IN THE MATTER OF MERCHANT MARINER'S DOCUMENT AND ALL OTHER SEAMAN'S DOCUMENTS NO. (redacted)
Issued to: Adelbert M. MILLS

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1955

Adelbert M. MILLS

This appeal has been taken in accordance with title 46 United States Code 239b and Title 46 Code of Federal Regulations 137.30-1.

By order dated 24 May 1972, an Administrative Law Judge of the United States Coast Guard at Seattle, Washington, revoked Appellant's seaman's documents upon findings him guilty of the charge of "conviction for a narcotic drug law violation." The specification found proved alleges that on 18 December 1967, Appellant now holder of the above captioned document was convicted by the United States District Court for the District of Arizona for violation of a narcotic drug law of the United States.

At the hearing, Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence records of the U.S. District Court for the district of Arizona.

In defense, Appellant offered in evidence his own testimony.

At the end of the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specification had been proved. The Administrative Law Judge then entered an order revoking all documents issued to Appellant.

The entire decision was served on 31 May 1972. Appeal was timely filed.

FINDINGS OF FACT

On 18 December 1967, Appellant was convicted in the United States District Court for the District of Arizona of violation of 26 U.S.C. 4744(a), a narcotic drug law of the United States for having unlawfully had in his possession two pounds, ten and one half ounces of marijuana.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Appellant asserts that he was entitled to a lesser order than revocation, under 16 CFR 137.03-4, that the repeal of 26 U.S.C. 4744(a) in 1970 nullifies his conviction, and that the conviction is not actionable under 46 U.S.C. 239b because of the decision in *Leary* v. *United states* (1969), 395 U.S. 6.

APPEARANCE: Legal Services Center, Seattle, Wash., by David Allen, Esq.

OPINION

I

In connection with *A*ppellant's point about experimental use of marijuana there is a misconception of the Administrative Law Judge that must be corrected.

In explaining Appellant's rights, he said,

> "In the event that this charge is proved I have no other alternative except with one exception than to revoke your document. The one exception is if there is a showing to my satisfaction that the narcotic drug law violation under which you were convicted was in the nature of experimentation involving marijuana. If I feel that it is true I can exercise discretion and give you something less than revocation order." R-16

When the Investigating Officer pointed out that the amendment of 1970 to 46 CFR 137.03-4 applied only to cases of misconduct

under R.S. 4450 (46 U.S.C. 239) and not to cases of conviction of violation of a narcotic drug law under 46 U.S.C. 239b, the Administrative Law Judge said.

> "That's in the opinion of the coast guard and of the investigating officer in this cause. I don't necessarily go along with that opinion..." R-19

It may be said once for all that the amendment to 46 CFR 137.03-4 has nothing to do with cases heard under 46 U.S.C. 239b, and administrative law judges do not have the discretion claimed here.

II

In light of these basic misconceptions it appears appropriate to go into some depth on the background of 46 U.S.C. 239(b) and 46 U.S.C. 239b and the regulations issued pursuant to each. These two statutory provisions are wholly independent of each other. Section 239(b) authorizes the commandant to promulgate regulations for the investigation of acts of misconduct and gives him broad authority to define misconduct. Section 239(g) provides for suspension or revocation of license or documents upon proof of misconduct at a Coast Guard hearing. Therefore, the Commandant has the responsibility to issue regulations defining misconduct, and he has discretion to decide whether revocation or suspension is appropriate in a given type of case. Under this authority the Commandant published regulations, 46 C.F.R. 137.03-3 and 137.03-4, in which he defined possession of narcotics, including marihuana, as misconduct and determined that mandatory revocation was appropriate upon proof of possession. In his discretion the Commandant has seen fit to allow less than revocation in those misconduct cases where mere experimentation with marihuana is satisfactorily demonstrated to the Administrative Law Judge.

III

Section 239b deals specifically with court convictions for narcotics drug law violations as opposed to misconduct. It mandates that in cases where a seaman has been convicted in a Federal or State court of record for a violation of a narcotics drug law, as defined in Sections 239a and 239b, and proof of such conviction is submitted at a Coast Guard hearing, the seaman's documents shall be revoked. Appellant erroneously assumes that the Administrative Law Judge has discretion and can enter and order less than revocation. The only discretion authorized under Section 239b is on the part of the Secretary in deciding whether or not to bring charges in the first instance. The responsibility for making

this determination has been delegated to the Coast Guard Investigating Officer, who must decide, based upon his investigation and evaluation of the facts and supporting evidence, whether or not charges should be placed. Once the charge of conviction for violation of a narcotics drug law has been brought and proof of the conviction has been submitted at a hearing, there is no one, not even the Secretary or the commandant, who can exercise discretion and do less than revoke the seaman's document. This interpretation is borne out by the legislative history of Section 239b. Throughout the hearings held on the bill containing Section 239b and throughout the House and Senate Reports, the only wordS used when discussing the appropriate order following proof of conviction are "deny" and "revoke". It is readily apparent that "deny" applies to initial issuance of a document to one previously convicted of a narcotics offense under Section 239b(a), and that "revoke" applies to taking away the document of one already holding it under Section 239b(b). Congress did not intend to distinguish between different types of convictions; so long as the conviction was for violation of a narcotics drug law, they intended mandatory revocation. See Hearings before the Senate Subcommittee on Interstate and Foreign Commerce on H.R. 8538 held June 16, 1954; House report No. 1559 of May 5, 1954; and Senate Report No. 1648 of June 28, 1954.

IV

Appellant's reliance on the repeal of 26 U.S.C. 4744(a) in 1970 is completely unfounded. Mere repeal of a law does not serve to expunge convictions which were had before the repeal. Further, the savings clause (1103) of P.L. 91-513, 84 Stat. 1294, provided that there was to be no bar to prosecutions for any violation of law occurring before the effective date of the repeal and confirmed all seizures and forfeitures which occurred before the effective date of repeal. A *fortiori*, the repeal had no bearing whatsoever on convictions which were final before the repeal became effective.

V

Of greater interest, and requiring some thought, is Appellant's claim that the decision in *Leary* v *United States* (1969), 395 U.S. 6, renders his conviction unactionable under 46 U.S.C. 239b.

A few word may be appropriate as to the scope of *Leary* v. *United states* (1969), 395 U.S. 6 and *United States* v. *Covington* (1969), 395 U.S. 57. First, 26 U.S.C. 4744(a) was

not held unconstitutional as such. What the Court said was, "...a timely and proper assertion of the privilege [against self-incrimination] should have provided a complete defense against prosecution under 4744(a) (2)..." *Leary*, p. 27, and, "We have held today...that the privilege does provide such a defense unless the plea is untimely...or the privilege has been waived." *Covington*, p. 59. Of constitutionality in general, it was later said, "...the statute continues to be viable and prosecutions under it could be successful...[in] unique circumstances." *United States* v. *Liquori*, CA 2 (1970), 430 F. 2nd 842, 844. In this same case, a separately concurring judge said, "I would have little hesitation in arriving at the result we reach today if *Leary*, *supra*, had simply declared 26 U.S.C. 4744(a) to be unconstitutional, in which case Liquori would have entered a plea to a count which did not charge a crime. Although the statute has been significantly emasculated, it is not completely void." *Id*, 850, 851.

Thus a glib statement that 26 U.S.C. 4744(a) is unconstitutional is not correct. What is important is that a timely assertion of the privilege against self-incrimination is a defense but that if the defense is not timely asserted or is waived a conviction may be had or have been had and not be overturned.

What we are concerned with here is whether in some fashion the principle of *Leary* is retroactive and, if so, what effect it has upon appellant's conviction.

As might have been expected a spate of decisions came from the courts of appeals in a short time. The several which do not deal with retroactivity but turn only on a finding of timeliness of the defense need not be considered here.

However, in *Sepulveda* v. *United States*, CA 10 (1969) 415 F. 2nd 321, in holding the defense untimely raised, without a reference to possible retroactivity, the court said:

> "In Covington...the Court stated the requirement of timeliness and recited that it had been met. Thus it must be considered of primary significance. We must hold that the assertion of the claim for the first time during the course of this post-conviction relief is not timely as required by Covington."

Of the pertinent cases, it must be said that the circuit courts of appeal show a marked divergence in their thinking.

In *Santos* v. *United States* CA 7 (1969) 417 F. 2nd 340, it was remarked that the section in question had been held unconstitutional (without qualification) and that the *Leary* application was therefore retroactive. (The question of timeliness, naturally, was not considered although the possibility of waiver was expressly ruled out.) This holding was restated in *Santos* v. *United States*, CA 7, 422 F. 2nd 244. In *United States* v. *Ingman*, CA 9 (1970) 426 F. 2nd 973, on an unquestioned premise of complete unconstitutionality of the statute, the Leary doctrine was held retroactive without discussion, and timeliness of the assertion of the privilege on appeal was found. *United States* v. *Liquori*, CA 2 (1970), 430 F. 2nd 842 (quoted twice above) considers the problem in its entirety. It gives its reasons for holding the *Leary* decision retroactive and it finds the interposition of the defense timely because Liquori's petition had been filed within four months of the date of the *Leary* decision.

On the other side, *Houser* v. *United States*, CA 6 (1970), 426 F. 2nd 817 specifically applies the guidelines as to retroactivity stated in *Stovall* v. *Denno* (1967), 388 U.S. 293, holds *Leary* v. *United States* not retroactive, and refuses to permit the "defense" raised for the first time on a *habeas corpus* action.

Another reasoned decision is *Ramseur* v. *United States*, CA 6 (1970), 425 F. 2nd 413, which did not reject the defense as untimely raised but, holding the *Leary* decision "largely prospective," refused to apply it to a final conviction entered four years prior to May 1969.

With this division of opinion, and in the absence of a Supreme Court ruling, it is not for me to choose between courts of appeal so as to "follow" one and "decline to follow" another. There would have to be more than just a clear and unmistakable direction for me to hold that Appellant's conviction was obtained in violation of his constitutional rights and therefore not actionable under 46 U.S.C. 239b. There would also have to be direction from a court of competent jurisdiction that Appellant's conviction was no longer of any force and effect.

To footnote this observation I may add a reference to *Miller* v. *United States*, D.C. N.D. Ohio (1970), 311 F. Supp. 705 in which, while deciding that the *Leary* rule could be applied retroactively and that the defense was raised in timely fashion because Miller attempted to assert his privilege soon after

the *Leary* decision was announced, the court saw the question as whether Miller should be permitted to change his plea of guilty. Thus the remedy for Miller was not an automatic voiding of his conviction but an opportunity to enter a plea of not guilty and to assert his privilege against self-incrimination, with presumably a dismissal of the indictment or a count of the indictment based on 26 U.S.C. 4744(a). This inevitably leads me to conclude that whatever benefit may be available to Appellant from the *Leary* decision the only forum in which it may be sought is in a district court of the United States.

Some may question whether a form of compassion should not lead me to breach the legal barrier and rationalize that Appellant is the victim of having been ahead of his time in his marijuana transactions of that he might find the right court at the right time to expunge his conviction.

I do not think I have the right under 46 U.S.C. 239b to speculate that some court somewhere might be inclined to relieve Appellant of his disability and, thus, to anticipate such a possibility by acting as though it had happened.

However, even if there were a possibility that I could lawfully act to give appellant some relief, in a case such as this it would be most inappropriate. Although the matter is not subject to the jurisdiction in this case, since we are here thinking of extraordinary action outside the record I cannot overlook the fact that Appellant's conviction was coincidental with another conviction for smuggling (seven peyote plants). More important I cannot overlook the quantity of marijuana that Appellant possessed. According to the indictment this was two pounds, ten and one half ounces. This is more than a kilogram. the Supreme Court has accepted, in the *Leary* decision, p. 51, that a kilogram of marijuana is good for 3300 useful cigarettes. We need not indulge in a vision of the experimentation in a junior college sociology class to conclude that Appellant is entitled to no special consideration whatever.

ORDER

The order of the Administrative Law Judge dated at Seattle, Washington, on 24 May 1972, is AFFIRMED.

T.R. SARGENT
Vice Admiral, U. S. Coast Guard
Acting Commandant

Signed at Washington, D.C., this 27th day of June 1973.

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***** END OF DECISION NO. 1955 *****

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