

United States law regarding the protection of religious freedom has recently been changed by the ruling by the United States Supreme Court in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 163 L. Ed. 2d 1017; 2006 U.S. LEXIS 1815; 74 U.S.L.W. 4119 (February 21, 2006) (*UDV hereafter*), which upholds the *Religious Freedom Restoration Act of 1993*, 42 U.S.C. § 2000(b)(b)(2004) (*RFRA hereafter*) restoring the compelling interest test abandoned by the United States Supreme Court in *Employment Div., Dep't of Human Services of Oregon v. Smith*, 494 U.S. 872 (1990) (*Smith hereafter*) (ruling that religious believers may not obtain exemptions to religion-neutral laws of general applicability that infringe on their religious practices).

During the same week that *Smith* was decided, the United States Supreme Court denied my petition for certiorari in *Olsen v. Drug Enforcement Admin.*, 495 U.S. 906; 110 S. Ct. 1926; 109 L. Ed. 2d 290 (1990) (*Olsen hereafter*) (appealing the denial of a DEA exemption for the sacramental use of marijuana).

The use of marijuana as a sacrament of my church was recognized in *Town v. State ex rel. Reno*, 377 So. 2d 648 (Fla. 1979) (*Town hereafter*), at page 649, where the Florida Supreme Court wrote:

(1) the Ethiopian Zion Coptic Church represents a religion within the first amendment to the Constitution of the United States; (2) the "use of cannabis is an essential portion of the religious practice"

Further, the Ethiopian Zion Coptic Church is not a new church or religion but the record reflects it is centuries old and has regularly used cannabis as its sacrament

I was living with Jacquelyn Town and her husband Clifton Middleton, *United States v. Middleton*, 690 F.2d 820, 825 (11th Cir. 1982), cert. denied, 460 U.S. 1051 (1983) (*Middleton hereafter*), at the time the Florida Supreme Court made its ruling in *Town*.

In *Smith*, the United States Supreme Court avoided consideration of my claim for the sacramental use of marijuana by declining to apply the "compelling interest" test to the sacramental use of peyote by members of the Native American Church as it had previously applied the "compelling interest" test in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

In *Smith*, Justice Scalia wrote:

If the "compelling interest" test is to be applied at all, then, it must be applied across the board, to all actions thought to be religiously commanded. Moreover, if "compelling interest" really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test. Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because "we are a cosmopolitan nation made up of people of almost every

conceivable religious preference," *Braunfeld v. Brown*, 366 U.S., at 606, and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind – [... *other citations omitted* ...] drug laws, see, e. g., *Olsen v. Drug Enforcement Administration*, 279 U. S. App. D. C. 1, 878 F. 2d 1458 (1989) [... *other citations omitted* ...]. The First Amendment's protection of religious liberty does not require this.

In response to the ruling in *Smith* Congress enacted the *RFRA*. This law provides that government action that substantially burdens religious exercise is invalid unless it is justified by a compelling government interest and is the least restrictive way to achieve that interest.

Shortly after the *RFRA* was enacted, I was contacted by Rev. Tom Brown of Our Church in Arkansas who told me he was going to exercise his religious freedom by planting marijuana at property owned by Our Church in Arkansas. Rev. Brown was subsequently arrested and the United States Court of Appeals for the Eighth Circuit refused to apply the *RFRA* to Rev. Brown's case. *United States v. Brown*, 72 F.3d 134 (8th Cir. 1995) (*Brown hereafter*).

Two years later, in *City of Boerne v. Flores*, 521 U.S. 507 (1997) (*Boerne hereafter*), the United States Supreme Court struck down the *RFRA* as applied to the states on the grounds that it exceeded Congress' power over states. The *RFRA* continues to apply to actions by the federal government.

Congress then enacted the **Religious Land Use and Institutionalized Persons Act of 2000** ("RLUIPA"), 114 Stat. 804 (*RLUIPA hereafter*), which imposes, among other things, a requirement on states that in most circumstances burdens on religion through land use regulation and burdens on the religious exercise of prisoners must, as with the *RFRA*, be justified by a compelling government interest and through the least restrictive means.

The Supreme Court upheld a constitutional challenge to the prisoner-rights portion of RLUIPA in *Cutter v. Wilkinson*, 125 S. Ct. 2113 (2005), finding that the law's protection of inmate religious rights did not violate the Establishment Clause. In *Cutter*, the Court emphasized that there is a long tradition in the United States of accommodating religious practice through laws such as the *RLUIPA*, and the fact that a law may provide exceptions to general rules for religious reasons but not other reasons does not render it invalid.

In *Olsen* at pages 1463, 1464, and 1465 (D.C. Cir. 1989) Justice Ginsburg wrote:

In sum, we conclude that the DEA cannot accommodate Olsen's religious use of marijuana without unduly burdening or disrupting enforcement of the federal marijuana laws. We therefore hold that the free exercise clause does not compel the DEA to grant Olsen an exemption immunizing his church from prosecution for illegal use of marijuana.

We agree that the vast difference in demand for marijuana on the one hand and peyote on the other warranted the DEA's response to Olsen's petition. Were the DEA to consider a marijuana exemption, equal protection (and/or the establishment clause, see *supra* note 5) would indeed appear to command that it do so evenhandedly.

While we rest our decision on the immensity of the marijuana control problem in the United States, we note some further distinctions. The peyote exemption was accorded to the Native American Church for a traditional, precisely circumscribed ritual. In that ritual, the peyote itself is an object of worship; for members of the Native American Church, use of peyote outside the ritual is sacrilegious.

True, for purposes of the exemption requested, Olsen narrowed the permission he sought to track the one accorded the Native American Church. See Memorandum of Court-Appointed Amicus Curiae in Support and on Behalf of Petitioner Carl E. Olsen at 29-30 (submitted to DEA on remand). But "narrow" use, concededly, is not his religion's tradition.

Since *Smith*, I have not practiced my religion because: (1) I have been repeatedly arrested and convicted of violating state and federal laws because I used marijuana as my sacrament; (2) courts have repeatedly refused to allow defendants claiming religious freedom to use marijuana as a sacrament to show the fact finder any factual evidence about the lack of toxicity or physical impairment caused by marijuana; and (3) I was astounded that the United States Supreme Court would refuse to apply the "compelling interest" test to the sacramental use of peyote which Congress had clearly contemplated in enacting the Controlled Substances Act of 1970 and I felt like my life was in danger if I continued practicing my religion.

Now, under *UDV*, the *RFRA* and the *RLUIPA*, the sacramental use of marijuana is protected to the extent that the courts are compelled to allow evidence about the lack of toxicity or physical impairment caused by marijuana to the fact finder at trial.

Justice Ginsburg's ruling in *Olsen* ignored the fact that Congress had considered a sacramental exemption for the use of peyote and had not considered the sacramental use of marijuana because it was not aware of any religions using marijuana at that time. It would be difficult to imagine that Congress would not have given equal consideration to a religion using marijuana as a sacrament if it had been aware of it.

Justice Ginsburg predicated her ruling on the assumption that I would not limit the practice of my religion, which is absurd because I have not practice my religion since the

ruling in *Smith*. I could be put to death under the Anti Terrorism and Death Penalty Act of 1996 for practicing my religion.

A statute burdens the free exercise of religion if it puts substantial pressure on an adherent to modify his behavior and to violate his beliefs including when, if enforced, it results in the choice to the individual of either abandoning his religious principal or facing criminal prosecution. *Braunfeld v. Brown*, 361 U.S. 599, 605 (1961). A person who desires to violate a criminal statute that he considers unconstitutional need not disobey the law and await his prosecution, before challenging its unconstitutionality. *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298, 99 S. Ct. 2301, 2308, 60 L.Ed. 2d 895, 906 (1979).

I was not effectively represented by the law firm appointed by the United States Court of Appeals to represent me. Approximately 9 months prior to the ruling in *Olsen*, the DEA's chief administrative law judge, Francis L. Young, *In the Matter of Marijuana Rescheduling Petition*, DEA Docket No. 86-22, Sept. 6, 1988 (*Marijuana Rescheduling Petition hereafter*), pages 58-59, ruled that:

Marijuana, in its natural form, is one of the safest therapeutically active substances known to man

I was one of the petitioners in the *Marijuana Rescheduling Petition*. My court appointed attorney was aware that I was a plaintiff in the *Marijuana Rescheduling Petition* and that the ruling had been issued in September of 1988. The ruling was issued prior to the last deadline for briefing in *Olsen*. Judge Young's ruling should have been presented by the law firm of Hogan and Hartson as proof that the government had no compelling interest in prohibiting my sacramental use of marijuana.

Under the federal drug statutes as written, the DEA Administrative Law Judge is the specific person in Government tasked with accumulating the scientifically derived evidence about a drug's toxicity and medical utility.

The DEA Administrative Law Judge holds the hearings where the evidence is accumulated and examined; and a recommended ruling is written. The Administrative Law ruling is then sent to the DEA Director for final decision on the recommended scheduling. But, **whatever the final decision on rescheduling**, the fact of toxicity is determined finally, under law, by that DEA Administrative Law Judge.

The first phase of the test for Compelling Interest is the examination of the evidence of the toxicity or threat to life caused by the substance or activity under examination. For instance, ethyl alcohol is a specific chemical which has a known physical toxicity per unit of body weight in a human being. By looking at that specific toxicity and how it manifests in human behavior, we learn about drunk driving. Drunk driving is an example of a specific toxic behavioral effect of the drug alcohol.

The government is specifically **empowered under the RFRA and the RLUIPA** to regulate religious exercise that threatens public health and safety.

There is no doubt that reenacting the ritual of Jesus making 180 gallons of the finest wine the steward ever drank for the marriage feast at Cana could cause drunk driving.

There is no doubt that the government can prove the fact of the threat of drunk driving in a specific manner and propose regulations in a least restrictive manner to control the threat to public health and safety caused by drunk driving.

However, the government cannot bootstrap total prohibition of religious use of wine onto the threat to the public caused by drunk driving. The government doesn't even try to shut down bars anymore just because drunk drivers come out of them every day and kill us on the roads - and that is only the protection of commerce, not protection of first amendment religious establishment and exercise.

Compelling Interest is the test under the **RFRA** and the **RLUIPA**. Compelling Interest is the test under **Sherbert** and **Yoder**. Compelling Interest is the test I never got and the test I am entitled to under the **statutory retroactive provisions** of the **RFRA** and the **RLUIPA**.

Under the compelling interest test it is not enough for the government to show a compelling interest in prohibiting the use of marijuana or even my sacramental use of marijuana, the government must then be subject to the least restrictive means of regulation required by the **RFRA** and the **RLUIPA**. So Justice Ginsberg's words above are now directly contradicted by the **RFRA** and the **RLUIPA** as interpreted in **UDV**.

The court wrote in **Olsen**:

And "Olsen does not dispute the government's compelling interest in controlling the distribution and drug-related use of marijuana," Brief of Court-Appointed Amicus Curiae at 18. Indeed, "[e]very 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." **Rush, 738 F.2d at 512.**

I was one of the defendants in **United States v. Rush, 738 F.2d 497 (1st Cir. 1984)**, in which the court found the government had a compelling interest in prohibiting the sacramental use of marijuana because Congress had made that decision in enacting the Controlled Substances Act. In **Rush**, at pages 511-513, the court wrote:

The question whether the government has an overriding interest in controlling the use and distribution of marijuana by private citizens is a topic of continuing political controversy. Much evidence has been adduced from which it might rationally be inferred that marijuana constitutes a health hazard and a threat to social welfare; on the other hand, proponents of free marijuana use have

attempted to demonstrate that it is quite harmless. See *Randall v. Wyrick*, 441 F. Supp. 312, 315-16 (W.D. Mo. 1977); *United States v. Kuch*, 288 F. Supp. 439, 446 & 448 (D.D.C. 1968). 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. 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 (1983); *United States v. Spears*, 443 F.2d 895 (5th Cir. 1971), cert. denied, 404 U.S. 1020 (1972); *Leary v. United States*, 383 F.2d 851, 859-61 (5th Cir. 1967), rev'd on other grounds 395 U.S. 6 (1969); *Randall*, 441 F. Supp. at 316 & n. 2; *Kuch*, 288 F. Supp. at 448. Only last year, the Eleventh Circuit rejected identical claims raised by some of the very appellants before us in this case, see *Middleton*, 690 F.2d 820, and the United States Supreme Court denied review. We decline to second-guess the unanimous precedent establishing an overriding governmental interest in regulating marijuana.

Finally, it has been recognized since *Leary* that accommodation of religious freedom is practically impossible with respect to the marijuana laws:

Congress has demonstrated beyond doubt that it believes marijuana is an evil in American society and a serious threat to its people. It would be difficult to imagine the harm which would result if the criminal sanctions against marijuana 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-marijuana laws would be meaningless, and enforcement impossible.

Leary, 383 F.2d at 861, quoted in *Middleton*, 690 F.2d at 825; see also *Kuch*, 288 F. Supp. at 447. Although a narrow administrative exception has been carved out from the Schedule I classification of peyote for the benefit of the Native American Church, see 21 C.F.R. § 1307.31, we think this exemption is properly viewed as a government "effort toward accommodation" for a "readily identifiable, narrow category" which has minimal impact on the enforcement of the laws in question. *Lee*, 455 U.S. at 260 n. 11 & 261. No broad religious exemption from the marijuana laws is constitutionally required. We therefore affirm the district court's ruling rejecting appellants' first amendment defense as a matter of law.

As Chief Justice Roberts wrote in *UDV* regarding the sacramental use of hoasca:

[T]he Government has not carried the burden expressly placed on it by Congress in the Religious Freedom Restoration Act

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).

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.

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.

We do not doubt that there may be instances in which a need for uniformity precludes the recognition of exceptions to generally applicable laws under RFRA. But it would have been surprising to find that this was such a case, given the longstanding exemption from the Controlled Substances Act for religious use of peyote, and the fact that the very reason Congress enacted RFRA was to respond to a decision denying a claimed right to sacramental use of a controlled substance. See 42 U.S.C. § 2000bb(a)(4).

The Government repeatedly invokes Congress' findings and purposes underlying the Controlled Substances Act, but Congress had a reason for enacting RFRA, too. Congress recognized that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise," and legislated "the compelling interest test" as the means for the courts to "strike sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. §§ 2000bb(a)(2), (5).

The government's current ban on my religious practice is not the least restrictive means of carrying out its responsibilities under the Controlled Substances Act and the **RFRA**.

UDV has now made it clear that: (1) Congress did not consider the sacramental use of marijuana when it passed the Controlled Substances Act in 1970; (2) Congress did contemplate religious exemptions for the use of controlled substances; and (3) a court is not prevented from its responsibility of considering the sacramental use of marijuana in the separate context of religious freedom.

I am now appealing to the United States Court of Appeals for the First Circuit for permission to file a successive motion under 28 U.S.C. 2255 to vacate my sentence in **Rush**. I am not bound to file a motion to vacate my sentence under 28 U.S.C. 2255 until within one year after the Supreme Court makes a ruling on the interpretation of the **RFRA**. The fact of the **RFRA** in October 1994 presented me with a chance to enter a

plea based on new legislation that is fully retroactive in the language of the statute. However, the fact that I did not do so, in light of *Brown* and *Boerne*, is demonstrably reflective of my concern to not waste the time of the court in challenging standing precedent absent the subsequent ruling of the United States Supreme Court on that legal point at bar.