

IN THE
UNITED STATES COURT OF APPEALS
FIRST CIRCUIT

CARL ERIC OLSEN, in propria persona,	*	
	*	
Petitioner,	*	No. 07-2310
	*	
v.	*	
	*	Petition for Writ of Mandamus
UNITED STATES DISTRICT COURT, DISTRICT OF MAINE	*	To Compel the District Court to
	*	Rule on Petition for Writ of Error
	*	Coram Nobis filed pursuant to
Respondent.	*	28 U.S.C. § 1651

PETITION FOR WRIT OF MANDAMUS

Pursuant 28 U.S.C. § 1651, the Petitioner, Carl Eric Olsen, hereby petitions this Court to issue a Writ of Mandamus to compel the United States District Court for the District of Maine to rule on his Petition for Writ of Habeas Corpus (Writ of Error Coram Nobis) as filed under 28 U.S.C. § 1651.

JURISDICTION

This Court has jurisdiction to issue the writ. See La Buy v. Howes Leather Co., 352 U.S. 249, 259-260 (1957) ("We believe that supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system. The All Writs Act confers on the Courts of Appeals the discretionary power to issue writs of mandamus in the exceptional circumstances existing here."); and see Schlagenhauf v. Holder, 379 U.S. 104, 109-110, 112 (1964) ("The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction . . . , 'Roche v. Evaporated Milk Assn.', 319 U.S. 21, 26.").

FACTS SUPPORTING THIS PETITION

1. On March 8, 2007, the Petitioner filed a Petition for Writ of Habeas Corpus in the United States District Court for the District of Maine pursuant to

28 U.S.C. § 1651 and 28 U.S.C. § 2241. Petitioner alleged that his conviction was obtained as the result of an error of law by the trial court. Petitioner alleged that this ruling deprived him of his Constitutional right to a fair trial because evidence of the Petitioner's innocence was withheld from the jury. All this occurred in violation of the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb et seq. See Exhibit #1 ("Petition for Writ of Habeas Corpus"). And see Exhibit #2 ("Trial Court's 1982 Ruling on Government's Motion to Limit Defendants' Proof at Trial").

2. Before filing the Petition for Writ of Habeas Corpus, the Petitioner requested an extension of time which stated that he was preparing to make a claim under 28 U.S.C. § 1651. Petitioner assigned the original criminal case number, No. 80-10025 B to the application under 28 U.S.C. § 1651. See Exhibit #3.

3. Shortly after filing the Petition for Writ of Habeas Corpus, the Petitioner received a letter from the Clerk of Court returning his \$5 filing fee, which is the statutory fee required for filing a Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. § 1914(a). See Exhibit #4.

4. The Petitioner was never notified that his \$5 filing fee had been returned by the Clerk of Court because the Clerk of Court had re-classified his Petition as a motion to vacate his conviction under 28 U.S.C. § 2255.

5. On March 19, 2007 the Magistrate made a recommended ruling that ignored the Petitioner's claim under 28 U.S.C. § 1651. The Magistrate recommended the Petitioner's Petition be dismissed because the Petitioner is no longer in custody and is therefore ineligible to file under 28 U.S.C. § 2241 or 28 U.S.C. § 2255, without ever mentioning the Petitioner's claim under 28 U.S.C. § 1651. See Exhibit #5 (ignoring the Petitioner's claim under 28 U.S.C. § 1651), and compare it with the title page of Exhibit #1 citing 28 U.S.C. § 1651.

6. On March 21, 2007 the Petitioner objected to the failure of the magistrate to address the Petitioner's claim under 28 U.S.C. § 1651. The

Petitioner informed the Court that he had filed his Petition for Writ of Error Coram Nobis pursuant to 28 U.S.C. § 1651. The Petitioner further informed the Court that he is not eligible to file under 28 U.S.C. § 2255 because he is no longer in custody. The Petitioner further informed the Court of United States Supreme Court case law supporting his right to file a Petition for Writ of Error Coram Nobis under 28 U.S.C. § 1651 because of the error of law made by the trial court in 1982 which resulted in withholding evidence of the Petitioner's innocence from the jury. See Exhibit #6.

7. On April 10, 2007 the District Court dismissed the Petition for Writ of Habeas Corpus without adding any further comment to the Magistrate's recommended ruling or addressing the Petitioner's claim under 28 U.S.C. § 1651. See Exhibit #7.

PRAYER FOR RELIEF

Therefore, Petitioner comes to the Court requesting the Writ of Mandamus issue to the District Court to require a ruling on his Petition under 28 U.S.C. § 1651.

ARGUMENT SUPPORTING THIS PETITION

In 1982, the Petitioner's trial court applied the legal standard in Leary v. United States, 383 F.2d 851 (5th Cir. 1967), to my claim of First Amendment protection of religious Establishment and Exercise. The trial court's position has been overturned by the United States Supreme Court in Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006).

The Petitioner informed the District Court of a substantial change in the law regarding the religious use of controlled substances because of the interpretation of the RFRA by the United States Supreme Court in Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006). The Petitioner also informed the District Court that the RFRA is fully retroactive to every prior implementation of federal law. 42 U.S.C. § 2000bb-3(a). The implementation of law applied by the trial court in 1982 denied the Petitioner's

First Amendment defense. United States v. Rush, 738 F.2d 497, 512 (1st Cir. 1984):

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.

The trial court applied a "rational basis test" analysis after finding the Petitioner's sincere religious practice was being burdened by the federal drug laws. In 1984, the United States Court of Appeals for the First Circuit applied a "rational basis test" in reviewing the 1982 decision of the trial court to withhold evidence of the Petitioner's innocence from the jury:

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*.

United States v. Rush, 738 F.2d at 512.

In Gonzales v. O Centro Espirita Beneficente Unaio do Vegetal, 546 U.S. 418 (2006), the Supreme Court recognized that strict scrutiny must be applied to cases involving the religious use of controlled substances. The fact based tests of Sherbert v. Verner, 374 U.S. 398 (1963), and Wisconsin v. Yoder, 406 U.S. 205 (1972), are now mandated by the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq., and are now required whenever a sincere religious practice is being burdened by the federal drug laws. The United States Supreme Court applied strict scrutiny and the three part test of the RFRA, 42 U.S.C. 2000bb-1(b) to both the importation and the distribution of a Schedule I controlled substance, DMT (dimethyltryptamine).

The decision in United States v. Rush is subject to review now because the Religious Freedom Restoration Act is fully retroactive to any prior implementation of federal law. 42 U.S.C. § 2000bb-3(a).

The ruling in Gonzales v. O Centro represents a substantive change in the law that that was applied in United States v. Rush. Gonzales v. O Centro shows

without a doubt that the evidence of sincerity, substantial burden, compelling interest, and least restrictive means of regulation must be entered into record at trial. The Rush decision shows clearly that no evidence of sincerity, substantial burden, compelling interest, or least restrictive means was entered into the record at trial. Therefore, Petitioner did not receive a fair trial on factual evidence of innocence or guilt and is now entitled to relief. See Schlup v. Delo, 513 U.S. 298, 316 (1995) ("However, if a petitioner such as Schlup presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims.").

At the same time, the Court has adhered to the principle that habeas corpus is, at its core, an equitable remedy. This Court has consistently relied on the equitable nature of habeas corpus to preclude application of strict rules of res judicata.

Schlup v. Delo, 513 U.S. at 320.

In assessing the adequacy of petitioner's showing, therefore, the district court is not bound by the rules of admissibility that would govern at trial. Instead, the emphasis on "actual innocence" allows the reviewing tribunal also to consider the probative force of relevant evidence that was either excluded or unavailable at trial. Indeed, with respect to this aspect of the *Carrier* standard, we believe that Judge Friendly's description of the inquiry is appropriate: The habeas court must make its determination concerning the petitioner's innocence "in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongfully excluded or to have become available only after the trial."

Schlup v. Delo, 513 U.S. at 327-328.

On April 10, 2007 the District Court denied the Petitioner's claim under 28 U.S.C. § 2241. On April 10, the district court ignored the Petitioner's claim under 28 U.S.C. § 1651. Since the Petitioner cited 28 U.S.C. § 1651 in the original application, and since the district court failed to address the issues under 28 U.S.C. § 1651, therefore, the district court did not perform its duty and is subject to an order of mandamus from this Court. By failing to

consider the petition under 28 U.S.C. § 1651 the district Court denied the Petitioner the Constitutional Right of Habeas Corpus. United States Constitution, Article I, Section 9, Clause 2.

A Petition for Writ of Error Coram Nobis is available when the Petitioner is no longer eligible to file under 28 U.S.C. § 2255. 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. 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.

United States v. Morgan, 346 U.S. 502, 512-513 (1954):

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.

The Petitioner suffers the injury of ongoing deprivation of his fundamental Constitutional rights: to establishment and exercise of religion; to peaceably assemble with the members of his faith; to bear arms; to be secure in his person, house, papers, and effects; to life, liberty and property; to be confronted with the witnesses against him; to right of trial by jury; to be free from cruel and unusual punishment; and to those inalienable right retained by the people such as the right to possess a green herb bearing seed which was given to the Petitioner by his Creator.

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.

Korematsu v. United States, 584 F. Supp. 1406, 1412 (N.D. Cal. 1984):

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. See *Hensley v. Municipal Court*, 411 U.S. 345, 36 L. Ed. 2d 294, 93 S. Ct. 1571 (1973) (discussing meaning of custody in context of 28 U.S.C. § 2254 requirements); *Jones v. Cunningham*, 371 U.S. 236, 9 L. Ed. 2d 285, 83 S. Ct. 373 (1963) (finding the restraints of parole sufficient to constitute custody for the purposes of habeas proceedings under § 2254); *Azzone v. United States*, 341 F.2d 417 (8th Cir. 1965), cert. denied sub. nom. *Azzone v. Tahash*, 390 U.S. 970, 19 L. Ed. 2d 1180, 88 S. Ct. 1090 (1968) (applying the custody requirement in § 2255 proceedings). It is in these unusual circumstances that an extraordinary writ such as the writ of *coram nobis* is appropriate to correct fundamental errors and prevent injustice. *United States v. Correa-De Jesus*, 708 F.2d 1283 (7th Cir. 1983).

The source of the court's power to grant *coram nobis* relief lies in the All Writs Act, 28 U.S.C. § 1651(a). The petition is appropriately heard by the district court in which the conviction was obtained. *Morgan*, 346 U.S. at 512. This is so even though the judgment has been appealed and affirmed by the Supreme Court. Appellate leave is not required for a trial court to correct errors occurring before it. *Standard Oil of California v. United States*, 429 U.S. 17, 50 L. Ed. 2d 21, 97 S. Ct. 31 (1976).

The evidence which was withheld from the jury in 1982 would have proved the Petitioner's innocence under the RFRA. For instance, the legislative history of the Controlled Substances Act (CSA) shows that Congress was unsure in 1970 whether to include marijuana in the CSA. 1970 USCCAN 4566, 4577-4579. See Exhibit #8. In addition, the Legislative History and the Act itself show that a Presidential Commission was appointed in 1970 to help Congress make a final decision on the inclusion of marijuana in the CSA. In addition, the Commission found in 1972 there was no threat to public and health and safety sufficient to criminalize the use of marijuana. 1972 Report of the Commission on Marihuana and Drug Abuse; 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. See Exhibits #9 and #10.

In addition, the CSA includes a process for reviewing the inclusion of substances in the CSA. The official review of the principle psychoactive substance in marijuana in 1986 approved the ingredient for medical use and transferred the substance from Schedule I to Schedule II of the CSA. Volume 51 Federal Register 17476, Tuesday, May 13, 1986. See Exhibit #11. The official review of marijuana conducted in 1988 found that, "Marijuana, in its natural form, is one of the safest therapeutically active substances known to man." Findings of Fact, DEA Docket No. 86-22, Sept. 6, 1988. See Exhibit #12. The official review of the principle psychoactive substance in marijuana in 1999 transferred the substance from Schedule II to Schedule III of the CSA. Volume 64 Federal Register 35928, Friday, July 2, 1999. See Exhibit #13. Finally, the official review of marijuana manufacture conducted in 2007, found no threat to public health or safety sufficient to prevent the University of Massachusetts from growing marijuana. See Exhibit #14.

In addition, 12 states have found no sufficient threat to public health and safety to prevent the cultivation of marijuana by medical patients. 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); On July 2, 2007, in compliance with the Temporary Provision (Section 10., A.) of the Lynn & Erin Compassionate Use Act of 2007, the New Mexico Department of Health began accepting applications for participation in the Medical Cannabis Program. During this phase, the Medical Cannabis Program will issue temporary

certification cards to eligible patients and primary caregivers. This temporary certification allows for people to enroll in the program prior to the public hearing process and full promulgation of rules by October 1, 2007. Consistent with the Lynn and Erin Compassionate Use Act, the New Mexico Department of Health has determined what constitutes an "adequate supply" of medical marijuana. Under the New Mexico Department of Health temporary regulations, you have the right to possess up to six (6) ounces of usable cannabis, four (4) mature plants and three (3) seedlings. All temporary certification cards will expire on October 1, 2007, at which time the program will issue registry cards that will expire one-year from the date the participant was originally enrolled. <http://www.nmhealth.org/marijuana.html>.

The RFRA also requires the government to show actual harm caused by the Petitioner's religious use of marijuana. The government failed to produce any evidence of actual harm caused by the Petitioner's religious use of marijuana at the Petitioner's trial in 1982. No witnesses or evidence were introduced by the government showing anyone was or ever could be injured by the actions of the Petitioner.

Therefore, the Petitioner respectfully moves this Court to issue a Writ of Mandamus to the United States District Court for the District of Maine compelling the District Court to accept the Petitioner's Petition for Writ of Habeas Corpus/Writ of Error Coram Nobis under the correct statute under which it was filed.

Respectfully submitted this 20th day of August, 2007.

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IN PROPRIA PERSONA

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Mandamus was mailed by first class mail on this 20th day of August, 2007 to the following respondent:

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