the Pure Food and Drug Act of 1906, which required that the presence of marijuana be indicated on the labels of products of which it was a component.[20] The modern prohibition began in 1937, in response to primarily economic pressures[21] without significant inquiry into its effects on users. More recently, the 1970 Controlled Substances Act[22] continued the prohibition of the use of marijuana, but a Presidential Commission was appointed to study its effects. Pending receipt of this report, marijuana was classified as a non-narcotic and although its use was still prohibited, the penalties were considerably reduced, with first offenders being discharged conditionally. The District of Columbia law, however, was not changed, and retains the narcotic classification based on the 1937 Uniform Narcotics Act.

Medical evidence suggests that the prohibition is not well founded.[23] 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 harm attendant upon the use of marijuana.[24] According to the most recent HEW study,[25] 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. Furthermore, unlike the so-called hard drugs, marijuana does not generally 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.[26] The current HEW report also notes the possibility of valid medical uses for this drug. Both the President's Commission and HEW found the current penalties too harsh in view of the relatively inoffensive character of the drug, and recommended decriminalization. Commissions of study in other countries have reached similar conclusions,[27] and several states have taken steps in this direction.[28]

The right of an individual to protect his body has been weighed by several courts

18. C. Kenny, note 3, *supra*.

19. *Bice*, *supra*, at 203.

20. Pure Food and Drug Act of 1906, ch. 3915, 34 Stat. 768.

21. 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. Brecher, *Licit and Illicit Drugs*, (Little, Brown, 1972). 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. Musto, "The Marijuana Tax Act of 1937", Arch. Gen. Psychiat., Vol. 26, Feb., 1972.

22. 21 U.S.C. *801 et seq.*

23. This observation should not be taken as a holding on the medical merits of this drug in general, an issue this Court is not called upon to decide.

24. Testimony of Director of the National Institute of Mental Health, a division of the Department of Health, Education and Welfare, at H. Rep. #91-1444 on P.L. 91-513. "First Report of the National Commission on Marijuana and Drug Abuse; Marijuana: A signal of Misunderstanding." "Second Report of the National Commission on Marijuana and Drug Abuse; Drug Use in America: Problems in Perspective."

25. HEW, "Marijuana and Health, Fifth Annual Report to the U.S. Congress," at 4-7 (1975). This document was entered in evidence as Defendant's Exhibit #1.

26. HEW, "Marijuana and Health", supra, note 25, at p.6.

27. See for example the Indian Hemp Drugs Commission of 1894, sponsored by the Indian and British governments, the Baroness Wooton Report of 1968 in the United Kingdom, the LeDain Report of Canada in 1970.

28. Thirty-nine states have adopted all or most of the Uniform Controlled Substances Act, which ceased the classification of marijuana as a narcotic: Alabama, Arkansas, Connecticut, Delaware, Florida, Georgia, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia,

against the interest of the government in guarding the health and morals of the general public. Most importantly, the Supreme Court addressed this question in *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973), cases which attacked the constitutionality of state statutes restricting abortions. In an opinion which stressed the fundamental nature of the right of an individual to preserve and control her body, the Court held that abortion cannot constitutionally be denied a woman under certain circumstances. These decisions recognize first that a woman may at any stage end a pregnancy which threatens her own existence, her right to life being more significant than that of the fetus, however close to term. The opinions go on to affirm the prerogative of a woman during the first three months of pregnancy to terminate it for any reason whatsoever, establishing that she may control her body at the expense of the life of a fetus less than four months old. The significance of these decisions to the instant case lies in the revelation of how far-reaching is the right of an individual to preserve his health and bodily integrity.

The federal district courts have also dealt with this problem. In *Stowe v. United States*, Civil No. 75-0218-B (W.D. Okla., August 14, 1975), plaintiffs alleged that they or their spouses suffered from cancer, and that they had been successfully treated with laetrile, a drug banned by the Food and Drug Administration on the ground that its effectiveness in the treatment of cancer is still in doubt. In an unreported interim decision, the court found that the plaintiff's right to medical treatment with a substance which had demonstrably favorable effects on their cancers superseded any interest of the government in protecting the general public from a drug whose properties were not conclusively proven. Accordingly, the FDA was enjoined from preventing the plaintiffs from importing stated quantities of laetrile for their own use. See also *Keene v. United States*, Civil No. 76-0249-H (S.D. W.Va., August 17, 1976).

Under these circumstances, 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. Unlike the situation in *Roe* and *Doe*, no direct harm will be visited upon innocent third parties; any major ill effects from the inhalation of marijuana smoke will occur to the defendant alone. Furthermore, defendant, by growing marijuana for his own consumption, cannot be said to be contributing to the illegal trafficking in this drug, and thus injuring, however nebulously, innocent members of the public. In any event, it is unlikely that such slight, speculative and undemonstrable harm could be considered more important than defendant's right to sight.[29]

Nonetheless it may be argued that the necessity defense, because it negates the mental element of criminality, cannot shield a defendant charged under a statute which purports to punish only the act, without any specified mental state.[30] Since the philosophical justification for this defense is the unfairness and ineffectiveness of punishing one who did not act through the exercise of his unfettered discretion, its applicability where the offense charged does not involve the wilful commission of an act is open to question. According to Section 33-402(a) of the District of Columbia Code:

> It shall be unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense, or compound any narcotic drug, except as authorized in this chapter.[31]

On its face, the statute does not admit of any defenses except those which negate the allegation that the accused committed the act. Liability appears to be absolute, to follow inexorably upon the performance of the proscribed action. The case law, however, supports an alternative view.

In *United States v. Weaver*, 458 F.2d 825, 148 U.S.App.D.C. 3 (1972), the United States Court of Appeals interpreted Section 33-402 as requiring a particular state of mind, the absence of words to this effect in the statutory language notwithstanding. There, defendant appealed from conviction of possession of narcotics in violation of section 33-402, citing the trial court's failure to instruct the jury that only a knowing possession was prohibited. Finding the jury instructions adequate, the appellate court affirmed the conviction, noting:

> Although the statute [D.C. Code Section 33-402] does not contain the term [knowingly], the offense prohibited by the law is a knowing possession of the drug.[32]

The commission of the prohibited act without the requisite mental state is not sufficient for commission of the offense. Similarly, in *McKoy v. United States*, 263 A.2d 649 (1970), defendant appealed from a conviction of possession of implements of a crime in violation of D.C. Code Section 22-3601, alleging insufficient proof of intent to use the items for criminal purposes. Affirming the conviction, the court found that while the statute prohibits only the possession of instruments generally employed in the commission of crime, the government must establish not only possession but also intent to use illegally. A mental element is implied in a statute despite its apparent imposition of criminal penalties for the mere commission of the act. See also *Rosser v. United States*, 313 A.2d 876 (1974).

In other jurisdictions, necessity has been raised successfully as a defense to statutes which contain no element of wilfulness or voluntariness. In *State v. Jackson*, 71 N.H. 552, 53 A. 1021 (1902), defendant appealed from a conviction for violation of the compulsory education law. The statute provided criminal penalties for any parent or guardian who did not send his child to school for designated portions of each year, unless absence was approved by the School Board after application and hearing. Defendant refused to allow his daughter's attendance, believing that the delicate state of her health required that she remain at home. The court held that the parent's interest in the preservation of the health of his child was superior to any interest of the state that its future citizens be educated. Recognizing the time required by the administrative process, the court held that the provision for application for permission from the School Board did not offer the accused a significant alternative. Thus, the preservation of health was deemed a valid defense to a statute which contained no requirement of voluntariness, and which appeared to bring criminal sanctions upon the mere performance of the act. See also *State v. Hall*, 74 N.H. 61, 64 A. 1102 (1906). In *Cross v. Wyoming*, 370 P.2d 371 (Wyo. 1962), the necessity defense was successfully raised to preserve property despite an absolute statutory prohibition. There the court reversed a conviction for violation of a statute providing penalties for the killing of moose out of season or without a license. Defendant, who did not deny knowledge of the absolute statutory ban, admitted killing the animals but interposed the defense of necessity. The moose, defendant alleged, were harming his land, eating forage necessary for his cattle, and frightening his family. Under these circumstances, the court held, the accused should not be criminally responsible for his violation of the statute, its absolute language notwithstanding, because the constitutional right of citizens to defend their lives and property cannot be circumvented by legislation. For similar results, see also *Brewer v. Arkansas*, 72 Ark. 145, 78 S.W. 773 (1904), and *State v. Ward*, 170 Iowa 185, 152 N.W. 501 (1915). Thus, the necessity defense has been raised effectively to protect a variety of interests, both within and without this jurisdiction, in connection with so-called strict liability statutes.

The additional subjects require discussion. While the Court has found no precedents precisely analogous to the case at bar, two recent decisions in this jurisdiction have discussed the necessity defense in connection with drug charges. *Gorham v. United States*, 339 A.2d 401 (D.C. App. 1975), and *United States v. Moore, supra.* In *Gorham*, the D.C. Court of Appeals was confronted with appeals from convictions of possession of heroin and of implements of crime in violation of D.C. Code

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Washington, West Virginia, Wyoming. New Hampshire and Vermont have enacted legislation similar in purpose to the Controlled Substances Act. Of the seven states still using the Uniform Narcotics Act, five have enacted legislation specifically removing marijuana from the classification of narcotic. In addition, the Supreme Court of Alaska has held in *Ravin v. State*, 537 P.2d 494 (Alaska, 1975), that the federal and state constitutions protect the right of individuals to have marijuana in their homes for their own use.

29. The Court thus does not reach the constitutional issues raised by the defendant in his briefs and argument. However, the Court agrees that a law which apparently requires an individual to submit to deteriorating health without proof of a significant public interest to be protected raises questions of constitutional dimensions. Furthermore, the Court declines to address defendant's motion for an injunction, believing that it is not ripe for decision at present.

30. This proposition appears in Note, *Criminal Liability without Fault:* A Philosophical Perspective, 75 Colum. L. Rev. 1517, 1541 (1975). However, the Court notes that no authority is cited for this position.

31. This chapter later provides that marijuana may be obtained on prescription, but in view of the total prohibition on marijuana possession, sale and use under federal law, the Court takes judicial notice that it is not legally obtainable in the District of Columbia.

32. *Weaver, supra*, at 4.

§33-402 and 22-3601 respectively. It was alleged that because of the defendants' heroin addiction, they were incapable of harboring the requisite criminal intent and therefore that they should not be held criminally responsible for their actions. Rejecting this defense, the Court held that for reasons of law and public policy, addiction cannot constitute a defense to possession of illegal drugs. Faced with a statute designed to control dangerous drugs, and to provide treatment for addicts who might not otherwise seek it, the Court refused to render a decision which would, in effect, completely nullify the law. The opinion also stresses that drug addiction is not a victimless crime, but rather one whose cost is borne by the taxpayers and the victims of the burglaries, robberies and muggings perpetrated to support drug habits.

In *United States v. Moore, supra*, defendant appealed from conviction of possession of heroin in violation of two federal statutes. Without disputing that the government had established each of the elements of the offense, appellant contended that his heroin addiction negated a primary requisite for criminal responsibility, "the capacity to control behavior."[33] Affirming the conviction, the Court noted that since defendant's ingestion of the heroin had been knowing and voluntary, the compulsion brought about by the drug could not be raised as an excuse for his criminal behavior. As Judge Leventhal in his concurring opinion makes clear, to permit such a defense would be to broaden impermissibly the contours of the original common law defense. Under the defendant's formulation, he argues, court would be constrained to except most drug users from criminal penalties, a consequence in clear violation of the intent of Congress to protect the public. For this reason, and because of the attendant problems of developing objective standards of proof, Judge Leventhal believes that the necessity defense should not be available to this defendant.

Both of these decisions are readily distinguishable from the case at bar. Unlike the defendants in *Moore* and *Gorham*, the accused in the instant case did nothing to bring about the circumstances necessitating his use of the prohibited drug. Recognition by the Court of this defense will not have the effect of nullifying the statute. Medical necessity is difficult to demonstrate, and would not be available to a sufficiently large number of those accused that it would support wholesale use of marijuana. Objective standards of proof can be developed without undue hardship, since the existence of a disease and its response to the drug can be demonstrated scientifically. In addition, permitting this limited use of marijuana, a drug with no demonstrably harmful effects, will not endanger the general public in the way that heroin might. Thus *Moore* and *Gorham* are inapposite; the rulings do not dictate a decision in the instant case.

Finally, it is appropriate here to discuss the burden of proof where the necessity defense is raised. While this issue does not arise in the case at bar, the government having contested only the applicability of the defense, the Court anticipates that it will be significant in the future. In general, an accused who raises any of the so-called affirmative defenses bears to some extent the risk of nonpersuasion. The weight of the burden in any given case, however, depends on the law's conception of the nature of the defense. Where the defense is actually an attempt to negate an element of the crime, for example, it must be proven beyond a reasonable doubt that the facts alleged by the defendant are not to be believed. Where defendant interposes a justification defense such as duress, necessity, or self-defense, on the other hand, a less stringent requirement, such as the preponderance standard, is employed. This point is well illustrated by the varying uses of the insanity defense. Where sanity is seen as an implied element of the crime, the government usually bears the burden of negating defendant's allegation of insanity beyond a reasonable doubt. Where insanity is considered a justification or an excuse for allowing the accused to escape criminal sanctions, however, it is the defendant who must establish it.

Despite this traditional approach, recent cases suggest that the government bears the burden of negating any defense raised by an accused. In *Mullaney v. Wilbur*, 421 U.S. 684 (1975), the Supreme Court considered an attack on the constitutionality of a Maine statute which required an accused who wished to reduce a charge of murder to manslaughter to prove by a preponderance of the evidence that he had acted in the heat of passion. In an opinion which stressed the importance of the presumption of innocence and the resultant placing on the government of the risk of nonpersuasion, the statute was found to be violative of due process. See also *In re Winship*, 397 U.S. 358 (1969), where the Supreme Court, in extending to juvenile cases the obligation of the government to establish guilt beyond a reasonable doubt, discussed the influence of the presumption of innocence in placing the burden of persuasion on the prosecution.

A case in a neighboring jurisdiction, *Evans v. State*, 28 Md. App. 640, 349 A.2d 300 (1975), has interpreted *Mullaney* as requiring the government to bear the burden of disproving all defenses. The District of Columbia Court of Appeals, however, has rejected this view. In *James v. United States*, 350 A.2d 748 (D.C. App. 1976), defendant appealed from a conviction of possession of implements of crime, alleging constitutional infirmities in the statute. Arguing that the provision allowing an accused to show innocent possession impermissibly shifted the burden of proof, the defendant contended that the statute was unconstitutional in light of the *Mullaney* decision. Affirming defendant's conviction, the Court distinguished *Mullaney* on several grounds, most notably because the *Mullaney* decision was based on a finding that there was no valid justification for placing on the defendant the burden of establishing a "fact so critical to criminal culpability".[34] In *James*, however,

> only the accused could know of possible innocent reasons he may have possessed the implements of a crime, and it does not violate due process to require him to give a satisfactory explanation for otherwise validly presumed criminal possession.[35]

This Court believes that *James*, which is controlling in this jurisdiction, takes the correct approach for cases of necessity. Since the defense does not attempt to disprove any element of the government's case, it should be classified as an affirmative defense which the accused bears the burden of establishing. In addition, the necessity defense, like the innocent possession raised in *James*, is one uniquely within the knowledge of the defendant. Placing the burden of persuasion on the defendant does not conflict with the presumption of innocence, since necessity of its nature arises only in cases where the defendant admits committing the prohibited act. Thus, a defendant who seeks to avail himself of the necessity defense should be required to prove it by a preponderance of the evidence. The defendant in the instant case has carried this evidentiary burden.

CONCLUSION

Upon the basis of the foregoing discussion, the Court finds that defendant Robert C. Randall has established the defense of necessity. Accordingly, it is the finding of this Court that he is not guilty of a violation of D.C. Code §33-402, and that the charge against him must be and hereby is

DISMISSED.

33. *Moore, supra* at 381.

34. 421 U.S. at 702.

35. 350 A.2d at 749.

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Notice is hereby given that an order dated December 15, 1976, has been issued by the undersigned authorizing the name of the Gas Screw Vessel, BOBBIE B, official number 539436, owned by Hollywood House T.V., of which Washington, D.C. is the home port, to be changed to ANDY