

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,	*	Petitioner's Objections to
	*	Magistrate's Recommended Decision
Respondent.	*	

Carl Eric Olsen objects to the Recommended Decision filed by Magistrate Judge Margaret J. Kravchuk on March 19, 2007.

JURISDICTION OF THIS COURT TO HEAR THIS CASE

The Petitioner, Carl Eric Olsen, is not an attorney. The Petitioner is looking at the case law he can find and in the Petitioner's untrained opinion that the remedy he seeks lies in 28 U.S.C. § 1651 (in what was formerly known as a "Writ of Error Coram Nobis").

PETITIONER IS NOT A PRISONER IN CUSTODY

It is worth reviewing the history of 28 U.S.C. § 2255 before explaining the reasons why the Petitioner, Carl Eric Olsen, did not style the case as a Motion to Vacate Sentence under 28 U.S.C. § 2255. In United States v. Hayman, 342 U.S. 205 (1952), the Supreme Court explained why Congress enacted 28 U.S.C. § 2255:

These practical problems have been greatly aggravated by the fact that the few District Courts in whose territorial jurisdiction major federal penal institutions are located were required to handle an inordinate number of habeas corpus actions far from the scene of the facts, the homes of the witnesses and the records of the sentencing court solely because of the fortuitous concentration of federal prisoners within the district. *Id.* at pages 213-214

This review of the history of Section 2255 shows that it was passed at the instance of the Judicial Conference to meet practical difficulties that had arisen in administering the habeas corpus jurisdiction of the federal courts. Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners'

rights of collateral attack upon their convictions. On the contrary, the sole purpose was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum. *Id.* at page 219.

The very purpose of Section 2255 is to hold any required hearing in the sentencing court because of the inconvenience of transporting court officials and other necessary witnesses to the district of confinement. *Id.* at pages 220-221.

The word "prisoner" appears frequently in the case law interpreting 28 U.S.C. § 2255 and would appear to have significance since 28 U.S.C. § 2255 did not replace 28 U.S.C. § 2241 in all circumstances. In Sawyer v. United States, 373 U.S. 1 (1963), the Supreme Court wrote:

Section 2255 of the Judicial Code, under which the instant case arises, is of course also a product of the 1948 revision -- enacted, in the language of the Reviser's Note, to provide "an expeditious remedy for correcting erroneous sentences [of federal prisoners] without resort to habeas corpus."

The Supreme Court has noted the similarity between 28 U.S.C. § 2255 and 28 U.S.C. § 2241, including the standard for successive applications (which is the same for either statute). In Sanders v. United States, 373 U.S. 1, 14-15 (1963), the Supreme Court wrote:

First, there is no indication in the legislative history to the 1948 revision of the Judicial Code that Congress intended to treat the problem of successive applications differently under habeas corpus than under the new motion procedure; and it is difficult to see what logical or practical basis there could be for such a distinction.

Second, even assuming the constitutionality of incorporating *res judicata* in § 2255, such a provision would probably prove to be completely ineffectual, in light of the further provision in the section that habeas corpus remains available to a federal prisoner if the remedy by motion is "inadequate or ineffective." A prisoner barred by *res judicata* would seem as a consequence to have an "inadequate or ineffective" remedy under § 2255 and thus be entitled to proceed in federal habeas corpus -- where, of course, § 2244 applies. See *Smith v. United States*, *supra*, 106 U. S. App. D. C., at 174, 270 F.2d, at 926.

II.

We think the judicial and statutory evolution of the principles governing successive applications for federal habeas corpus and motions under § 2255 has reached the point at which the formulation of basic rules to guide the lower federal courts is both feasible and desirable. Compare *Townsend v. Sain*, 372 U.S. 293, 310. Since the motion procedure is the substantial equivalent of federal habeas

corpus, we see no need to differentiate the two for present purposes. It should be noted that these rules are not operative in cases where the second or successive application is shown, on the basis of the application, files, and records of the case alone, conclusively to be without merit. 28 U. S. C. §§ 2243, 2255. In such a case the application should be denied without a hearing.

Perhaps the language of the statute itself explains why the Petitioner chose to bring his application to this court under 28 U.S.C. § 1651 and 28 U.S.C. § 2241 rather than 28 U.S.C. § 2255. The Petitioner, Carl Eric Olsen, is not a "prisoner" and is not in "custody". In her Recommended Decision, the Magistrate cited Melton v. United States, 359 F.3d 855, at page 857 (7th Cir. 2004):

Paragraph 1 of § 2255 reads:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Melton's application fits comfortably within that coverage. It therefore was a motion under § 2255, notwithstanding its caption, and the district court was obliged to dismiss it for want of jurisdiction because Melton had not received this court's permission to commence a second or successive collateral attack. Moreover, because § 2255 governs, Melton needed a certificate of appealability in order to obtain appellate review, see 28 U.S.C. § 2253(c), and he has neither requested nor received one. (The district court also neglected to make the initial determination that Fed. R. App. P. 22(b)(1) calls for in all matters within the scope of § 2255, even if the prisoner fails to request a certificate.)

Melton is inapposite to the facts in the instant case, because Melton brought his application under an ancient writ that has nothing to do with criminal proceedings. As the court noted, "The ancient writ of audita querela, long ago abolished in federal civil proceedings, see Fed. R. Civ. P. 60(b), has no apparent relevance to criminal sentences." Melton, 359 F.3d at page 856. The Court of Appeals held that Melton was a prisoner in custody, the substance of Melton's application was a motion to vacate his sentence, Melton's motion was

successive, Melton's motion would be treated as a request to the appellate court to file a successive motion, and that Melton's motion did not have merit.

IF 28 U.S.C. § 2255 IS NOT AVAILABLE

The courts in Triestman v. United States, 124 F.3d 361, 377 (2nd Cir. 1997), In Re Dorsainvil, 119 F.3d 245, 252-53 (3rd Cir. 1997); and In Re Hanserd, 123 F.3d 922, 929-30 (6th Cir. 1997) all rule that review of a claim is available under section 28 U.S.C. § 2241 where the gate keeping provisions of section 2255 would bar a claim.

RESTRAINTS ON LIBERTY AND WRIT OF ERROR CORAM NOBIS

In Jones v. Cunningham, 371 U.S. 236 (1963), the Supreme Court wrote: "Similarly, in the United States the use of habeas corpus has not been restricted to situations in which the applicant is in actual, physical custody." Jones at page 239. The Supreme Court then described the essence restraint on liberty, "[W]hat matters is that they significantly restrain petitioner's liberty to do those things which in this country free men are entitled to do. Such restraints are enough to invoke the help of the Great Writ." Jones at page 243.

The Writ of Error Coram Nobis is not barred by 28 U.S.C. § 2255, as noted by the Supreme Court in United States v. Morgan, 346 U.S. 502, 510-511 (1954)

The contention is made that § 2255 of Title 28, U. S. C., providing that a prisoner "in custody" may at any time move the court which imposed the sentence to vacate it, if "in violation of the Constitution or laws of the United States," should be construed to cover the entire field of remedies in the nature of *coram nobis* in federal courts. We see no compelling reason to reach that conclusion. [*511] In United States v. Hayman, 342 U.S. 205, 219, we stated the purpose of § 2255 was "to meet practical difficulties" in the administration of federal habeas corpus jurisdiction. We added: "Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions." We know of nothing in the legislative history that indicates a different conclusion. We do not think that the enactment of § 2255 is a bar to this motion, and we hold that the District Court has power to grant such a motion.

The Supreme Court further explained "restraint on liberty" in Morgan, at pages 512-513:

Although the term has been served, the results of the conviction may persist. Subsequent convictions may carry heavier penalties, civil rights may be affected. As the power to remedy an invalid sentence exists, we think, respondent is entitled to an opportunity to attempt to show that this conviction was invalid. (footnote omitted)

When no other remedy is available, courts still retain jurisdiction under 28 U.S.C. § 1651 and 28 U.S.C. § 2241. See Felker v. Turpin, 518 U.S. 651, 116 S. Ct. 2333, 135 L. Ed. 2d 827 (1996). See also, Sanders v. United States, 373 U.S. 1, 15, 83 S. Ct. 1068, 1077, 10 L. Ed. 2d 148, 161 (1963).

Again, the language of the statute itself provides instruction. Paragraph (a) of 28 U.S.C. § 2241 reads: "... the restraint complained of ..."

The Petitioner's liberty is restrained because: (1) the Petitioner cannot apply for employment without stating that he is a convicted felon; (2) the Petitioner is prohibited from owning a firearm, a Constitutional right of the people under the Second Amendment to the Constitution; (3) the Petitioner cannot vote in some states; and (4) for all of the reasons cited by the United States Supreme Court in Jones and Morgan.

See also, Korematsu v. United States, 584 F. Supp. 1406, 1411 (N.D. Cal. 1984):

A writ of *coram nobis* is an appropriate remedy by which the court can correct errors in criminal convictions where other remedies are not available. Although Rule 60(b), Fed. R. Civ. P., abolishes various common law writs, including the writ of *coram nobis* in civil cases, the writ still obtains in criminal proceedings where other relief is wanting.

...

While the habeas corpus provisions of 28 U.S.C. § 2255 supplant most of the functions of *coram nobis*, particularly in light of the federal courts' expanded view of custody, habeas corpus is not an adequate remedy here. Petitioner's sentence has been served. He cannot meet the "in custody" requirements of § 2255 under any interpretation of that section.

If the Petitioner was a "prisoner" in "custody" and entitled to file a motion under 28 U.S.C. § 2255 the Petitioner would have done so and would have requested permission to file a successive motion under 28 U.S.C. § 2255 from the United States Court of Appeals for the First Circuit as required by the AEDPA.

FACTUAL INNOCENCE AND PLAIN ERROR

This court has jurisdiction to review claims of "factual innocence" caused by "plain error" resulting in "miscarriage of justice." See, Schlup v. Delo, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995). See also, Sawyer v. Whitley, 505 U.S. 333, 112 S. Ct. 2514, 120 L. Ed. 2d 269 (1992).

The Petitioner is a factually innocent person who was convicted in a case where the trial court made a plain error when it refused to demand that the government present evidence of guilt to the jury. It is also plain error for the trial court to conceal the evidence of the Petitioner's innocence from the jury.

In Schlup v. Delo, the Supreme Court of the United States ruled that where Schlup claimed actual innocence of the crime and the trial court was tainted by constitutional error, which deprived the jury of evidence of innocence, the petition under writ of habeas corpus should go forward on its merits.

Carl Eric Olsen has always claimed actual innocence of the crime. The evidence of innocence was withheld from the jury solely because of the ruling of the trial court refusing to apply Religious Freedom to the drug laws. The ruling in Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 126 S. Ct. 1211, 163 L. Ed. 2d 1017 (2006), clearly states that Religious Freedom is applicable to the drug laws.

Under the Religious Freedom Restoration Act (RFRA) it is Plain Error for the trial court to fail to order the government to produce the evidence of guilt of a violation of federal law as amended by the RFRA.

Under the RFRA it is Plain Error for the trial court to prevent the defendant from presenting evidence of innocence of violation of federal law to the jury.

Under the RFRA it is Plain Error where the trial court did not allow jury instructions on the religious defense under the RFRA.

Under Schlup v. Delo, this Court has jurisdiction to hear claims of factual innocence due to plain error, which deprived the jury at trial of the evidence of innocence of the crime.

The conviction of crime where no facts of guilt are proved is a miscarriage of justice, which has caused irreparable harm, as well as actual damages, inflicted on a factually innocent person.

If the trial court had allowed the jury to consider religious freedom according to the ruling in Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 126 S. Ct. 1211, 163 L. Ed. 2d 1017 (2006), the evidence would have clearly shown that the Commission established by Congress to review the marijuana laws in 1970 when it enacted the Controlled Substances Act found there was no threat to public and health and safety sufficient to justify making a criminal out of anyone for using marijuana. If there is no justification for making anyone a criminal for using marijuana, then there is no justification for make the religious use of marijuana a crime.

The evidence now is even greater than it was in 1982 when the trial court refused to allow the religious defense. The principle psychoactive ingredient in marijuana was found to have medical value and moved from Schedule I to Schedule II of the Controlled Substances Act in 1986. The DEA's chief administrative law judge in 1988 found that "Marijuana, in its natural form, is one of the safest therapeutically active substances known to man." The principle psychoactive ingredient in marijuana was moved from Schedule II to Schedule III in 1999. Since 1999, 11 states have legalized the cultivation of marijuana by medical patients and their care givers. The evidence is overwhelming. Under these set of facts, no jury could have found the Petitioner guilty of a crime in light of the strict scrutiny applied to the religious use of controlled substances in Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 126 S. Ct. 1211, 163 L. Ed. 2d 1017 (2006). If the federal Commission set up by the Controlled Substances Act found no threat to

public health and safety from the general use of marijuana by anyone, how could a jury find the Petitioner was threatening anyone's health and safety by using marijuana for religious purposes?

The trial court's ruling at the Petitioner's trial that the marijuana laws are too important to allow religious freedom is in direct contradiction with City of Indianapolis v. Edmond, 531 U.S. 32, 42, 121 S. Ct. 447, 454, 148 L. Ed. 2d 333, 344 (2000), in which the Supreme Court found "the severe and intractable nature of the drug problem" does not justify violation of constitutional protections.

CONCLUSION

WHEREFORE, the Petitioner objects to the magistrate's recommended decision and requests this honorable court to vacate his conviction.

Respectfully submitted this 21st day of March, 2007.

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

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Extension of Time was served electronically on this 21st day of March, 2007 to the following respondent:

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