

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

In re **CARL ERIC OLSEN**,

Petitioner,

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No. 07-2310

CRIMINAL NO. 80-10025 B

Petition for Rehearing and

Suggestion for Rehearing En Banc

**PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC**

The panel decision conflicts with a decision of the United States Supreme Court, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (*O Centro* hereafter), and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions.

Pursuant to Federal Rule of Appellate Procedure 40 and Federal Rule of Appellate Procedure 35, 28 U.S.C. § 1651, the Petitioner, Carl Eric Olsen, hereby moves the court for an en banc rehearing of the order dismissing his petition for Writ of Mandamus to compel the United States District Court for the District of Maine to rule on his Petition for Writ of Error Coram Nobis as filed under 28 U.S.C. § 1651.

QUESTION OF EXCEPTIONAL IMPORTANCE

Mr. Olsen filed a Petition for Writ of Error Coram Nobis in the United States District Court for the District of Maine, pursuant to the Religious Freedom Restoration Act (**RFRA** hereafter), 42 U.S.C. §§ 2000bb et seq., as applied to the federal drug laws by the United States Supreme Court in *O Centro* at page 430 (“Congress' express decision to legislate the compelling interest test indicates that RFRA challenges should be adjudicated in the same manner as constitutionally mandated applications of the test”).

The ruling in *O Centro* overrules this Court’s ruling in *United States v. Rush*, 738 F.2d 497, 512 (1st Cir. 1984) (*Rush* hereafter) (“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.”). *Rush* did not apply the constitutionally mandated “compelling interest test” now required by **RFRA**. Mr. Olsen was a defendant in *Rush*.

RFRA is fully retroactive, and applies to every federal law, whether enacted before or after the enactment of **RFRA**, and every implementation of federal law, whether implemented before or after the enactment of **RFRA**. 42 U.S.C. § 2000bb-3 (“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]”). As the Supreme Court explained in *Boerne v. Flores*, 521 U.S. 507, 532 (1997) (*Boerne* hereafter), **RFRA** represents an exception change in federal law:

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.

Rush applied a “rational basis test” analysis based on *Leary v. United States*, 383 F.2d 851 (5th Cir. 1967) (*Leary* hereafter), rejected by *O Centro* at page 431:

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.

The *Leary* court rejected the application of *Sherbert*. At page 860, the 5th Circuit 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.

Rush relied on *Leary* at pages 512-513.

Dr. Leary did not get *Sherbert* and neither did Mr. Olsen. RFRA demands the *Sherbert* and *Yoder* (decided after *Leary*) “compelling interest test” that requires a fact based analysis of threats to public health and safety.

In *Employment Division v. Smith*, 494 U.S. 872 (1990) (*Smith* hereafter), at pages 888-889 Justice Scalia actually says strict scrutiny had not been applied in a variety of contexts and cites *Olsen v. DEA*, 878 F.2d 1458 (D.C. Cir. 1989) (*Olsen* hereafter) as an example of a case where strict scrutiny (the constitutionally required “compelling interest test” of *Sherbert* and *Yoder*) as an example (relying on the ruling in *Rush*, at page 1461).

This Eighth Circuit has determined that RFRA is fully retroactive. *Christians v. Crystal Evangelical Free Church*, 82 F.3d 1407, 1417 (8th Cir. 1996) (“We and other circuits have held that the RFRA applies retroactively in other contexts.”), *affirmed after remand*, 141 F.3d 854, 860 (8th Cir. 1998) (“Congress has often provided statutory protection of individual liberties that exceed the Supreme Court's interpretation of constitutional protection”).

Finally, *United States v. Bauer*, 84 F.3d 1549, 1557 and 1559 (9th Cir. 1996) (*Bauer* hereafter), recognizes that *Leary* is no longer valid under **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 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 WRIT OF ERROR CORAM NOBIS

This Court cannot simply sweep Mr. Olsen away because of the error of this Court and the District Court misconstruing his Writ of Error Coram Nobis as a prisoner Habeas Corpus motion under 28 U.S.C. § 2255. In fact, this Court has original jurisdiction over Mr. Olsen's Petition for Writ of Error Coram Nobis and can construe Mr. Olsen's Petition for Writ of Mandamus as a Petition for Writ of Error Coram Nobis. 28 U.S.C. § 1651 ("The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable with the usages and principles of law"). There is no way this Court can escape its duty to act on Mr. Olsen's Petition for Writ of Error Coram

Nobis. See *United States v. Morgan*, 346 U.S. 502, 505 (1954) (“federal courts should act in doing justice if the record makes plain a right to relief . . . We therefore treat the record as adequately presenting a motion in the nature of a writ of error coram nobis enabling the trial court to properly exercise its jurisdiction.”).

The Supreme Court’s *O Centro* decision applying *RFRA* to the federal drug laws requires this Court to grant Mr. Olsen’s Petition for Writ of Error Coram Nobis. See *United States v. Mandel*, 862 F.2d 1067, 1075 (4th Cir. 1988) (“Without coram nobis relief, the petitioners, who contested their guilt at each stage of the proceeding, would face the remainder of their lives branded as criminals simply because their federal trial occurred before rather than after the Supreme Court’s ruling . . .”).

And see *United States v. Rice*, 379 F. Supp. 2d 1007, 1010 (S.D. Iowa), *affirmed*, 2006 U.S. App. LEXIS 13319 (8th Cir. Iowa, May 30, 2006):

Like the circumstances in *Morgan*, most Eighth Circuit coram nobis case law deals with post-judgment challenges brought by defendants. See, e.g., *United States v. Little*, 608 F.2d 296, 299 n.5 (8th Cir. 1979) (listing the types of situations in which the writ is proper: “Coram nobis lies only where the petitioner has completed his sentence and is no longer in federal custody, *Gajewski v. United States*, 368 F.2d 533 (8th Cir. 1966), is serving a sentence for a subsequent state conviction, *United States v. Morgan*, 346 U.S. 502, 98 L. Ed. 248, 74 S. Ct. 247 (1954); *Azzone v. United States*, 341 F.2d 417 (8th Cir. 1965), or has not begun serving the federal sentence under attack, *Thomas v. United States*, 106 U.S. App. D.C. 234, 271 F.2d 500 (D.C. Cir. 1959)”; see also *Curtiss v. United States*, 511 U.S. 485, 512 n.7, 128 L. Ed. 2d 517, 114 S. Ct. 1732 (1994) (stating that the writ of coram nobis is available, in the proper circumstances, to challenge a prior conviction relied upon at sentencing to enhance that sentence) (Souter, J., dissenting). “The . . . [coram nobis] motion is a step in the criminal case and not, like habeas

corpus where relief is sought in a separate case and record, the beginning of a separate civil proceeding." *United States v. Camacho-Bordes*, 94 F.3d 1168, 1171 n.2 (8th Cir. 1996). In order to make the writ available: 1) "the petitioner must show a compelling basis" and 2) "the movant must articulate the fundamental errors and compelling circumstances for relief in the application for coram nobis." *Id.* at 1173. A third element that appears in many cases, and is assumed in others, requires the defendant to show he presently suffers adverse legal consequences which stem from the conviction he is challenging. See, e.g., *Hunter v. United States*, 317 F. Supp. 2d 1147, 1148 (D. N.D. 2004).

In this case, where the decision in *Rush* is being used in other cases to deny Mr. Olsen a statutory right under **RFRA** and a constitution right under the First Amendment as defined in *O Centro*, the error of *Rush* is fundamental and the circumstances are compelling. See *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.")

Rush was used against Mr. Olsen in *Olsen v. DEA*, 878 F.2d 1458 (D.C. Cir. 1989), and is currently being used against Mr. Olsen in *Olsen v. Mukasey*, No. 07-3062, in the U.S. Court of Appeals for the Eighth Circuit, to deprive Mr. Olsen of his religious freedom.

REQUIRING CERTIFICATE OF APPEALABILITY FOR WRIT OF ERROR CORAM NOBIS IS PLAIN ERROR

There is no statutory authority for certificate of appealability under 28 U.S.C. § 1651 or 28 U.S.C. § 2241 and both the District Court and this Court were in error to require that Mr. Olsen comply with 28 U.S.C. § 2253 which only applies to 28

U.S.C. § 2254 and 28 U.S.C. § 2255. See *United States v. Kwan*, 407 F.3d 1005, 1009-1010 (9th Cir. 2005). The effect of requiring Mr. Olsen to file a certificate of appealability was to deny Mr. Olsen his right to appeal the decision of the District Court misconstruing his case as a prisoner motion under 28 U.S.C. § 2255. It is plain error for this court to now dismiss Mr. Olsen's Petition for Writ of Mandamus (to force the District Court to rule on the Petition for Writ of Error Coram Nobis) on the grounds that Mr. Olsen now has an appeal available to him that was not available when Mr. Olsen file this Petition for Writ of Mandamus. See this Court's Order of March 21, 2008, in *Olsen v. United States*, No. 07-1883 (1st Cir. 2008), reversing its own ruling of August 16, 2007, that required Mr. Olsen to file a certificate of appealability.

Mr. Olsen is a pro se litigant and not a trained attorney. Both the District Court and this Court have an obligation to construe Mr. Olsen's petitions correctly. See, *Haines v. Kerner*, 404 U.S. 519, 520-421 (1972):

Whatever may be the limits on the scope of inquiry of courts into the internal administration of prisons, allegations such as those asserted by petitioner, however inartfully pleaded, are sufficient to call for the opportunity to offer supporting evidence. We cannot say with assurance that under the allegations of the pro se complaint, which we hold to less stringent standards than formal pleadings drafted by lawyers, it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

CONCLUSION

Wherefore, the Petitioner moves this Court for a rehearing en banc.

Respectfully submitted this 24th day of April, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Rehearing En Banc
was mailed by first class mail on this 24th day of April, 2008 to:

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