

DRUG POLICY ALLIANCE

Reason. Compassion. Justice.

Dear Mr. Olsen,

Thank you for sending us drafts of your legal brief and permission to file a second motion to vacate sentence, which we received on March 21, 2006 and May 29, 2006 respectively. We have carefully reviewed these documents, your subsequent emails, and the relevant case law and the legal issue that you raise regarding the impact of the United States Supreme Court's decision in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 126 S. Ct. 1211 (2006) (hereinafter *UDV*) on the sacramental use of marijuana, but unfortunately we cannot assist you at this time.

Although the *UDV* case is noteworthy for the fact that the current Supreme Court is not entirely hostile to legal claims involving the sacramental use of controlled substances, the Court's holding and reasoning in the *UDV* case is quite narrow and carefully crafted to limit the immediate force and effect of the decision with respect to entheogens other than ayahuasca/hoasca. As explained more fully below in our discussion of the *Rush* and *Forchion* cases, we do *not* feel that the *UDV* ruling overturns existing case law concerning sacramental marijuana use.

UDV Applied to Rush

You asked whether the holding of *UDV* could be used to attack the holding of the court in *United States v. Rush*, 738 F.2d 497 (1st Cir. 1984) (hereinafter "*Rush*"). We think not, for both substantive and procedural reasons.

UDV rests on a very specific set of factual and procedural circumstances. The specific characteristics both of hoasca and of the *UDV* sect are crucial to the Court's holding. In *UDV*, the Supreme Court held that a preliminary injunction on the enforcement of the Controlled Substance Act ("CSA") in relation to the hallucinogenic tea of the Christian spiritualist sect was appropriate where the Government failed to demonstrate that an exemption for the sect would serve a compelling government interest. Hoasca, the sect's tea, included DMT, a Schedule I drug under the CSA. *UDV* brought suit under the Religious Freedom Restoration Act of 1993 ("RFRA"), which prevents substantial burdens on religious exercise unless the Government can demonstrate that the application of the law to the burdened person is the least restrictive way of furthering a compelling government interest.

To qualify for RFRA protection, proponents must first make a *prima facie* showing that the sacramental use is deserving of protection. The *prima facie* showing involves three steps. Specifically, the proponents must demonstrate that a Government action creates (1) a substantial burden on a (2) sincere (3) religious exercise. Only after a *prima facie* showing has been made does the burden shift to the Government to articulate compelling national interests that justify its interference with the specific religious exercise.

What is interesting and rather unique in the *UDV* litigation is that the Government conceded the *prima facie* case under the RFRA. This was a strategy that the Department of Justice attorneys, who may have been overly confident at the beginning of this case, likely regret in retrospect. Specifically, the Government stipulated that enforcement of the CSA would cause (1) a substantial burden on a (2) sincere (3) religious exercise. This is a first and crucial point of difference between the *UDV* and *Rush* cases.

The *Rush* case, decided by the United States Court of Appeals for the First Circuit in 1984, concerned an appeal of conspiracy convictions involving marijuana possession with the intent to distribute by members of the Ethiopian Zion Coptic Church. The appeal alleged several legal errors, including denial of the opportunity to assert a defense under the Free Exercise Clause of the First Amendment. The First Circuit affirmed the convictions of the church members and held that the Free Exercise defense failed because the Government had “an overriding interest” in controlling the use and distribution of marijuana. In reaching this conclusion, the court emphasized Congressional and judicial findings that marijuana was “a real threat” to public health and social welfare.

Rush predates the RFRA by nine years and instead relies on a claim under the Free Exercise Clause of the First Amendment. In *Rush*, the Government only stipulates the second and third elements of the *prima facie* showing required under what would later become the RFRA test -- namely, that use of marijuana by Ethiopian Zion Coptic Church constitutes a “sincere religious practice.” Neither the Government nor the First Circuit addresses the first element of the *prima facie* test -- whether the Government’s action creates a “substantial burden” on the religious exercise. Thus, it is difficult to argue that, standing alone, absent additional fact-finding, the church makes a *prima facie* showing under the standards later articulated by RFRA.

At the District Court level in *UDV*, the Government argued that burdening the UDV sect’s use of hoasca served three compelling national interests: (1) preventing harm to UDV members; (2) preventing diversion to secular users; and (3) compliance with the 1971 UN Convention on Psychotropic Substances. The District Court found that the evidence presented by both sides on the first two interests was “equally balanced” and that the third interest, compliance with UN conventions, did not apply. Because of this equal balance, the Government could not prove a likelihood of success on the merits under the RFRA, and the District Court granted a preliminary injunction for UDV.

Importantly, the Government did not challenge the District Court’s factual findings under interests (1) and (2) when the case went up to the Supreme Court. This may be another litigation strategy that the Government now regrets in hindsight. In any event, the Supreme Court was never asked to consider whether enforcement of the CSA prevented harm to UDV members or was easily diverted to secular uses -- the Court simply regarded the District Court’s findings as valid and addressed the questions of law raised by the case. The Supreme Court then held only that: (1) equally balanced evidence was not enough for the Government to defeat a preliminary injunction; (2) the Government’s interest in uniform application of the CSA did not preclude courts from recognizing certain exceptions to federal prohibitionist drug laws and permitting, under special

circumstances, individuals to obtain and ingest controlled substances for religious purposes; and (3) DMT's status as a Schedule I Drug was not in and of itself a sufficient reason to prohibit its sacramental use.

As with *UDV*, the court in *Rush* analyzed the evidence of potential harm of the drug (marijuana) presented by the parties. The *Rush* court applied the legal standard set forth in *United States v. Lee*, 455 U.S. 252, 256-59 (1982) to determine whether the government had an overriding interest in controlling the use and distribution of marijuana. The *Rush* court determined that both Congress and the courts declared that marijuana is "a real threat to individual health and social welfare."

This finding creates a critical distinction between the *UDV* and *Rush* cases. Whereas the District Court in *UDV* found that evidence on the harmful nature of DMT (as used in hoasca) was "equally balanced," the *Rush* court found that evidence on the harmful nature of marijuana essentially favored the Government. As noted above, the Supreme Court in *UDV* never addressed the issue of the harm caused by DMT, because the Government did not contest that finding.

In other words, the holding in *Rush* -- that marijuana is harmful enough to justify a burden on the religious practices of a group -- is not legally at odds with the holding of *UDV*. Whether or not specific religious exceptions for marijuana use are covered under the RFRA has yet to be litigated. But the *UDV* decision appears to anticipate this issue and does its best to narrow the entryway through which any future sacramental marijuana case must pass before it succeeds.

First, it should be made clear that nothing in the *UDV* decision -- by any of the three federal courts -- says that an RFRA exception must also be carved out for marijuana.

Second, even if a group can successfully make the case that enforcement of the CSA substantially burdens a sincere religious exercise with respect to sacramental marijuana use, the Government may still argue for enforcement based on compelling state interests (related to the burden placed on the specific religious group). Then, both parties would present evidence related to these interests that would then be weighed by the court. *UDV* tells us that the evidence must be related to the specific deprivation and that equally balanced evidence is not enough for the Government to prevail. To be sure, the Supreme Court does not address what findings a court might make about the harmful nature of marijuana use (or diversion for secular use) in the sacramental context. But it is likely that a federal court would feel bound to adhere to the unhelpful findings made by the court in *Rush*, and the statements made by various justices of the Supreme Court in the medical marijuana cases *Ashcroft v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 491 (2001) ("Whereas some other drugs can be dispensed and prescribed for medical use the same is not true for marijuana. Indeed, for purposes of the Controlled Substances Act, marijuana has 'no currently accepted medical use' at all.") and *Gonzales v. Raich*, 125 S. Ct. 2195, 2211, 2214 (2005) ("The CSA designates marijuana as contraband for *any* purpose. . . ." "[T]he danger that [excess marijuana production] will satisfy some of the admittedly enormous demand for recreational use seems obvious.").

For these reasons, as a matter of substantive law, the *UDV* decision does not appear to provide a ready vehicle by which to change the outcome of *Rush*, or to pursue a broad-based claim in support of sacramental marijuana use.

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You also inquired about trying to use the *UDV* decision to attack the holding of *Rush* and obtain some sort of post-conviction relief. As noted above, there does not seem to be a positive, substantive conflict between the two cases and thus no real grounds for using *UDV* to re-open the *Rush* case, per se. But just as importantly, there is also a major procedural barrier to obtaining such post-conviction relief for a 22-year-old conviction, at least through the federal writ of habeas corpus.

In order to file a petition for a federal writ of habeas corpus, a person must demonstrate that he is in “custody.” See 28 U.S.C. § 2255. Custody is defined broadly under the statute to include “restraints not shared by the public generally.” However, these restraints are limited to those placed on physical movement. Thus, custody includes incarceration, confinement, parole, release on own recognizance/bail pending a trial, and probation. Custody, however, does not include being at risk for a sentencing enhancement or other adverse effects, after a person’s sentence has expired. Therefore, §2255 is not an appropriate tool by which to seek to re-open an old conviction, such as that in *Rush*, and have it reconsidered and expunged.

Relevance of *Forchion*

You suggest that *United States v. Forchion*, 205 U.S. Dist. LEXIS 14791 (E. D. Pa. 2005) (hereinafter “*Forchion*”) is another case worth examining in light of *UDV*. *Forchion* is another case that indicates some courts might be sympathetic to claims of sacramental drug use. In *Forchion* the Eastern District of Pennsylvania affirmed the convictions of several Rastafarians for possession of marijuana in a national park. The court vacated the sentence of probation imposed by the magistrate judge and remanded the case for consideration that some or all of the six conditions of probation violated the RFRA. These conditions included the following prohibitions: (1) possessing or using controlled substances; (2) frequenting places where controlled substances are used illegally; and (3) associating with people who are engaged in criminal activity or who have been convicted of a felony (without permission from a probation officer). They also include the following requirements: (4) permitting the probation officers who visit their homes to seize “contraband” in plain view; (5) submitting to substance abuse testing; and (6) participating in substance abuse treatment.

Although the District Court remanded the case so that the Rastafarians could present evidence under the RFRA, the court’s actual holding in *Forchion* is narrow. The court did not address the merits of *Forchion*’s sacramental use argument. Rather, on remand to the magistrate judge, *Forchion* will be required to meet the three-part *prima facie* case that his probation conditions are a substantial burden on a sincere religious exercise.

This may prove to be a very high hurdle. If Forchion cannot meet this burden to the judge's satisfaction, his probation requirements will stand. Only if he is able to establish all three factors must the Government, pursuant to *UDV*, make specific showing as to how these probation requirements are narrowly tailored to serve the public interest. If the Government can make such a showing, the probation conditions will stand.

How *UDV* Might Apply to Future Cases Involving Sacramental Use of Marijuana

The first problem with using *UDV* as a model to bring future litigation to declare and protect the rights of sacramental marijuana users is that in *UDV* the Government conceded the *prima facie* case under the RFRA -- that enforcement of the CSA was a substantial burden on a sincere religious exercise. The Government would be exceedingly unlikely to make such a concession in the context of a marijuana case, for political as well as legal reasons.

A second important distinction is that in *UDV* the religious practice was limited to the 130 people of the UDV sect. By contrast, tens of millions of people in the U.S. use or have used marijuana, and tens of thousands of people may regard themselves as sacramental users. Further, hoasca does not have a history of "abuse," and is not considered to be an addictive substance. Meanwhile, it is the official position of Congress and the federal government that marijuana is widely abused and is addictive (or at least can cause psychological dependence). To this end, there are many government-funded studies describing various purported harms associated with marijuana use. Against this very different background, the Government would almost certainly attack each element of a *prima facie* case -- from whether the sacramental use of marijuana is "sincere" to whether enforcing the CSA against sacramental marijuana users creates a "substantial burden" on "religious exercise." It is not at all clear that the *UDV* opinion would aid litigants in meeting their substantial *prima facie* burden.

In the event that a sacramental marijuana user could pass the *prima facie* hurdle, the Government would then be allowed to assert one or more compelling interests that justify enforcing the CSA against the religious group. Again, *UDV* only requires that the Government justify these compelling interests with reference to the specific burden placed on the specific religious group. In *UDV*, the Court found that uniform enforcement of the CSA is not a sufficient compelling interest. But the Court never considered whether the other interests asserted by the Government in the District Court were compelling, namely (1) harm to users; (2) diversion; and (3) compliance with the 1971 UN Convention on Psychotropic Substances. It did not do so because the Government failed to challenge the District Court's findings that the evidence presented by both sides was "equally balanced." (The Supreme Court did, however, note that the UN Convention could apply if the Government made a showing that allowing an exemption to UDV specifically jeopardized international relations. This argument is particularly relevant in the marijuana context, the trafficking and eradication of which is subject to much greater international cooperation than is hoasca.).

In fact, the Supreme Court's opinion in *UDV* can -- and perhaps should -- be read as a series of instructions to Government lawyers on how to win such prosecutions in the future, and how to avoid the attorney-created pitfalls of the *UDV* case. The Court underscores the Government's poor litigation choices, including (1) conceding the *prima facie* case, (2) failing to challenge the District Court's findings, and (3) failing to articulate compelling governmental interests with specificity. The Court went out of its way to note that it is still open for the Government to argue that international treaties and agreements require the Court to rule against UDV, so long as it does so with particularity. The Court also suggests that the Government examine legislative discussions on the scheduling of drugs to determine if religious use was contemplated in the formation of the CSA. The implication seems to be that if the Government can argue that Congress contemplated sacramental use in connection with a particular drug, Schedule I classification could serve as a categorical bar to an RFRA defense. Lastly, the Court suggests that the Government try to distinguish the sacramental use of hoasca from peyote.

In sum, even a cursory reading of the *UDV* opinion makes clear that the decision was carefully crafted by the Justices to prevent the RFRA door from being flung wide open by litigants of various persuasions -- including those who use marijuana -- trying to gain legal protection for their sacramental drug use.

To be sure, the *UDV* is a welcome decision if only because it did not take us backwards and seems, at least for the moment, to have helped the members of the UDV church. It is a very modest step in the right direction. It is by no means a dramatic leap forward in the jurisprudence of religious liberty or civil rights.

The UDV decision should be built on and expanded with care, over time. Moving quickly, with reckless abandon before more favorable case law is developed, poses the real risk that more bad law will be created in this area.

Sincerely,

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Drug Policy Alliance