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Gosa v. Mayden

413 U.S. 665 (1973)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 13, 1973

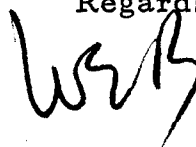
PERSONAL

Re: 71-6314 - Gosa v. Mayden
71-1398 - Warner v. Flemings

Dear Harry:

I wonder if on page 3 it would be helpful
(since jurisdiction is always open) to avoid
the term "jurisdiction" and say "power
of the military tribunal to try him." Note
that Bill puts jurisdiction in quotes.

Regards,

A handwritten signature in dark ink, appearing to be 'WSB', written over the typed word 'Regards,'.

Mr. Justice Blackmun

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 13, 1973

Re: No. 71-6314 - Gosa v. Mayden
No. 71-1398 - Warner v. Flemings

Dear Harry:

Please join me.

Regards,

WRB

Mr. Justice Blackmun

Copies to the Conference

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Supreme Court of the United States
Washington 25, D. C.

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

December 13, 1972

MEMORANDUM TO THE CONFERENCE:

In re 71-6314, Gosa v. Mayden

Since I will be away for a large part of next week, I thought I should leave behind my views in the Gosa case. Accordingly I attach hereto a rough draft of a memo.

I also attach a xerox of the petition for review which petitioner through his counsel submitted to the U.S. Court of Military Appeals on July 10, 1967.

WV
William O. Douglas

WSP

22

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

71-6314

Circulated: 12-13

James Roy Gosa, Petitioner, } On Writ of Certiorari to
v. } the United States Court
J. A. Mayden, Warden. } of Appeals for the Fifth
Circuit.

Recirculated: _____

[December —, 1972]

Memorandum from MR. JUSTICE DOUGLAS.

In this case petitioner was tried for rape before a military tribunal and convicted. The case went through the hierarchy of review within the military establishment and after the conviction and sentence were affirmed, a petition for review was filed with the Court of Military Appeals (a civilian court created by Congress); but that court denied review.¹ The events described took place in

¹The Code of Military Justice after providing for investigation before a charge is referred to a general court-martial in Art. 32 (a) goes on to state in Art. 32 (b):

"The accused shall be advised of the charges against him and of his right to be represented at that investigation by counsel. Upon his own request he shall be represented by civilian counsel if provided by him, or military counsel of his own selection if such counsel is reasonably available, or by counsel detailed by the officer exercising general court-martial jurisdiction over the command. At that investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after the investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides and a copy thereof shall be given to the accused."

Petitioner had counsel before the Court of Military Appeals, one designated by the Army; and only "the merits" of the conviction was raised, no question relating to the "jurisdiction" of the military.

Interacting
opinion
affirming
in ground
of res
judicata

Assigned
to Harry

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From: Douglas, J.

STATES
Circulated:

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THIRTIETH DAY OF CONGRESS

Petitioner had counsel before the Court of Military Appeals, one designated by the Army; and only "the merits" of the conviction was raised, no question relating to the "jurisdiction" of the military.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

5th DRAFT

From: Douglas, J.

SUPREME COURT OF THE UNITED STATES

Circulated: 5-31-73

Nos. 71-6314 AND 71-1398

Recirculated: _____

James Roy Gosa, Petitioner, } On Writ of Certiorari to
71-6314 v. } the United States Court
J. A. Mayden, Warden. } of Appeals for the Fifth
Circuit.

John W. Warner, Secretary } On Writ of Certiorari to
of the Navy, Petitioner, } the United States Court
71-1398 v. } of Appeals for the Sec-
John W. Flemings. } ond Circuit.

[May — 1973]

MR. JUSTICE DOUGLAS, concurring.

Petitioner Gosa was tried for rape before a military tribunal and convicted. The case went through the hierarchy of review within the military establishment and after the conviction and sentence were affirmed, a petition for review was filed with the Court of Military Appeals (a civilian court created by Congress); but that court denied review.¹ The events described took place in

¹ The Code of Military Justice, after providing for investigation before a charge is referred to a general court-martial in Art. 32 (a), goes on to state in Art. 32 (b):

"The accused shall be advised of the charges against him and of his right to be represented at that investigation by counsel. Upon his own request he shall be represented by civilian counsel if provided by him, or military counsel of his own selection if such counsel is reasonably available, or by counsel detailed by the officer exercising general court-martial jurisdiction over the command. At that investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigating officer shall examine available

3
U
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

June 19, 1973

MEMO TO THE CONFERENCE:

In Gosa, 71-6314 and the companion
case I am adding on pages 4 and 8 of my
opinion the attached Riders.

sp
William O. Douglas

The Conference

114-7

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RECEIVED BY ADVISORY IN

The case is ~~therefore~~ unlike McClaughry v. Deming, 186 U.S. 49 where a court martial was constituted of officers of the regular army who by an Act of Congress were not authorized to sit in judgment on volunteers. The court martial was held incompetent to sit on the case because it acted in plain violation of an Act of Congress. There was therefore no tribunal authorized by law to render the challenged judgment. Consent to be so tried could not confer jurisdiction in face of the mandate of the statute. In the present cases Congress by express provisions of the Code had authorized the military tribunals to sit in these types of cases.

Rider 8

71-6314

My conclusion obviously has no bearing on relief by way of habeas corpus against constitutional errors committed by state or federal courts or by military tribunals during the course of the trial

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U.S. DEPARTMENT OF JUSTICE

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

June 20, 1973

71-6314 (71-1398)

Dear Potter:

In my revised Gosa and Flemings, I'm joining you in the latter.

I am making my "concurring" opinion "concurring in part," stating that Gosa should be put down for reargument on whether res judicata is not a defense.

I've been trying to get the revised opinion out of the Printer. But he's jammed up. I hope to have the revision by tomorrow, the 21st.

W. O. D. WW

Mr. Justice Stewart

cc: Conference

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SECRET NO. 100-441111-1

Changes throughout

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

7th DRAFT

SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

Nos. 71-6314 AND 71-1398

Circulated:

James Roy Gosa, Petitioner,
71-6314 v.
J. A. Mayden, Warden.

On Writ of Certiorari to
the United States Court
of Appeals for the Fifth
Circuit.

Circulated: 6-22

114-6

John W. Warner, Secretary
of the Navy, Petitioner,
71-1398 v.
John W. Flemings.

On Writ of Certiorari to
the United States Court
of Appeals for the Sec-
ond Circuit.

[June 25, 1973]

MR. JUSTICE DOUGLAS, concurring in part.

I agree with MR. JUSTICE STEWART that respondent Flemings committed a "service connected" crime.¹

As to the *Gosa* I think the case should be put down for reargument on whether *res judicata* controls the disposition of the case. The argument that it does goes as follows:

Petitioner Gosa was tried for rape before a military tribunal and convicted. The case went through the hierarchy of review within the military establishment and after the conviction and sentence were affirmed, a petition for review was filed with the Court of Military Appeals (a civilian court created by Congress); but that court denied review.² The events described took place in

¹ In the *Flemings* case respondent in time of war went AWOL and stole a car from a civilian. The military charge against him was an unauthorized absence from his duty station during wartime and theft of a car from a civilian. He pleaded guilty; and the only action brought came years later when he sought correction of his military records.

² The Code of Military Justice, after providing for investigation

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist

8th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 71-6314 AND 71-1398

From: Douglas, J.

Circulated: _____

James Roy Gosa, Petitioner, } On Writ of Certiorari to
 71-6314 v. } the United States Court
 J. A. Mayden, Warden. } of Appeals for the Fifth
 } Circuit.

Circulated: 6-22

John W. Warner, Secretary } On Writ of Certiorari to
 of the Navy, Petitioner, } the United States Court
 71-1398 v. } of Appeals for the Sec-
 John W. Flemings. } ond Circuit.

[June 25, 1973]

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Petitioner Gosa was tried for rape before a military tribunal and convicted. The case went through the hierarchy of review within the military establishment and after the conviction and sentence were affirmed, a petition for review was filed with the Court of Military Appeals (a civilian court created by Congress); but that court denied review.² The events described took place in

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² The Code of Military Justice, after providing for investigation

3

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 19, 1973

RE: No. 71-6314 & 71-1398 Gosa v. Mayden
& Warner v. Flemings

Dear Thurgood:

Please join me in your dissent in the
above.

Sincerely,



Mr. Justice Marshall

cc: The Conference

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June 19, 1973

SUPREME COURT OF THE UNITED STATES

Nos. 71-6314 and 71-1398

James Roy Gosa, Petitioner,)
71-6314 v.)
J. A. Mayden, Warden.)

John W. Warner, Secretary)
of the Navy, Petitioner)
71-1398 v.)
John W. Flemings.)

MR. JUSTICE STEWART, dissenting in No. 71-6314, Gosa v. Mayden, and concurring in the result in No. 71-1398, Warner v. Flemings.

I dissented in O'Callahan v. Parker, 395 U.S. 258, 274, (1969), and continue to believe that that case was wrongly decided. Until or unless O'Callahan is overruled, however, I think it must be given fully retroactive application for the reasons stated in my Brother MARSHALL's persuasive dissenting opinion, post. Accordingly, I join his dissenting opinion as it applies to No. 71-6314, Gosa v. Mayden.

But that view, in my opinion, does not dispose of No. 71-1398, Warner v. Flemings. I think a serviceman who deserts his post during a time of congressionally declared war and steals an automobile in order to get away is guilty of a "service-connected"

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 19, 1973

71-6314 -- Gosa v. Mayden

Dear Thurgood,

Please add my name to your dissenting opinion in this case, with an asterisk footnote indicating that I join your dissent only as it applies to No. 71-6314, Gosa v. Mayden.

Sincerely yours,

P.S.

Mr. Justice Marshall

Copies to the Conference

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U.S. SUPREME COURT RECORDS

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall ✓
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Stewart, J.

Nos. 71-6314 AND 71-1398 Circulated: _____

Recirculated: JUN 21 1973

James Roy Gosa, Petitioner,
71-6314 v.
J. A. Mayden, Warden. } On Writ of Certiorari to
the United States Court
of Appeals for the Fifth
Circuit.

John W. Warner, Secretary
of the Navy, Petitioner,
71-1398 v.
John W. Flemings. } On Writ of Certiorari to
the United States Court
of Appeals for the Sec-
ond Circuit.

[June 25, 1973]

MR. JUSTICE STEWART, dissenting in No. 71-6314, *Gosa v. Mayden*, and, joined by MR. JUSTICE DOUGLAS, concurring in the result in No. 71-1398, *Warner v. Flemings*.

I dissented in *O'Callahan v. Parker*, 395 U. S. 258, 274 (1969), and continue to believe that that case was wrongly decided. Until or unless *O'Callahan* is overruled, however, I think it must be given fully retroactive application for the reasons stated in my Brother MARSHALL's persuasive dissenting opinion, *post*. Accordingly, I join his dissenting opinion as it applies to 71-1398, *Warner v. Flemings*.

But that view, in my opinion, does not dispose of No. 71-1398, *Warner v. Flemings*. I think that a serviceman who deserts his post during a time of congressionally declared war and steals an automobile is guilty of a "service-connected" offense. Accordingly, I conclude that the respondent Flemings was properly tried before a court-martial under *O'Callahan*. Cf. *Relford v. Commandant*, 401 U. S. 355, 365 (1971). For this reason I concur in the result reached by the Court in that case.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White ✓
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

SUPREME COURT OF THE UNITED STATES, J.

Nos. 71-6314 AND 71-1398

Circulated: _____
Recirculated: JUN 22 1973

James Roy Gosa, Petitioner, } On Writ of Certiorari to
71-6314 v. } the United States Court
J. A. Mayden, Warden. } of Appeals for the Fifth
Circuit.

John W. Warner, Secretary } On Writ of Certiorari to
of the Navy, Petitioner, } the United States Court
71-1398 v. } of Appeals for the Sec-
John W. Flemings. } ond Circuit.

[June 25, 1973]

MR. JUSTICE STEWART, dissenting in No. 71-6314, *Gosa v. Mayden*, and, joined by MR. JUSTICE DOUGLAS, concurring in the result in No. 71-1398, *Warner v. Flemings*.

I dissented in *O'Callahan v. Parker*, 395 U. S. 258, 274 (1969), and continue to believe that that case was wrongly decided. Until or unless *O'Callahan* is overruled, however, I think it must be given fully retroactive application for the reasons stated in my Brother MARSHALL's persuasive dissenting opinion, *post*. Accordingly, I join his dissenting opinion as it applies to 71-6314, *Gosa v. Mayden*.

But that view, in my opinion, does not dispose of No. 71-1398, *Warner v. Flemings*. I think that a serviceman who deserts his post during a time of congressionally declared war and steals an automobile is guilty of a "service-connected" offense. Accordingly, I conclude that the respondent Flemings was properly tried before a court-martial under *O'Callahan*. Cf. *Relford v. Commandant*, 401 U. S. 355, 365 (1971). For this reason I concur in the result reached by the Court in the *Flemings* case.

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U.S. SUPREME COURT RECORDS

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 24, 1973

Re: Nos. 71-6314 and 71-1398 - Gosa v. Mayden

Dear Harry:

I am in agreement with your memorandum
in this case.

Sincerely,



Mr. Justice Blackmun

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REPRODUCED FROM THE COLLECTION OF THE MANUSCRIPT DIVISION

U.S. SUPREME COURT

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 1, 1973

Re: Nos. 71-6314 and 71-1398 - Gosa v. Mayden and
Warner v. Flemings

Dear Harry:

In due course I will be circulating
a dissent in these cases.

Sincerely,


T.M.

Mr. Justice Blackmun

cc: Conference

REPRODUCED FROM THE COLLECTION OF THE MANUSCRIPT DIVISION
To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Black
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

SUPREME COURT OF THE UNITED STATES

From: Marshall, J.

Circulated: JUN 18 1973

Nos. 71-6314 AND 71-1398

Recirculated: _____

James Roy Gosa, Petitioner, } On Writ of Certiorari to
71-6314 v. } the United States Court
J. A. Mayden, Warden. } of Appeals for the Fifth
Circuit.

John W. Warner, Secretary } On Writ of Certiorari to
of the Navy, Petitioner, } the United States Court
71-1398 v. } of Appeals for the Sec-
John W. Flemings. } ond Circuit.

[June —, 1973]

MR. JUSTICE MARSHALL, dissenting.

I

The Court, by its efforts today to establish that *O'Callahan v. Parker*, 395 U. S. 258 (1969), was not a decision dealing with jurisdiction in its classic form, implicitly acknowledges that if *O'Callahan* were in fact concerned with the adjudicatory power—that is, the jurisdictional competency¹—of military tribunals, its holding would necessarily be fully retroactive in effect, cf. *e. g.*, *Linkletter v. Walker*, 381 U. S. 618, 623 (1965). The Court now puts forth the view that *O'Callahan* was not concerned with the true jurisdictional competency of courts-martial but that the decision yielded merely a new constitutional rule. This characterization of *O'Callahan* permits the Court to apply in this case the three-prong test employed to judge the retroactivity of new procedural rules under *Linkletter* and its progeny, see, *e. g.*, *Desist v. United States*, 394 U. S. 244, 249 (1969);

¹ See generally ALI Restatement of the Laws of Judgments, comment to § 7, at 41-46 (1942).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 21, 1973

MEMORANDUM TO THE CONFERENCE

Re: No. 71-6314 and No. 71-1398 - Gosa v. Mayden, etc

In light of the changes made by Bill Douglas in his concurring opinion, I have slightly modified Part II of my dissenting opinion.

I am enclosing the modified version without a reprint because of the backlog at the press.



T.M.

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U.S. SUPREME COURT RECORDS

STYLISTIC CHANGES THROUGHOUT

1, 8, 11, 14, 15, 16, 17, 20

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Marshall, J.

Nos. 71-6314 AND 71-1398

Circulated: _____

James Roy Gosa, Petitioner,
71-6314 v.
J. A. Mayden, Warden. } On Writ of Certiorari to
the United States Court
of Appeals for the Fifth
Circuit.

Recirculated: JUN 22 1973

John W. Warner, Secretary
of the Navy, Petitioner,
71-1398 v.
John W. Flemings. } On Writ of Certiorari to
the United States Court
of Appeals for the Sec-
ond Circuit.

[June 25, 1973]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE
BRENNAN and MR. JUSTICE STEWART* join, dissenting.

I

MR. JUSTICE BLACKMUN's plurality opinion, by its
efforts to establish that *O'Callahan v. Parker*, 395 U. S.
258 (1969), was not a decision dealing with jurisdic-
tion in its classic form, implicitly acknowledges that if
O'Callahan were in fact concerned with the adjudicatory
power—that is, the jurisdictional competency¹—of mili-
tary tribunals, its holding would necessarily be fully
retroactive in effect, cf. *e. g.*, *Linkletter v. Walker*, 381
U. S. 618, 623 (1965). The plurality now puts forth
the view that *O'Callahan* was not concerned with the true
jurisdictional competency of courts-martial but that the
decision yielded merely a new constitutional rule. This
characterization of *O'Callahan* permits the plurality to

*MR. JUSTICE STEWART joins this opinion only as it applies to
No. 71-6314. See *ante*, at —.

¹See generally ALI Restatement of the Laws of Judgments,
comment to § 7, at 41-46 (1942).

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SSSBCNOC FO ADV PBL I N

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist

will dissent 6/1

1st DRAFT

From: Blackmun, J.

SUPREME COURT OF THE UNITED STATES

Recirculated: 5/23/73

Nos. 71-6314 AND 71-1398

Recirculated:

James Roy Gosa, Petitioner,
71-6314 v.
J. A. Mayden, Warden. } On Writ of Certiorari to
the United States Court
of Appeals for the Fifth
Circuit.

John W. Warner, Secretary
of the Navy, Petitioner,
71-1398 v.
John W. Flemings. } On Writ of Certiorari to
the United States Court
of Appeals for the Sec-
ond Circuit.

[May —, 1973]

MR. JUSTICE BLACKMUN, memorandum.

In *O'Callahan v. Parker*, 395 U. S. 258, decided June 2, 1969, this Court, by a 5-3 vote, held that when a person in military service is charged with a crime that is not "service connected," *id.*, at 272, the defendant is entitled, despite his military status, to the benefit of "two important constitutional guarantees," *id.*, at 273, namely, indictment by a grand jury¹ and trial by jury in a civilian court.

The Court noted that O'Callahan was "properly absent from his military base when he committed the crimes with which he is charged," *ibid.*; that there was no connection between his military duties and the crimes; that the offenses were committed off the military post or enclave; that the victim was not performing any

¹ The Court, of course, has not yet held the indictment requirement of the Fifth Amendment to be binding upon the States. *Hurtado v. California*, 110 U. S. 516 (1884); *Gaines v. Washington*, 277 U. S. 81, 86 (1928); *Branzburg v. Hayes*, 408 U. S. 665, 688 n. 25 (1972).

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

From: Blackmun, J.

SUPREME COURT OF THE UNITED STATES

Circulated

Nos. 71-6314 AND 71-1398

Recirculated

6/14/73

James Roy Gosa, Petitioner,
71-6314 v.
J. A. Mayden, Warden. } On Writ of Certiorari to
the United States Court
of Appeals for the Fifth
Circuit.

John W. Warner, Secretary
of the Navy, Petitioner,
71-1398 v.
John W. Flemings. } On Writ of Certiorari to
the United States Court
of Appeals for the Sec-
ond Circuit.

[May —, 1973]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

In *O'Callahan v. Parker*, 395 U. S. 258, decided June 2, 1969, this Court, by a 5-3 vote, held that when a person in military service is charged with a crime that is not "service connected," *id.*, at 272, the defendant is entitled, despite his military status, to the benefit of "two important constitutional guarantees," *id.*, at 273, namely, indictment by a grand jury¹ and trial by jury in a civilian court.

The Court noted that O'Callahan was "properly absent from his military base when he committed the crimes with which he is charged," *ibid.*; that there was no connection between his military duties and the crimes; that the offenses were committed off the military post or enclave; that the victim was not performing any

¹ The Court, of course, has not yet held the indictment requirement of the Fifth Amendment to be binding upon the States. *Hurtado v. California*, 110 U. S. 516 (1884); *Gaines v. Washington*, 277 U. S. 81, 86 (1928); *Branzburg v. Hayes*, 408 U. S. 665, 688 n. 25 (1972).

REPRODUCED FROM THE COLLECTION

OF THE MANUSCRIPT DIVISION

U. S. DEPARTMENT OF JUSTICE

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 18, 1973

MEMORANDUM TO THE CONFERENCE

Re: Holds for No. 71-6314 - Gosa v. Mayden and
No. 71-1398 - Flemings v. Warner

There are three holds for one or both of these cases.

1. No. 71-6879 - Schlomann v. Moseley, Warden

In 1964 (pre-O'Callahan) the petitioner was convicted by a general court-martial held in Alaska of unpremeditated murder, of assault with a dangerous weapon, and of attempted robbery. On appeal his conviction was affirmed. 16 U.S.C.M.A. 414 (also pre-O'Callahan). The offenses took place in Alaska outside the Army post while petitioner was off duty on pass and dressed in civilian clothes. The victims were all civilians.

The present proceeding is in federal habeas from the District of Kansas. The district court denied the application. On appeal the Tenth Circuit held that O'Callahan was not retroactive.

The retroactivity issue will be controlled by Gosa, and I shall not vote to grant on that issue. I express no opinion here on other issues raised by the petitioner.

2. No. 72-835 - Pettibone v. Woodall

This is not a military case. It is related to Gosa only in that it also presents a retroactivity question. The petitioner (the Director of the Division of Parole and Probation of the State of Maryland) claims that the CA4 erred in holding retroactive its decision in Long v.

WB

-2-

Robinson, 436 F.2d 1116 (1971). Long held that equal protection was denied by Maryland statutes that required that those persons 16 and 17 years old arrested for acts committed in Baltimore City be tried as adults in the Baltimore Criminal Court, whereas persons the same age arrested elsewhere in Maryland are initially subject to the jurisdiction of the juvenile court system. The CA4 reasoned that the failure to allow Baltimore juveniles the opportunity to plead the defense of diminished responsibility because of age was "so fundamentally unfair as to impeach the validity of the 'adult' proceedings and render unreliable the guilty verdicts obtained in these proceedings." The CA4 also found that its holding would not have a significant effect on the administration of justice in Maryland.

One may argue that, as a federal constitutional matter, if Gosa is not retroactive, the ruling in Long need not be. On the other hand, within two weeks after the CA4's decision in this case, the Maryland Court of Special Appeals held that the Maryland law was unconstitutional and went on to hold that its decision was not retroactive to those cases that had become final by May 15, 1969, the date of the federal district court's decision in the present case. In January 1972 the Maryland Court of Appeals in another case explicitly approved a May 15, 1969 cutoff date. There is, therefore, a conflict on the retroactivity issue between the Maryland state courts and the CA4.

There are indications in the record that a maximum of 122 individuals will be affected by the decision which concerns only the City of Baltimore.

Because of the last mentioned factor, one could vote a discretionary deny. On the other hand, one might vote to grant, vacate and remand for reconsideration in the light of Gosa. A third alternative is to reverse outright, citing Gosa and the Maryland decisions.

3. No. 72-6310 - Wimberley v. Richardson

In 1963 the petitioner, while in military service in Germany,

-3-

was convicted by a court-martial of murder. The victim was a German, and the homicide took place in Germany. On appeal the conviction was affirmed. 16 U.S.C.M.A. 3 (pre-O'Callahan). Apparently, at the time of the incident the petitioner was off duty, away from the post and not in uniform. The victim had no connection with the United States Armed Forces.

The present proceeding was instituted by an application for writ of mandamus. The district court treated it as an application for federal habeas. It was denied. The CA7 affirmed, emphasizing the foreign situs of the crime and citing O'Callahan and Relford.

Gosa clearly controls the retroactivity issue. This case is also weaker than Gosa because the homicide took place in Germany. Both O'Callahan and Relford imply that the court-martial jurisdiction is appropriate where nonservice connected crimes occur outside United States territory. I shall vote to deny on the retroactivity issue. I express no opinion as to other claims in the case.

H.A.B.

WB

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall ✓
Mr. Justice Powell
Mr. Justice Rehnquist

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Blackmun, J.

Circulated: _____

Nos. 71-6314 AND 71-1398

Recirculated: 6/21/73

James Roy Gosa, Petitioner,
71-6314 v.
J. A. Mayden, Warden. } On Writ of Certiorari to
the United States Court
of Appeals for the Fifth
Circuit.

John W. Warner, Secretary
of the Navy, Petitioner,
71-1398 v.
John W. Flemings. } On Writ of Certiorari to
the United States Court
of Appeals for the Sec-
ond Circuit.

[May —, 1973]

MR. JUSTICE BLACKMUN announced the judgments of the Court and an opinion in which THE CHIEF JUSTICE, MR. JUSTICE WHITE, and MR. JUSTICE POWELL join.

In *O'Callahan v. Parker*, 395 U. S. 258, decided June 2, 1969, this Court, by a 5-3 vote, held that when a person in military service is charged with a crime that is not "service connected," *id.*, at 272, the defendant is entitled, despite his military status, to the benefit of "two important constitutional guarantees," *id.*, at 273, namely, indictment by a grand jury¹ and trial by jury in a civilian court.

The Court noted that O'Callahan was "properly absent from his military base when he committed the crimes with which he is charged," *ibid.*; that there was no connection between his military duties and the crimes;

¹ The Court, of course, has not yet held the indictment requirement of the Fifth Amendment to be binding upon the States. *Hurtado v. California*, 110 U. S. 516 (1884); *Gaines v. Washington*, 277 U. S. 81, 86 (1928); *Branaburg v. Hayes*, 408 U. S. 665, 688 n. 25 (1972).

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 29, 1973

No. 71-6314 Gosa v. Mayden
No. 71-1398 Warner v. Flemings

Dear Harry:

Please join me in your memorandum as an opinion for the
Court.

Sincerely,

Lewis

Mr. Justice Blackmun

lfp/ss

cc: The Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

Mr. Chief Justice
Mr. Justice Burger
Mr. Justice Brennan
Mr. Justice Black
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist

June 20, 1973

6/20

Nos. 71-6314 and 71-1398

JAMES ROY GOSA, Petitioner

v.

J. A. MAYDEN, Warden

JOHN W. WARNER, Secretary of the Navy,
Petitioner

v.

JOHN W. FLEMINGS

MR. JUSTICE REHNQUIST, concurring in the judgment.

I believe that prior decisions of this Court do not support today's holding that the rule announced in O'Callahan v. Parker, 395 U.S. 258 (1969) should not be applied retroactively to court martial convictions entered before the decision in that case. In O'Callahan, the Court clearly held that courts martial did not have jurisdiction to try servicemen for "non-service connected" crimes. For substantially the reasons stated by my Brother Marshall, I believe that Robinson v. Neil, 409 U.S. 505 (1973) and prior decisions mandate that O'Callahan be applied retroactively.

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