

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, *
 *
 Respondent. *

PETITION FOR WRIT OF HABEAS CORPUS
UNDER 28 U.S.C. § 1651 and 28 U.S.C. § 2241
AND 42 U.S.C. §§ 2000bb et seq. and 42 U.S.C. §§ 2000cc et seq.

TO VACATE THE CONVICTION OF A FACTUALLY INNOCENT PERSON
WHERE EVIDENCE OF INNOCENCE WAS WITHHELD FROM THE JURY AT TRIAL
AND THE GOVERNMENT WAS NOT REQUIRED TO SHOW PROOF OF GUILT

DUE TO PLAINT ERROR OF THE DISTRICT COURT
IN LIGHT OF GONZALES v. O CENTRO ESPIRITA BENEFICENTE UNIAO DO VEGETAL
No. 04-1084, 546 U.S. 418 (2006)

Carl Eric Olsen moves this honorable court to vacate his conviction because the trial created plain error by ruling that establishment and exercise of the Petitioner's religion does not create an issue of fact which must be considered by the jury.

The United States Court of Appeals for the First Circuit, United States v. Rush, 738 F.2d 497, 512 (1st Cir. 1984), described the district court's ruling as follows:

On November 23, 1982, the district court ruled as a matter of law that the first amendment did not protect the possession of marijuana with intent to distribute by the defendants, and further ordered that the defendants be precluded from introducing at trial any evidence concerning the Ethiopian Zion Coptic Church and the use of marijuana by its members, insofar as such evidence related to their alleged first amendment defense.

On February 21, 2006, the Supreme Court of the United States, 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), ruled, as a matter of law, that the

finder of fact must consider sincerely held establishment and exercise of religion (interpreting the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb et sq.).

Under UDV, once a person has shown that a law, or application of law, burdens a sincerely held establishment and exercise of religion the burden shifts to the government to show that the law is justified by a compelling interest. If, and only if, the government can prove the law is justified by a compelling interest, then the government has to show that the application of the law to the person is the least restrictive means of burdening the religious establishment and exercise of the person.

The trial court's refusal to allow the defendant to present a defense based on Sherbert v. Verner, 374 U.S. 398 (1963), and Wisconsin v. Yoder, 406 U.S. 205 (1972), in light of the Religious Freedom Restoration Act, which is fully retroactive, is plain error.

RELIGIOUS FREEDOM RESTORATION ACT

The relevant portions of the Religious Freedom Restoration Act follow:

42 U.S.C. § 2000bb.

Congressional findings and declaration of purposes

(b) Purposes. The purposes of this Act are--

- (1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
- (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

42 U.S.C. § 2000bb-2.

Definitions

(4) the term "exercise of religion" means religious exercise, as defined in section 8 of the Religious Land Use and Institutionalized Persons Act of 2000 [42 USCS § 2000cc-5].

42 U.S.C. 2000bb-3.

Applicability

(a) In general. This Act applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act [enacted Nov. 16, 1993].

RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSON ACT

The relevant portions of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc et seq. follow:

42 U.S.C. § 2000cc-5.

Definitions

In this Act:

(7) Religious exercise.

(A) In general. The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

FACTS WHICH PROVE THE PETITION IS A FACTUALLY INNOCENT PERSON

Part F, Section 601, of the Controlled Substances Act created a "Commission on Marihuana and Drug Abuse" to study marijuana. Comprehensive Drug Abuse Prevention and Control Act of 1970, Public Law 91-513 - OCT. 27, 1970 [84 STAT. 1280-1281]. In its 1972 report to Congress and the President of United States, "Marihuana: A Signal of Misunderstanding - First Report of the National Commission on Marihuana and Drug Abuse" (U.S. Government Printing Office, Stock Number 5266-0001) at page 150, the Commission wrote:

The total prohibition scheme was rejected primarily because no sufficiently compelling social reason, predicated on existing knowledge, justifies intrusion by the criminal justice system into the private lives of individuals who use marihuana. The Commission is of the unanimous opinion that 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 Controlled Substances Act, 21 U.S.C. § 811, creates a method for review under the Administrative Procedures Act. The Administrative Procedures Act has been used to review marijuana in 1986, 1988, 1999, and 2007, as follows:

In 1986, THC (the principle psychoactive substance in marijuana) was moved from Schedule I to Schedule II of the Controlled Substances Act for medical use. Federal Register, Vol.51, No. 92, Page 17476, Tuesday, May 13, 1986. This rescheduling proves prima facie that marijuana is safe for use by sick and

injured human beings. If marijuana is safe for use by sick and injured human beings, then it is safe for use in church.

In 1988, the DEA Administrative Law Judge stated this fact: "Marijuana, in its natural form, is one of the safest therapeutically active substances known to man." In the Matter of Marijuana Rescheduling Petition, DEA Docket 86-22, September 6, 1988, at pages 58-59.

In 1999, THC (the principle psychoactive substance in marijuana) was moved from Schedule II to Schedule III of the Controlled Substances Act. Federal Register, Vol. 64, No. 127, Page 35928, Friday, July 2, 1999. Again, if marijuana is safe for use by sick and injured human beings it is surely safe for use in church.

In 2007, the DEA Administrative Law Judge found that current supplies of marijuana being grown by researchers at the University of Mississippi for medical research were inadequate and recommended the DEA issue a license to grow marijuana to a researcher at the University of Massachusetts. In the Matter of Lyle E. Craker, Ph.D., DEA Docket No. 05-16, February 12, 2007. Again, if it is safe for Harvard to grow marijuana, and it is safe for the University of Mississippi to grow marijuana, then it is safe for the Ethiopian Zion Coptic Church to grow marijuana as a factual matter.

Between 1988 and 2006, eleven states enacted medical marijuana laws allowing the acquisition, possession, cultivation, use, distribution, or transportation of marijuana. Alaska Statutes 17.37.070(8) (2007); California Health & Safety Code § 11362.5(d) (2006); Colorado Constitution Article XVIII, Section 14(1)(b) (2006); Hawaii Revised Statutes § 329-121 (2006); 22 Maine Revised Statutes § 2383-B(5)(H) (2005); Montana Code Annotated § 50-46-102(5) (2006); Nevada Revised Statutes Annotated § 453A.120 (2006); Oregon Revised Statutes § 475.300(8) (2006); Rhode Island General Laws § 21-28.6-3(4) (2006); 18 Vermont Statutes Annotated § 4472(10) (2006); Revised Code Washington (ARCW) § 69.51A.010(1) (2006).

These facts show beyond any doubt that marijuana is not a threat to public health and safety of sufficient magnitude to satisfy the government's burden under 42 U.S.C. 2000bb-1 (in order to justify total prohibition of marijuana to the Ethiopian Zion Coptic Church).

42 U.S.C. § 2000bb-1.

Free exercise of religion protected

(a) In general. Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Exception. Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

FIRST AMENDMENT

It is clearly established that laws which are neither neutral toward religion nor generally applicable to everyone are required to meet the same standard articulated in the Religious Freedom Restoration Act under the compelling interest test set forth in Sherbert v. Verner and Wisconsin v. Yoder.

In Employment Division v. Smith, 494 U.S. 872, 884 (1990), the Supreme Court of the United States wrote:

As the plurality pointed out in *Roy*, our decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason. *Bowen v. Roy, supra*, at 708.

In City of Boerne v. Flores, 521 U.S. 507 (1997), the Supreme Court of the United States wrote:

Those cases, the Court explained, stand for 'the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of religious hardship without compelling reason.' 494 U.S. at 884;

As the Supreme Court of the United States recognized in UDV, 546 U.S. at ___, 126 S. Ct. at 1222-1223, 163 L. Ed. 2d at 1034, the Controlled Substances

Act is not neutral toward religion, because it provides a religious exemption for the sacramental use of the Schedule I controlled substance peyote.

The well-established peyote exception also fatally undermines the Government's broader contention that the Controlled Substances Act establishes a closed regulatory system that admits of no exceptions under RFRA.

As the Supreme Court of the United States recognized in UDV, 546 U.S. at ___, 126 S. Ct. at 1221, 163 L. Ed. 2d at 1033, the Controlled Substances Act is not generally applicable to everyone.

The Act contains a provision authorizing the Attorney General to "waive the requirement for registration of certain manufacturers, distributors, or dispensers if he finds it consistent with the public health and safety." 21 U.S.C. § 822(d). The fact that the Act itself contemplates that exempting certain people from its requirements would be "consistent with the public health and safety" indicates that congressional findings with respect to Schedule I substances should not carry the determinative weight, for RFRA purposes, that the Government would ascribe to them.

What this means, in terms of the Petitioner's motion to vacate his conviction, is the United States Supreme Court has applied Sherbert v. Verner and Wisconsin v. Yoder to the federal drugs laws and reached a conclusion opposite of that reached by the trial court in the Petitioner's criminal trial. The effect of the ruling in UDV is to overturn the legal basis for the Petitioner's criminal conviction and to justify vacating the ruling of the trial court which prevented the Petition from presenting a religious establishment and exercise defense to the jury based on the First Amendment to the Constitution of the United States.

The Sherbert v. Verner, Wisconsin v. Yoder, tests were not utilized in the Petitioner's criminal trial. The trial court denied the Sherbert and Yoder tests and the United States Court of Appeals for the First Circuit upheld the error by relying on a series of published decisions derived from Leary v. United States, 383 F.2d 851 (5th Cir. 1967), reversed on other grounds, 395 U.S. 6 (1969). All of the cases derived from Leary claim that the drug laws, in and of them selves, override the Petitioner's constitutional rights. In not one of

these cases was an immediate threat to public health and safety shown to have been caused by the Petitioner's establishment and exercise of his religion nor was the Petitioner allowed to present any evidence to the jury that 20 tons of marijuana caused no threat to public health and safety.

The Leary court did not apply the Sherbert test. The Leary court, 383 F.2d, at pages 860-861, wrote:

Appellant's reliance on Sherbert v. Verner, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963), for authority that the constitutionally guaranteed right of free religious exercise imposes on the Government the burden of showing a compelling interest in its abridgement, is misplaced and inapposite on the facts.

Inapposite is a legal term, not commonly used by ordinary people, that means something is irrelevant and cannot be applied. The Leary court continued by saying:

We cannot reasonably equate deliberate violation of federal marihuana laws with the refusal of an individual to work on her Sabbath Day and nevertheless claim compensation benefits.

Congress has made it a crime to traffic in marihuana and it was not incumbent upon the Government to produce evidence to controvert the testimony of witnesses on the controversial question whether use of the drug is relatively harmless.

The Leary court did not apply Sherbert to the religious use of a Schedule I controlled substance because the court said "it was not incumbent upon the government to produce evidence" showing an immediate threat to public health and safety caused by Dr. Leary's use of marijuana as a sacrament. Sherbert and Yoder are fact based contests. If the government is not required to produce evidence, then there is no factual contest as described in Sherbert and Yoder.

The United States Court of Appeals for the First Circuit, following Leary, said that the drug laws cannot be questioned or put to the tests set forth in Sherbert and Yoder. In United States v. Rush, 738 F.2d 497, 512 (1st Cir. 1984), the court wrote:

In enacting substantial criminal penalties for possession with intent to distribute, Congress has weighed the evidence and reached a conclusion which it is not this court's task to review de novo.

Under the U.S. Supreme Court's decision in UDV it is the trial court's obligation under Sherbert and Yoder to review the particular religious use of a scheduled substance de novo (as applied "to the person", 546 U.S. ___, 126 S. Ct. at 1220, 163 L. Ed. 2d at 1031). The UDV court said Sherbert and Yoder "looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants." 546 U.S. ___, 126 S. Ct. at 1220, 163 L. Ed. 2d at 1031. The Rush court, *id.* at 512, relied on Leary as precedent for its decision:

Every federal court that has considered the matter, so far as we are aware, has accepted the congressional determination that marijuana in fact poses a real threat to individual health and social welfare, and has upheld the criminal sanctions for possession and distribution of marijuana even where such sanctions infringe on the free exercise of religion. *United States v. Middleton*, 690 F.2d 820, 825 (11th Cir. 1982), *cert. denied*, 460 U.S. 1051, 103 S. Ct. 1497, 75 L. Ed. 2d 929 (1983); *United States v. Spears*, 443 F.2d 895 (5th Cir. 1971), *cert. denied*, 404 U.S. 1020, 30 L. Ed. 2d 669, 92 S. Ct. 693 (1972); *Leary v. United States*, 383 F.2d 851, 859-61 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6, 23 L. Ed. 2d 57, 89 S. Ct. 1532 (1969)

The previous case in this series of decisions is United States v. Middleton, 690 F.2d 820, 825 (11th Cir. 1982), which also relied on Leary (and is also plain error and superseded under RFRA and overturned by UDV):

As this court noted in *Leary v. United States*, 383 F.2d 851 (5th Cir. 1967), *rev'd. on other grounds*, 395 U.S. 6, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969), both the fact of legislation and the severity of the penalties provided in statutes such as the one in question clearly evidence "the grave concern of Congress" in controlling the use of drugs. *Id.* at 859. Moreover, the harm of the particular drug in question is not relevant in determining the degree of protection afforded by the free exercise clause to the defendant's actions.

Olsen v. State of Iowa, 808 F.2d 652, 653 (8th Cir. 1986), follows Rush and Middleton and is also plain error reversed under RFRA and UDV.

We agree with the district court that Olsen's claims are without merit. See, *e.g.*, *United States v. Rush*, 738 F.2d 497, 511-513 (1st Cir.1984), *cert. denied*, 471 U.S. 1120, 105 S. Ct. 2370, 86 L. Ed. 2d 269 (1985) (rejecting free-exercise and equal protection claims by members of the Ethiopian Zion Coptic Church convicted for possession of marijuana); *United States v. Middleton*, 690 F.2d 820, 824-825 (11th Cir.1982) (rejecting similar free-exercise claim);

In UDV, 546 U.S. at ___, 126 S. Ct. at 1220; 163 L. Ed. 2d at 1031, the U.S. Supreme Court reversed this series of cases based on Leary when it wrote: "Under the Government's view, there is no need to assess the particulars of the UDV's use or weigh the impact of an exemption for that specific use, because the Controlled Substances Act serves a compelling purpose and simply admits of no exceptions." In UDV, 546 U.S. ___, 126 S. Ct. at 1220, 163 L. Ed. 2d at 1031, the U.S. Supreme Court continued:

RFRA, and the strict scrutiny test it adopted, contemplate an inquiry more focused than the Government's categorical approach. RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law "to the person" -- the particular claimant whose sincere exercise of religion is being substantially burdened. 42 U.S.C. § 2000bb-1(b). RFRA expressly adopted the compelling interest test "as set forth in *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972)." 42 U.S.C. § 2000bb(b)(1). In each of those cases, this Court looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants."

In UDV, 546 U.S. ___, 126 S. Ct. at 1221, 163 L. Ed. 2d at 1032-1033, the U.S. Supreme Court described the de novo review required by the finder of fact under Sherbert and Yoder:

Under the more focused inquiry required by RFRA and the compelling interest test, the Government's mere invocation of the general characteristics of Schedule I substances, as set forth in the Controlled Substances Act, cannot carry the day. It is true, of course, that Schedule I substances such as DMT are exceptionally dangerous. See, e.g., *Touby v. United States*, 500 U.S. 160, 162, 111 S. Ct. 1752, 114 L. Ed. 2d 219 (1991). Nevertheless, there is no indication that Congress, in classifying DMT, considered the harms posed by the particular use at issue here -- the circumscribed, sacramental use of *hoasca* by the UDV. The question of the harms from the sacramental use of *hoasca* by the UDV was litigated below. Before the District Court found that the Government had not carried its burden of showing a compelling interest in preventing such harms, the court noted that it could not "ignore that the legislative branch of the government elected to place materials containing DMT on Schedule I of the [Act], reflecting findings that substances containing DMT have 'a high potential for abuse,' and 'no currently accepted medical use in treatment in the United States,' and that 'there is a lack of accepted safety for use of [DMT] under medical supervision.'" 282 F. Supp. 2d, at 1254. But Congress' determination that DMT should be listed under Schedule I simply does not provide a

categorical answer that relieves the Government of the obligation to shoulder its burden under RFRA.

This conclusion is reinforced by the Controlled Substances Act itself. The Act contains a provision authorizing the Attorney General to "waive the requirement for registration of certain manufacturers, distributors, or dispensers if he finds it consistent with the public health and safety." 21 U.S.C. § 822(d). The fact that the Act itself contemplates that exempting certain people from its requirements would be "consistent with the public health and safety" indicates that congressional findings with respect to Schedule I substances should not carry the determinative weight, for RFRA purposes, that the Government would ascribe to them.

Finally, in Olsen v. DEA, 878 F.2d 1458, 1467 (D.C. Cir. 1989), cert. denied, US (2006), the Plaintiff sought an administrative hearing on his petition for a sacramental exemption under the provisions of 21 C.F.R. 1308 et seq., which was denied by the DEA Administrator. The DEA Administrator wrote:

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).

The United States Court of Appeals for the District of Columbia affirmed the DEA Administrator by denying the Plaintiff's right to be heard, to present evidence, and to have an administrative law judge make findings of fact. Instead, the Court of Appeals simply used the facts from the Plaintiff's criminal cases as evidence. Clearly, under RFRA and UDV, the Plaintiff was entitled to a hearing, since the purpose of filing the petition was to remedy the failure of the Leary series of decisions to apply the Sherbert and Yoder fact tests and to consider any less restrictive means than complete prohibition of the Plaintiff's religion.

In United States v. Bauer, 84 F.3d 1549m 1559 (9th Cir. 1996), the United States Court of Appeals for the 9th Circuit reversed a district court's reliance on Leary,

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.

CONCLUSION

WHEREFORE, the Petitioner requests this honorable court to vacate his conviction.

Respectfully submitted this 3rd day of March, 2007.

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515-288-5798
IN PROPRIA PERSONA

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Extension of Time was mailed by first class mail on this 3rd day of March, 2007 to the following respondent:

Paula Silsby
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