

Religious Use of Drugs

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NORML PRESENTATION, Aspen, CO, 5 June 2011

IN THE BEGINNING . . .

- *And God said, Let the earth bring forth grass, and the herb yielding seed...*
-Genesis 1:11

I. FEDERAL LAW

- “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”
- It is the “free exercise clause” that is implicated by laws of general applicability that prohibit the religious use of drugs.

I. FEDERAL LAW

- The federal statute on religious use of drugs is the Religious Freedom Restoration Act ('RFRA'). (42 U.S.C. § 2000bb et seq.)
- RFRA provides that government, "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless it passes the **strict scrutiny test**.

I. FEDERAL LAW

- The “RFRA is unconstitutional and does not trump California statutes prohibiting the sale or possession of marijuana for sale. ‘When the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs.’ (*City of Boerene v. Flores*, (1997), 521 U.S. at p. 535 [138 L.Ed.2d at p. 648].)”

I. FEDERAL LAW

- The test applied to Federal Statutes and Federal Territories is the RFRA Test
- The States revert to *Employment Division v. Smith* (1990) 494 U.S. 872, where the strict scrutiny test was abandoned.
- The States are left to determine the level of constitutional scrutiny, if any, based upon their own laws

I. FEDERAL LAW

- “In *Employment Division v. Smith* (1990) 494 U.S. 872, 879 [110 S.Ct. 1595, 1600, 108 L.Ed.2d 876], the Supreme Court held that ‘the right of free exercise does not relieve an individual of the obligation to comply with a ‘**valid and neutral law of general applicability**’ on the ground that the law proscribes conduct that his religion proscribes.” (494 U.S. at p. 879 [110 S.Ct. at p. 1600].)

I. FEDERAL LAW

- Central holding of *Smith*: Although it is constitutionally permissible to exempt sacramental peyote use from the operation of drug laws, it is not constitutionally required.
- Such exemption is only required if the conduct is otherwise lawful.
- *Smith* rejects the test set forth in *Sherbert v. Verner*, (1963) 374 U.S. 398, 402 – 403.

I. FEDERAL LAW – RFRA TEST

- Test to determine whether a statute impinges upon religious freedom is the “**compelling state interest test.**”
- Held up to “**strict constitutional scrutiny**”
- must be “**narrowly tailored**” to suit a “**compelling state interest.**” (See, e.g., *United States v. Israel* (7th Cir. 2003) 317 F.3d 768, 772; *Olsen v. DEA* (D.C. Cir. 1989) 878 F.2d 1458)

I. FEDERAL LAW

- Defense must rest on substantial evidence that the use is actually **central to the religion** and that the defendant is **truly a member** of that religion with those **honest and actual** beliefs

II. CALIFORNIA

- The defense of “**Religious Use**” was NOT abolished by Prop 215 (The CUA).
- The defense of religious use is still available, as long as a defendant provides adequate evidence to trigger its use. (*People v. Trippet* (1997) 56 Cal.App.4th 1532, 1542)

II. CALIFORNIA

- Religious Use” – hard defense to win in CA:
- *Trippet* - "I use it for spiritual and meditative needs." – we lose
- The use of marijuana must be an indispensable practice of one's faith. (*People v. Collins* (1969) 273 Cal.App.2d 486.)

II. CALIFORNIA / RASTAFARIANS

- It also seems clear that genuine membership in the Ethiopian Zion Coptic Church (**Rastafarians**) would lead to the availability of the defense of religious use.
- *United States v. Bauer* (9th Cir. 1996) 84 F.3d 1549, 1556; *People v. Mitchell* (1966) 244 Cal.App.2d 176, *People v. Peck* (1996) 52 Cal.App.4th 351; *Guam v. Guerrero* (9th Cir. 2002) 290 F.3d 12 10

II. CALIFORNIA / RASTAFARIANS

- Rastafarians believe ganja is the “tree of life” and translate Revelations 22:2 as “... the herb is the healing of the nations.”

II. CALIFORNIA / RASTAFARIANS

- In, *People v. Peck* (1996) 52 Cal.App.4th 351, Peck was “president and a priest of the Israel Zion Coptic Church (IZCC) charged with transportation.
- The IZCC has about 200 or 250 members. The IZCC is an offshoot of the Ethiopian Zion Coptic Church, commonly known as the **Rastafarians**.

II. CALIFORNIA / RASTAFARIANS

- The IZCC uses marijuana as a sacrament. The purpose of using the marijuana is to make the users aware of their sins.
- Typically, marijuana would be used approximately three times a day.”
(*People v. Peck*, supra, 52 Cal.App.4th at 356.)

II. CALIFORNIA / RASTAFARIANS

- The court determined that the use was central to the religion (*Id.* at p. 359)
- BUT the **manner** in which Peck procured the marijuana was **unreasonable**.
- Peck had traveled from Wisconsin to California to obtain cheaper marijuana in bulk for his church.
- Would the court have reached a different result if this case just involved possession of a small personal use amount?

II. CALIFORNIA

- *People v. Trippet* (1997) 56 Cal.App.4th 1532 at pp. 1542-43: “I use [marijuana] for spiritual and meditative needs”
 - Insufficient to establish the **strongly held personal religious belief** that is **necessary** to trigger a consideration of the free exercise clause of First Amendment to the US Constitution, where religious freedom would be made a defense to charges of transporting and possessing marijuana.

II. CALIFORNIA

- Does using marijuana in order to extend and intensify one's ability to engage in meditative communication with a Supreme Being, to attain spiritual peace through union with God the Father and to search out the ultimate meaning of life and nature constitute a strongly held personal religious belief?

II. CALIFORNIA

- Not according to *People v. Collins* (1969) 273 Cal.App.2d 486
 - “defendant does not worship or sanctify marijuana, but employs its hallucinogenic biochemical properties as an auxiliary to a desired capacity for communication.” (*Id.* at pg. 487)

II. CALIFORNIA

- Unless a defendant can conscientiously offer to prove through a **detailed factual representation** that his use of marijuana comes within the **narrow margins** of accepted religious use, he or she will be denied the ability to even raise the issue in front of a jury. (*People v. Werber* (1971) 19 Cal.App.3d 598.)

II. CALIFORNIA

- This is different than and distinguishable from the use of peyote by Native Americans that was held to be available for religious use in *People v. Woody* (1964) 61 Cal.2d 716.

III. COMPARE: KANSAS

- **65-4116. Registration requirements, exceptions; termination of registration**
- **Everyone must register drug possession except . . .**
- (c)(9) *any person who is a member of the **Native American Church**, with respect to use or possession of **peyote**, whose use or possession of peyote is in, or for use in, bona fide religious ceremonies of the Native American Church, but nothing in this paragraph shall authorize the use or possession of peyote in any place used for the confinement or housing of persons arrested, charged or convicted of criminal offenses or in the state security hospital.*

III. COMPARE: Other States

- It is therefore not surprising that a number of States have made an exception to their drug laws for **sacramental peyote use**. *Smith*; 494 U.S. 872, 890
- **Ariz.** Rev. Stat. Ann. 13-3402(B)(1)-(3) (1989); **Colo.** Rev. Stat. 12-22-317(3) (1985); **N. M.** Stat. Ann. 30-31-6(D) (Supp. 1989).

IV. HAWAII

HAWAII POLICE DEPARTMENT RULES AND REGULATIONS GOVERNING INVESTIGATIONS INVOLVING THE MEDICAL AND RELIGIOUS USE OF MARIJUANA

- An officer shall document all claims of religious use of marijuana made by a defendant including spontaneous utterances and statements and all documents explaining the religious use of marijuana

IV. HAWAII

HAWAII POLICE DEPARTMENT RULES

- The police shall not decide whether the suspect's claimed religion is a recognized religion within the meaning of the First Amendment and not just a belief, as **this is a legal question reserved for the courts.**

IV. HAWAII

- When sincere belief does not override state law:
 - Role of marijuana in religion is **optional** and can freely practice their religion [Hindu Tantrism] without it. (*State v. Blake* (1985) 695 P.2d 336)

IV. HAWAII

- Where personal use, while mandated by religion, extends to commercial use. (*State v. Adler* (2005) 108 Hawai'i 169)
 - Adler's religion mandated its members smoke marijuana at least once a year
 - Adler was arrested after police seized 82 marijuana plants from his residence (50 was the non-commercial state limit).
 - All parties stipulated that Adler's religion was legitimate and he was a member.

IV. HAWAII

- Adler could not articulate why he needed more than 50 plants to smoke once a year
- **Religious Use of Roman Red?**



IV. HAWAII

Examples of a really bad idea

THC Ministry Sanctuary Kits

The best religious **defense to prosecution** for any marijuana charge is based in your own sincerity and in the legitimacy of your religious organization. We have compiled the following Kits to help you understand and prove the legitimacy of the THC Ministry and your religious beliefs. The sincerity part is up to you!

IV. HAWAII

Examples of a really bad idea

Minister's Sanctuary Kit: \$250 donation

The Kit includes: Sanctuary Plaques, ID Cards, Citizen's Rule Book, 150 page manual to educate and empower a new Cannabis Sacrament Minister, Sacramental Plant tags, THC Minsitry Cannabis and Religion Guide and more

...

<http://www.thc-ministry.org>

IV. HAWAII

Why The THC Ministry Doesn't Work

Our Beliefs

The THC Ministry is a universal religious organization that uses Cannabis to exalt consciousness, facilitate harmony, and become closer to God and Nature.

- See *State v. Blake* (1985) 695 P.2d 336; *People v. Trippet* (1997) 56 Cal.App.4th 1532

V. VERMONT

- In, *State v. Rocheleau* (1982) 451 A.2d 1144, Rocheleau entered the men's restroom of a St. Albans, Vermont, nightclub. Shortly thereafter a college student entered the room and asked aloud, “Does anybody got any dope?”

V. VERMONT

- Rocheleau produced a plastic sandwich bag containing marijuana. At that moment an off-duty Vermont deputy game warden emerged from a partitioned toilet area. The game warden detained Rocheleau and everyone in the restroom until St. Albans Police arrived.

V. VERMONT

- Rocheleau claimed that his use of marijuana was for religious purposes associated with the doctrines of **Tantric Buddhism**, a genuine religion which includes the use of marijuana for spiritual purposes.

V. VERMONT

- **Compelling state interest** in regulating marijuana was of sufficient magnitude to override defendant's interest claiming protection under the free exercise clause of the First Amendment
- Defendant did not assert that he would be unable to practice his religion without use of marijuana and it was doubtful that he was actually practicing his religion while in the restroom of a nightclub.

VI. MINNESOTA

- In, *State v. Pederson* (2004) 679 N.W.2d 368, Pederson was pulled over for speeding. The Sheriff's Deputy detected an odor marijuana coming from the vehicle. He asked if she had any marijuana and she admitted "yes, a little." During a search of the vehicle the sheriff discovered 529.3 grams of marijuana.

VI. MINNESOTA

- Pederson testified that her medicinal use of marijuana is consistent with her religious belief as a Messianic Jew and cited various biblical passages to support this contention.
 - “God gives us every plant bearing seeds inside itself for our consumption and for our health.” Genesis 1:11-12, 29; 9:3.

VI. MINNESOTA

- Both trial court and appellate court agreed that:
 - The **beliefs** in connection with marijuana use were **personal** beliefs, based on a personal, rather than communal, interpretation of religious significance
 - **Failed to provide any evidence** that her medicinal use of marijuana involved **religious ceremony**, and
 - **Failed to demonstrate** how her medicinal use of marijuana was **supported or advocated** by Essenic or Messianic Judaism in context of their **fundamental tenets, precepts, scriptures or rites**

VII. NEW MEXICO

Insufficient Evidence Of Sincere Religious Belief

- Belief that use and distribution of marijuana was permitted because God gave man every herb-bearing seed and which was derived solely from defendant's personal use of the Bible (*State v. Brashear* (1979) 92 N.M. 622)

VIII. TEXAS

Insufficient Evidence Of Sincere Religious Belief

- Using scripture to support one's religious belief that because marijuana plant was created by God, was intended to be used by man (*Burton v. Texas* (2006) 194 S.W.3d 686)

IX. NEW YORK

Insufficient Evidence Of Sincere Religious Belief

- Use of marijuana (and other drugs) to have a religious experience, especially where it is not part of a religious ceremony is insufficient evidence of a sincere religious belief. (*People v. Crawford* (1972) 328 N.Y.S.2d 747)

X. OHIO

Sincerity does not override State law

- Where law is neutral, generally applicable law, and is not specifically directed to religious practice, and is otherwise constitutionally sound sincerity of belief does not override state law (*State v. Flesher* (1990) 585 N.E.2d 901).
- “The *Smith* case therefore reduces appellant's arguments to a puff of smoke.”

XI. WASHINGTON

Competition of Rights

- Where marijuana is found in home of a shared-custodial parent.
 - Concern for child's immediate and future impairment override father's (illegal) use of marijuana for religious purposes (*State on Behalf of Hendrix v. Water* (1998) 89 Wash.App.921)

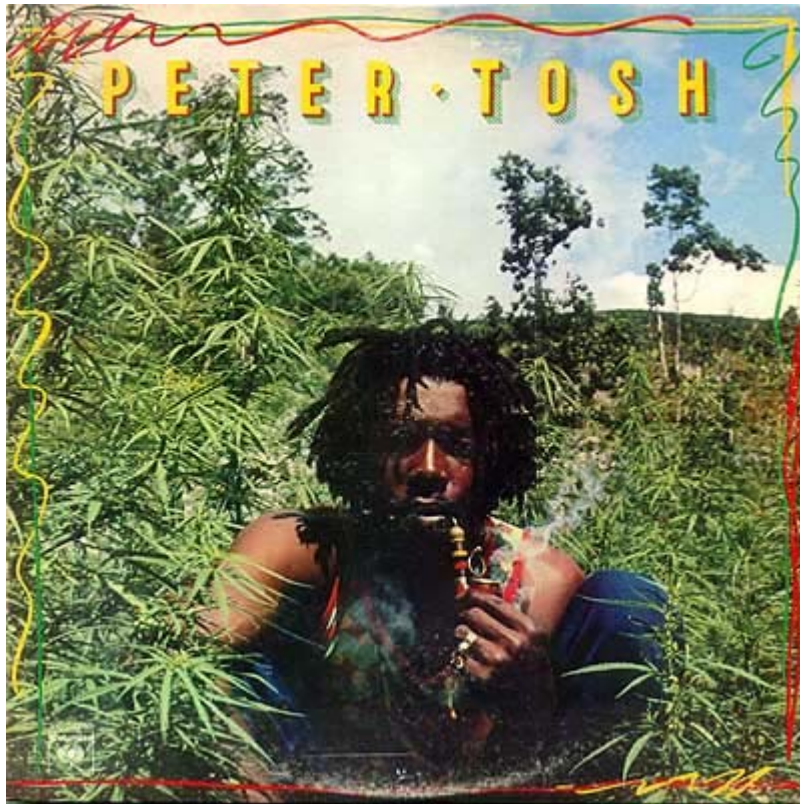
XII. Lessons Learned

- God say's "let's party" does not get it done, nor does quoting isolated scripture
- Beliefs must be **sincere, central** to the religion, and the use must be as a part of the **religious practice**, the **religion must be legitimate and** defendant must truly be a **member of the religion.**
- Shams will be quickly seen through.

XII. Lessons Learned

- Cannabis is not central to the beliefs of Messianic Jews, Tantric Hindus and Tantric Buddhists.
- Rastafarians (cannabis); Native Americans (peyote), IVC's/Brazilian Church (ayahuasca) are more likely to prevail.
- Religion is seldom practiced in the bathroom of a nightclub

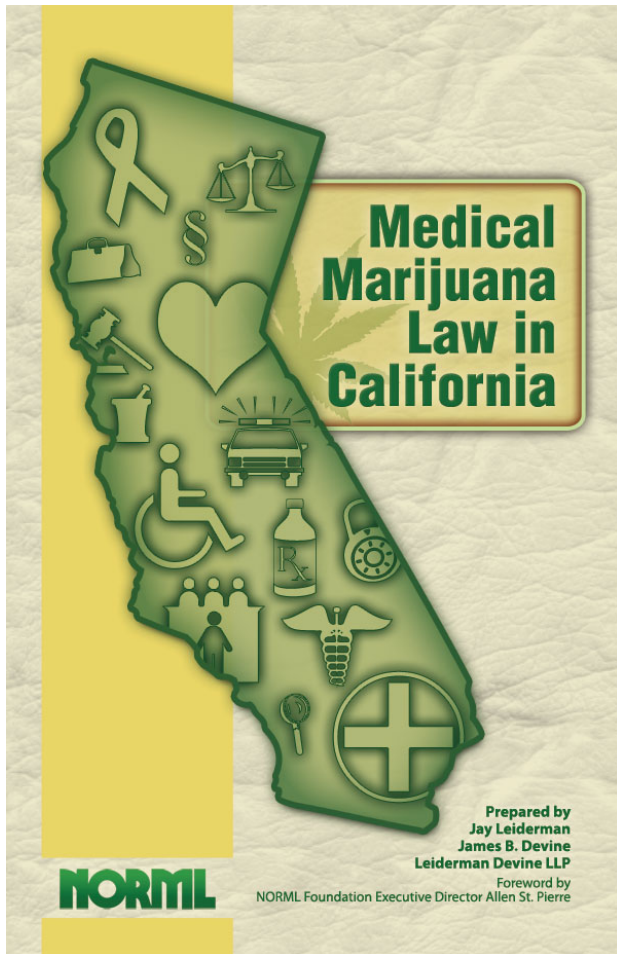
Simple Solution: LEGALIZE IT



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- Buy our book: “*The NORML Legal Guide to Medical Marijuana Law in California*”
By Jay Leiderman and James B. Devine
- Available at NORML.org

SHAMELESS SELF PROMOTION



Medical Marijuana Law in California

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NORML Foundation Executive Director Allen St. Pierre

NORML

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Fifteen States and Washington DC Have Legalized Medical Marijuana Use



States That Have Passed Medical Marijuana Laws Since 1996:

Alaska, Arizona, California, Colorado, Hawaii, Maine, Michigan, Montana, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, Washington and the District of Columbia.

Visit us on the web at norml.org

National Organization for the Reform of Marijuana Laws Foundation (NORML Foundation)
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NORML

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NORML PRESENTATION 5, Aspen CO, June 2011