

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE, PORTLAND

CARL ERIC OLSEN, in propria persona,	*	
	*	
Petitioner,	*	1:07-cv-34
	*	
v.	*	
	*	
UNITED STATES,	*	Motion for Certificate of
	*	Appealability under Local Rule 83:10
Respondent.	*	

The Petitioner respectfully moves the Court for a Certificate of Appealability under Local Rule 83:10.

The Petitioner is not an attorney but has researched the case law and formed his own opinion that he filed his Petition for Habeas Corpus under the correct statutes, 28 U.S.C § 1651 and 28 U.S.C. § 2241, and that the Magistrate misunderstood the Petition to be a motion under 28 U.S.C. § 2255. See Petitioner's Objection to Magistrate's Recommended Ruling for case citations.

The Court affirmed the Magistrate's opinion that the Plaintiff's petition was governed by 28 U.S.C. § 2255.

In the Court's ruling, the Magistrate states that the Petitioner is not eligible to file under 28 U.S.C. § 2255 because the Petitioner has completed his sentence and parole.

When a petitioner is not eligible to file under 28 U.S.C. § 2255 and there has been a substantial change in legal principles effectually reversing the ruling of the trial court, the Petitioner is entitled to file a Petition for Habeas Corpus under 28 U.S.C. § 1651 and 28 U.S.C. § 2241 which are only available when 28 U.S.C. §2255 is not available, and only if the Petitioner's arguments have merit.

The Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. §§ 2000bb et seq. as amended by the Religious Land Use and Institutionalized Persons Act

(RLUIPA) of 2000, 42 U.S.C. §§ 2000cc et seq. is a substantial change in legal principles effectually reversing the ruling of the trial court in Petitioner's 1982 criminal trial. The Petitioner was not allowed to present evidence of his factual innocence to the jury during his trial.

The United State Supreme Court indirectly guaranteed this Petitioner the right to the compelling interest test in Employment Division v. Smith, 494 U.S. 872, 884-885, 110 S. Ct. 1595, 1603, 108 L. Ed. 2d 876, 889-890 (1990). Justice Scalia wrote that application of the compelling interest test to the drug laws would "open the prospect of constitutionally required religious exemptions", citing Olsen v. Drug Enforcement Administration, 279 U. S. App. D. C. 1, 878 F. 2d 1458 (1989). When the Supreme Court made the ruling in Employment Division v. Smith, the Petitioner realized that the decision denying him the compelling interest test in United States v. Rush, 738 F.2d 497 (1st Cir. 1984), would be eventually be overturned, but the Petition also knew it would be a long time before the law was finally settled in this area. The law is now finally settled by the RFRA and the RLUIPA, as well as by the decisions of the United States Supreme Court in Cutter v. Wilkinson, 544 U.S. 709, 125 S. Ct. 2113, 161 L. Ed. 2d 1020 (2005) (upholding the application of the RLUIPA to the states as a valid exercise of Congress' spending and commerce powers) and in Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 126 S. Ct. 1211, 163 L. Ed. 2d 1017, 2006 (upholding the application of the RFRA to the Federal drug laws).

The RFRA and the tests it mandates, Sherbert v. Verner, 374 U.S. 398 (1963), and Wisconsin v. Yoder, 406 U.S. 205 (1972), effectively reverse the 1967 decision in Leary v. United States, 383 F.2d 851 (5th Cir. 1967) which, if it ever was valid, is no longer valid law. The following quote from Olsen v. DEA, 878 F.2d 1458, 1467 (D.C. Cir. 1989), confirms that the decision in United States v. Rush, 738 F.2d 497, 512-513 (1st Cir. 1984), simply assumed the drug laws prove a compelling interest in prohibiting religious freedom without any

further factual findings to support the Governments' burden to show a compelling interest under the RFRA and the RLUIPA:

Beginning with *Leary v. United States*, 383 F.2d 851 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6, 23 L. Ed. 2d 57, 89 S. Ct. 1532 (1969), the federal appellate courts have found that the government has a compelling interest in controlling marijuana use. See: *United States v. Spears*, 443 F.2d 895 (5th Cir. 1971), *cert. denied*, 404 U.S. 1020, 92 S. Ct. 693, 30 L. Ed. 2d 669 (1972); *United States v. Middleton*, 690 F.2d 820 (11th Cir. 1982), *cert. denied*, 460 U.S. 1051, 75 L. Ed. 2d 929, 103 S. Ct. 1497 (1983); *United States v. Rush*, 738 F.2d 497 (1st Cir. 1984), *cert. denied*, 471 U.S. 1120, 86 L. Ed. 2d 269, 105 S. Ct. 2370 (1985) and *Olsen v. State of Iowa*, 808 F.2d 652 (8th Cir. 1986).

"Finally, it has been recognized since *Leary* that accommodation of religious freedom is practically impossible with respect to the marijuana laws." *United States v. Rush*, at page 513.

United States v. Bauer, 84 F.3d 1549 (9th Cir.1996), was the first court to recognize that *United States v. Leary* was no longer good law under the RFRA:

The district court first found that the challenged law substantially burdened the free exercise of the Rastafarian religion. Relying on several earlier appellate cases, the district court held, however, "that the government has an overriding interest in regulating marijuana." The district court quoted *Leary v. United States*, 383 F.2d 851, 861 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6, 23 L. Ed. 2d 57, 89 S. Ct. 1532 (1969), as follows: "'It would be difficult to imagine the harm which would result if the criminal statutes against marihuana were nullified as to those who claim the right to possess and traffic in this drug for religious purposes. For all practical purposes the anti-marihuana laws would be meaningless, and enforcement impossible.'" The district court concluded that the government's in limine motion would have been granted even if the Religious Freedom Restoration Act had been the law of the land at the time.

United States v. Bauer, 84 F.3d at 1557.

The district court treated the existence of the marijuana laws as dispositive of the question whether the government had chosen the least restrictive means of preventing the sale and distribution of marijuana. The district court relied on a drug case decided before the enactment of the Religious Freedom Restoration Act. We do not exclude the possibility that the government may show that the least restrictive means of preventing the sale and distribution of marijuana is the universal enforcement of the marijuana laws. Under RFRA, however, the government had the obligation, first, to show that the application of the marijuana laws to the defendants was in furtherance of a compelling governmental interest and, second, to show that the application of these laws to these defendants was the

least restrictive means of furthering that compelling governmental interest. The Act was relevant to the counts of simple possession.

United States v. Bauer, 84 F.3d at 1559.

The trial court in United States v. Rush did not apply the compelling interest test of Sherbert v. Verner and Wisconsin v. Yoder which are now mandated by the RFRA and the RLUIPA. The trial court employed a "rational basis test" type of analysis which assumes the Federal Controlled Substances Act is proof that Congress did not intend to allow an exception for the Sacramental use of Marijuana.

United States v. Rush did not consider the finding of fact that the Commission on Marihuana and Drug Abuse established by the Controlled Substances Act (CSA) of 1970 which found as a fact that marijuana is not a threat to public health and safety. This is a finding of fact under the very statute the Court used to deny the compelling interest test in United States v. Rush. The consideration of the Marihuana Commission report under the compelling interest test of the RFRA and the RLUIPA is now mandatory. PUBLIC LAW 91-513 - OCT. 27, 1970 [84 STAT. 1280-1281] Part F - Advisory Commission - Establishment of Commission on Marihuana and Drug Abuse - SEC. 601. And see, H.R. Rep. No. 91-1444, October 10, 1970, 1970 USCCAN 4566, at pages 4578-1580; See also, First Report of the National Commission on Marihuana and Drug Abuse, at page 150 ("marihuana use is not such a grave problem that individuals who smoke marihuana, and possess it for that purpose, should be subject to criminal procedures").

The trial court ruling in United States v. Rush prevented this Petitioner from presenting new evidence in 1988 which proves the government does not have a compelling interest in enforcement of the drug laws against the Petitioner. The Chief Administrative Law Judge for the DEA, established by the CSA as the authority to review the classification of marijuana, found as a fact that "Marijuana, in its natural form, is one of the safest therapeutically actives

substances known to man." This is a finding of fact under the very statute the trial court in United States v. Rush cited as the reason for preventing the Petitioner from presenting evidence to the jury. The consideration of this evidence under the compelling interest test of the RFRA and the RLUIPA is now mandatory. In The Matter of Marijuana Rescheduling, DEA Docket No. 86-22, September 6, 1988, at pages 58-59.

Other new evidence has been created by the Federal Government which shows that the Petitioner cannot cause harm by using Marijuana as a Sacrament. The principle psychoactive ingredient in marijuana has been rescheduled twice because of its safety in medical use. 51 FR 17476, May 13, 1986; 64 FR 35928, July 2, 1999. These facts must now be considered under the mandatory compelling interest test of the RFRA and the RLUIPA.

Evidence that the Federal Government is supplying medical patients with marijuana under the federal "Compassionate Use Program" was not allowed by the trial court in United States v. Rush. The Federal Government has been supplying two Iowans with 300 rolled marijuana cigarettes per month for the past 15 years and the program has been in existence since 1976. Bob Randall was the first patient to receive marijuana from the Federal Government and was ready to testify at my trial. These facts must now be considered under the mandatory compelling interest test of the RFRA and the RLUIPA.

The Petitioner has never injured anyone and this fact must now be considered under the compelling interest test mandated by the RFRA and the RLUIPA.

All of these facts (the Commission on Marihuana and Drug Abuse findings of fact, the 1988 DEA findings of fact, the 1986 and 1999 rescheduling of THC, the non-violent history of the Plaintiff's protests, and the lack of harm caused by the Plaintiff's Sacramental use of Marijuana), all of which come from the Federal Government, prove that the Plaintiff cannot injure anyone by using

Marijuana as his Sacrament, because these facts prove that no one has ever been injured from using Marijuana.

The Petitioner has never abandoned his religious freedom claims, the Petitioner is sincere, and the Federal Government has inflicted actual injury on the Petitioner.

Seven years after the decision in Employment Division v. Smith, and four years after the enactment of the RFRA, in City of Boerne v. P.F. Flores, 521 U.S. 507; 532, 117 S. Ct. 2157; 2170, 138 L. Ed. 2d 624, 646-647 (1997), the Supreme Court explained the effect of the Religious Freedom Restoration Act:

Sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter. RFRA's restrictions apply to every agency and official of the Federal, State, and local Governments. 42 U.S.C. § 2000bb-2(1). RFRA applies to all federal and state law, statutory or otherwise, whether adopted before or after its enactment. § 2000bb-3(a). RFRA has no termination date or termination mechanism. Any law is subject to challenge at any time by any individual who alleges a substantial burden on his or her free exercise of religion.

As the Eighth Circuit Court of Appeals recognized in Christians v. Crystal Evangelical Free Church, 82 F.3d 1407, 1417 (8th Cir. 1986):

[T]he RFRA is more protective of the right of free exercise than Smith, see, e.g., Flores v. City of Boerne, 73 F.3d at 1361 (describing RFRA as 'a substantive expansion of First Amendment doctrine' and in effect 'an assignment by Congress of a higher value to free-exercise-secured freedoms than the value assigned by the courts-- that is, strict scrutiny versus a form of intermediate scrutiny') . . .

The Supreme Court remanded the case to the Eighth Circuit in Christians v. Crystal Evangelical Free Church, 521 U.S. 1114, 117 S. Ct. 2502, 138 L. Ed. 2d 1007 (1997) ("The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eighth Circuit for further consideration in light of *City of Boerne v. Flores*, 521 U.S. 507, 138 L. Ed. 2d 624, 117 S. Ct. 2157 (1997).") The Eighth Circuit Court of Appeals in Christians v. Crystal Evangelical Free Church, 141 F.3d 854, 856 (8th Cir. 1998) found that: "RFRA is

constitutional as applied to federal law." At 141 F.3d, page 860, the Eighth Circuit Court of Appeals wrote:

While Congress cannot, through ordinary legislation, amend the Court's authoritative interpretation of the Constitution, "congressional disapproval of a Supreme Court decision does not impair the power of Congress to legislate a different result, as long as Congress had that power in the first place." *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1562 (11th Cir. 1984); see also *Flores*, 117 S. Ct. at 2171 ("When Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution. This has been clear from the early days of the Republic."). Congress has often provided statutory protection of individual liberties that exceed the Supreme Court's interpretation of constitutional protection. See, e.g., Privacy Protection Act of 1980, 42 U.S.C. §§ 2000aa to 2000aa-12 (reacting to *Zurcher v. Stanford Daily*, 436 U.S. 547, 56 L. Ed. 2d 525, 98 S. Ct. 1970 (1978), and providing journalists with greater protection against searches and seizures); National Defense Authorization Act for Fiscal Years 1988 and 1989, § 508, 10 U.S.C. § 774 (reacting to *Goldman v. Weinberger*, 475 U.S. 503, 89 L. Ed. 2d 478, 106 S. Ct. 1310 (1986), and providing that members of military were entitled to wear religious headgear); cf. *Pregnancy Discrimination Act*, 42 U.S.C. § 2000e(k) (reacting to *Geduldig v. Aiello*, 417 U.S. 484, 41 L. Ed. 2d 256, 94 S. Ct. 2485 (1974), and equating employment discrimination based on pregnancy with employment discrimination based on gender). Because Congress need not agree with everything the Supreme Court does in order for its legislation to pass constitutional muster, we conclude that RFRA is not contrary to the Constitution merely because Congress disagreed with the Smith Court's interpretation of the Free Exercise Clause.

Congress has amended the CSA with the RFRA and Congress had the authority to do it because Congress enacted the CSA and Congress has the authority to amend the CSA. The CSA is now amended with a religious freedom component that was not available to the Petitioner previously.

In *Cutter v. Wilkinson*, 544 U.S. 709, 714, 125 S. Ct. 2113, 2118, 161 L. Ed. 2d 1020, 1029-1030 (2005), the Supreme Court wrote:

The Court recognized, however, that the political branches could shield religious exercise through legislative accommodation, for example, by making an exception to proscriptive drug laws for sacramental peyote use.

In fact, Congress has chosen to make an exception to the proscriptive drug laws for sacramental peyote use, codified at 42 U.S.C. § 1996a.

In Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, ___, 126 S. Ct. 1211, 1222, 163 L. Ed. 2d 1017, 1033-1034 (2006), the Supreme Court wrote:

The Government argues that the existence of a congressional exemption for peyote does not indicate that the Controlled Substances Act is amenable to *judicially crafted* exceptions. RFRA, however, plainly contemplates that courts would recognize exceptions -- that is how the law works. See 42 U.S.C. § 2000bb-1(c) ("A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government"). Congress' role in the peyote exemption -- and the Executive's, see 21 CFR § 1307.31 (2005) -- confirms that the findings in the Controlled Substances Act do not preclude exceptions altogether; RFRA makes clear that it is the obligation of the courts to consider whether exceptions are required under the test set forth by Congress.

In Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, ___, 126 S. Ct. 1211, 1225, 163 L. Ed. 2d 1017, 1037 (2006), the Supreme Court wrote:

The Government repeatedly invokes Congress' findings and purposes underlying the Controlled Substances Act, but Congress had a reason for enacting RFRA, too. Congress recognized that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise," and legislated "the compelling interest test" as the means for the courts to "strike sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. §§ 2000bb(a)(2), (5).

See also, Navajo Nation v. Forest Service, No. 06-15371, No. 06-15436, No. 06-15455 (9th Cir. March 12, 2007), pages 12-17:

In 1997, in *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997), the Supreme Court held RFRA unconstitutional as applied to state and local governments because it exceeded Congress's authority under § 5 of the Fourteenth Amendment. *Id.* at 529, 534-35. The Court did not, however, invalidate RFRA as applied to the federal government. See *Guam v. Guerrero*, 290 F.3d 1210, 1220-21 (9th Cir. 2002) (holding RFRA constitutional as applied to the federal government). Three years later, in response to *City of Boerne*, Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"). Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. §§ 2000cc *et seq.*). RLUIPA prohibits state and local governments from imposing substantial burdens on the exercise of religion through prisoner or land-use regulations. 42 U.S.C. §§ 2000cc, 2000cc-1. In addition, RLUIPA replaced RFRA's original, constitution-based definition of "exercise of religion" with the broader definition quoted above. RLUIPA §§ 7-8, 114 Stat. at 806-07. Under RLUIPA, and under RFRA after its amendment by RLUIPA in 2000, "exercise of religion" is

defined to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000bb-2(4), 2000cc-5(7)(A).

In several ways, RFRA provides greater protection for religious practices than did the Supreme Court's pre-*Smith* free exercise cases. First, as we have previously noted, RFRA "goes beyond the constitutional language that forbids the 'prohibiting' of the free exercise of religion and uses the broader verb 'burden': a government may burden religion only on the terms set out by the new statute." *United States v. Bauer*, 84 F.3d 1549, 1558 (9th Cir. 1996) [*14] (as amended). *Cf.* U.S. Const. amd. 1 ("Congress shall make no law . . . prohibiting the free exercise [of religion]."); *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451, 108 S. Ct. 1319, 99 L. Ed. 2d 534 (1988) ("The crucial word in the constitutional text is 'prohibit': 'For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.'" (quoting *Sherbert*, 374 U.S. at 412 (Douglas, J., concurring))).

Second, as the Supreme Court noted in *City of Boerne*, RFRA provides stronger protection for free exercise than the First Amendment did under the pre-*Smith* cases because "the Act imposes in every case a least restrictive means requirement -- a requirement that was not used in the pre-*Smith* jurisprudence RFRA purported to codify." 521 U.S. at 535.

Third, RFRA provides broader protection for free exercise because it applies *Sherbert's* compelling interest test "in all cases" where the free exercise of religion is substantially burdened. 42 U.S.C. § 2000bb(b). Prior to *Smith*, the Court had refused to apply the compelling interest analysis in various contexts, exempting entire classes of free exercise cases from such heightened scrutiny. *Smith*, 494 U.S. at 883 ("In recent years, we have abstained from applying the *Sherbert* test (outside the unemployment compensation field) at all."); *see, e.g., O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349, 107 S. Ct. 2400, 96 L. Ed. 2d 282 (1987) (not applicable to prison regulations); *Bowen v. Roy*, 476 U.S. 693, 707, 106 S. Ct. 2147, 90 L. Ed. 2d 735 (1986) (Burger, J., for plurality) (not applicable in enforcing "facially neutral and uniformly applicable requirement for the administration of welfare programs"); *Goldman v. Weinberger*, 475 U.S. 503, 506-07, 106 S. Ct. 1310, 89 L. Ed. 2d 478 (1986) (not applicable to military regulations).

Finally, and perhaps most important, Congress expanded the statutory protection for religious exercise in 2000 by amending RFRA's definition of "exercise of religion." Under the amended definition -- "any exercise of religion, whether or not compelled by, or central to, a system of religious belief" -- RFRA now protects a broader range of religious conduct than the Supreme Court's [*16] interpretation of "exercise of religion" under the First Amendment. *See Guru Nanak Sikh Soc'y v. County of Sutter*, 456 F.3d 978, 995 n.21 (9th Cir. 2006) (noting same). To the extent that our RFRA cases prior to RLUIPA depended on a narrower definition of "religious exercise," those cases are no longer good law. *See, e.g., Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir. 1995) (burden must prevent adherent "from engaging in conduct or having a religious

experience which the faith mandates" and must be "an interference with a tenet or belief that is central to religious doctrine" (quoting *Graham v. Commissioner*, 822 F.2d 844, 850-51 (9th Cir. 1987)); *Stefanow v. McFadden*, 103 F.3d 1466, 1471 (9th Cir. 1996) (no substantial burden because prisoner was not prevented from "engaging in any practices mandated by his religion"); *Goehring v. Brophy*, 94 F.3d 1294, 1299 (9th Cir. 1996) (plaintiffs failed to establish "a substantial burden on a central tenet of their religion"). The district court in this case therefore erred by disregarding the amended definition and requiring Appellants to prove that the proposed [*17] action would prevent them "from engaging in conduct or having a religious experience which the faith mandates." 408 F. Supp. 2d at 904 (quoting *Worldwide Church of God, Inc. v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1121 (9th Cir. 2000), decided before RLUIPA's passage) (emphasis added).

Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 126 S. Ct. 1211, 163 L. Ed. 2d 1017 (2006) (UDV hereafter) applied a different standard than applied to the Petitioner in United States v. Rush, applying the compelling interest tests from Sherbert v. Verner and Wisconsin v. Yoder to the drug laws. This factual test is absent in United States v. Rush and we know this because there is no mention of the findings of the Commission on Marihuana and Drug Abuse established by the CSA, and there is no mention of the 1988 findings of fact of the DEA Chief Administrative Law Judge. We know the court in United States v. Rush did not justify the application of the CSA to the Petitioner under the RFRA and the RLUIPA and that the only evidence produced was the bare fact of the CSA itself. The government did not have to produce any evidence that the Petitioner had actually harmed anyone by the Sacramental use of Marijuana. The fact based tests of Sherbert v. Verner and Wisconsin v. Yoder are missing from United States v. Rush and are now made applicable to the CSA through the RFRA and the RLUIPA, which are fully retroactive. 42 U.S.C. § 2000bb-3.

CONCLUSION

WHEREFORE, the Petitioner moves this Honorable Court for a Certificate of Appealability under Local Rule 83:10.

Respectfully submitted this 20th day of April, 2007.

[/s/ Carl E. Olsen](#)

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Certificate of Appealability was served electronically on this 20th day of April, 2007 to the following respondent:

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