7-13-2012

# State v. Cordingley Appellant's Brief Dckt. 39518

IN THE SUPREME COURT OF THE STATE OF IDAHO

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| STATE OF IDAHO,<br><br>Plaintiff-Respondent,<br>vs.<br><br>LEVON CORDINGLY,<br><br>Defendant-Appellant. | ) | SUPREME COURT NO. 39518-2012<br><br>APPELLANT'S BRIEF |

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE KATHRYN STICKLEN
DISTRICT JUDGE

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## STATEMENT OF THE CASE

### Nature of the Case

Mr. Cordingly appeals from the denial of his Motion To Dismiss, which asserted a violation of his right to religious freedom as guaranteed by the First Amendment to the United States Constitution, Article I, Section 4 of the Idaho Constitution, and Idaho Code (I.C.) § 73-402 (Idaho Free Exercise of Religion Protected Act).

### Statement of Facts and Course of Proceedings

On February 23, 2008, Boise City Police Officer Stace, was on foot patrol near the Cactus Bar, located at 6th St. and Main St. As Mr. Cordingly exited the Cactus Bar he noticed the officer and attempted to get his attention, yelled words to the effect, "hey, Boise's finest," and gestured for Stace to stop walking and to come to where Mr. Cordingly was standing. Officer Stace waited for Mr. Cordingly to approach his position. When Mr. Cordingly met Officer Stace, the men talked briefly. Officer Stace indicated that he needed to be on his way. However, Mr. Cordingly insisted on talking to them. As Mr. Cordingly spoke, Officer Stace could smell a very strong odor of marijuana. Just then, Boise City Police Officer Urian walked up to the two men as they spoke. Officer Urian acted as though he knew Mr. Cordingly and Officer Urian and Mr. Cordingly spoke briefly concerning a previous meeting the two had had the previous year. As the men spoke, Officer Urian said to Officer Stace, "you can see the marijuana on him, can't you?" Officer Stace then answered, "yes I can." Tr., p.21, Ls.6-9. Officer Urian then

asked Mr. Cordingly if he had any marijuana on his person, to which Mr. Cordingly replied "yes." In plain view could be seen a glass smoking pipe located in the large warming pocket in the front of the pullover "hoodie" sweatshirt that Mr. Cordingly was wearing. Mr. Cordingly was then arrested and transported to the Ada County Jail on charges of possession of marijuana and possession of drug paraphernalia, violations of Idaho Code §§ 37-2732 and 37-2734(A).

Mr. Cordingly plead not guilty on March 14, 2008, and a Pre-Trial Conference was scheduled for June 10, 2008, and Jury Trial was scheduled for July 3, 2008, which were later continued. On August 28, 2008, Mr. Cordingly filed a "Motion for Dismissal (Free Exercise of Religion)." A hearing on the motion was scheduled for October 14, 2008. On October 29, 2009, the Court entered a Memorandum and Order Denying the Motion to Dismiss. On October 30, 2008, the parties met for another Pre-Trial Conference where the parties entered into an agreement. The State permitted the Defendant to give additional oral testimony to support his written Motion and in exchange, Mr. Cordingly would accept as fact, the allegations made by Officer Stace and Officer Urian and the court would then render a "final" decision on the Motion To Dismiss.

On December 5, 2008, the court heard additional testimony from Mr. Cordingly. The City Attorney cross-examined Mr. Cordingly. Additionally, the court inquired of Mr. Cordingly. After all evidence in support of the Motion to Dismiss had been taken, the court entered its Order Denying Motion To Dismiss on January 29, 2009.

Mr. Cordingly entered a Conditional Plea to possession of marijuana and possession of drug paraphernalia, violations of Idaho Code §§ 37-2732 and 37-2734(A), on July 10, 2009. An Order to Stay Sentence Pending Appeal was subsequently entered and on August 24, 2009, Mr. Cordingly filed his appeal.

Evidence Submitted in Support of Motion To Dismiss

Mr. Cordingly testified that he is an ordained minister and Founder and President of the Church of Cognitive Therapy, based in Portland, Oregon. He is also a follower of the Rastafarian religion. Tr., p.8, Ls.14-21 – p.23, Ls. 13-17. He appeals his conviction of the charges based upon his sincere religious beliefs. Mr. Cordingly alleged that his conviction under I.C. §§ 37-2732 and 37-2734(A) has substantially burdened his right to religious freedom guaranteed to him under Idaho Code § 73-402, titled Free Exercise Of Religion Protected, The Religious Freedoms Restoration Act (RFRA) as well as the federal counterpart, 42 U.S.C. §§ 2000bb, the First Amendment of the United States Constitution, and Article 1, §§ 4 and 13 of the Idaho Constitution, and the 1st and 14th Amendments to the United States Constitution.

During the taking of oral testimony on December 5, 2008, Mr. Cordingly testified that what the Officers referred to as marijuana is known spiritually as cannabis. Cannabis as a "sacrament" has been used in religious services for over 10,000 years. He and all members of his Church of Cognitive Therapy (COCT) carry it on their persons in containers clearly marked "sacrament" with the words, "[t]he sacrament for the Church of Cognitive Therapy, using the full exercise of religious belief. Not for sale. . . ," and that when it is used in conjunction with prayer, it aids and comforts those people in need. Tr., p. 38, Ls. 22-25 – p. 39. The central tenant of belief is that the sacramental use of cannabis leads to spiritual enlightenment and brings one closer to the creator of the universe, or God. The use of cannabis is the same exercise of

meditation as prayer in this religion. Minister Cordingly testified that the use of cannabis was "vital and mandatory" in the everyday practice of this religion "as if the Buddha himself ate hemp seed." Tr. p. 10. Referring to the larger Rastafarian religion, to which he is also a member, Mr. Cordingly testified that there are now as many as twelve million people on this planet that use cannabis as part of a religion. Tr. p. 10, ll. 18-19. The church utilizes the Bible as well as other texts as everyday tools to understand the path of enlightenment and the meaning of God. In this regard the COCT is nondenominational in its approach, but one must partake of the sacrament in COCT or "it would be pointless for them." The "whole idea of using entheogenic sacraments is to get us closer to our creator." Tr. p. 50, ll. 19-25.

The sacrament may be administered to any person in need, irrespective of whether the needy are inside a building of worship or on the sidewalk. Tr., p. 21-24. Normally – and preferably – the sacrament would only be administered in private by an ordained minister, out of respect for law. Nonetheless, it may be administered anywhere at any time, under the direction of the local minister. Tr., pp. 27-28. A minister who notices a person in "need," typically a homeless person who appears angry or confused or when decisions of life are weighing heavily on the individual's mind, may approach the individual and then try to aid and comfort them through the use of the sacrament of cannabis. If the individual is seen privately, typically the minister will talk to them. After talking to them, the minister will hand the sacrament to the individual and instruct him or her on how to use it privately. If the needy person is seen

in a public setting, the minister will typically accompany the person to a place of privacy, after which the minister removes some of the sacrament out of the marked sacrament containers and after putting the sacrament in a chalice, raises it above their heads and proclaims the sacrament "as a burnt offering and offers a prayer on behalf of the needy person, thanking God for the sacrament and the comfort afforded them and asks for blessings on behalf of the afflicted person. Tr., p. 46, Ls. 4-11- p. 49, Ls. 5-8.

Any person wishing to become an ordained minister of COCT usually accesses the COCT website and pays the listed fee and requests a membership card. Tr., p. 40, Ls. 16-19. Interested persons gain membership in COCT typically by the personal recommendation of another member to the Board of Directors. In order to screen out those persons who would attempt to use COCT as a means of unsanctioned or recreational use of cannabis, the Board requires those wishing to join the church to send their "testimony" so that the Board may determine the alleged interested person's sincerity in the belief that the prayerful, sacramental, entheogenic use of cannabis is effective to themselves and their creator. Tr., p. 39, Ls. 13-23. COCT condemns the non-religious or recreational use of cannabis, and any person attempting to use cannabis that does not have a membership card and does not have the sacrament contained in and labeled with an official "sacrament stickers" is sanctioned by the Board. Tr., p. 38 – p. 39, 49, Ls. 1-25.

Mr. Cordingly explained that his church is an organized, spiritual community comprised of anywhere between five to twenty believers of different religious systems,

including but not limited to Buddhists, Rastafarian Christians and others that utilize cannabis as a component of their beliefs to reach spiritual enlightenment. Tr., p. 30, 41, Ls. 19-25, Ls. 1-2, p. 58, Ls. 1-14. The exclusive purpose of the Church is to use cannabis as a sacrament to achieve spiritual enlightenment. Tr., p. 59, L. 25 – p. 60. There would be no COCT without the use of cannabis. Tr., p. 51, Ls. 4-25 – p. 52, p. 53, Ls. 1-9. The entheogenic use of cannabis is required for every member because the only purpose for the COCT is to utilize sacramental cannabis to reach spiritual enlightenment, spiritually connect with their universe, their creator, and become better people. Tr., p. 60. Should a member choose not to use cannabis, his membership would be in question. Tr. p. 50, Ls. 11-25 – p. 51, Ls. 1-6, p. 56. Meetings of COCT are held every other Sunday, for four hours. These spiritual meetings begin and end with prayer. Potluck dinner is provided, sacrament is administered, music is employed and discussion of members' interests in religion, spirituality, life and death and references to cannabis biblically are discussed. Tr., p. 30, Ls 18-25 – pp.31-32. COCT is nondenominational, celebrates most major holidays including Christmas, Easter, as well as non-Christian important dates in the Hindu faith and other important dates, such as the date that the founder of Rastafarian Christianity, Haile Selassie I, came to Jamaica. COCT believes in an ultimate creator, although use of the term "God" is used in a generalized, "God-is-the-universe" way, so as not to offend those that are not Christians. Tr. p. 36-37, Ls. 1-25.

The entheogenic use of cannabis is required by members of COCT. The term entheogenic means "as used to expand the individual's spirituality on their quest for enlightenment." Cannabis is the elixir or spiritual enhancer. Mr. Cordingly testified that based on his studies, "different cultures have used . . . entheogenic sacraments to spiritually enhance them for times of prayer, for times of sickness, for times of comfort." Tr., p. 33, Ls. 21-25 – p. 34. Mr. Cordingly explained his spiritual journey through his own addictions early in life, and how a spiritual experience stopped his abuse. Tr. 50, Ls. 7-10. For the next part of his life until the present, Mr. Cordingly has used cannabis only spiritually, to aid the homeless whom he gained a great affinity for during his tribulations, to overcome their post-traumatic stress disorders, depression and spiritual deficits. Tr. pp. 60-62.

## ISSUES

1. Did The District Court Err When the Court Affirmed the Magistrate's Decision Denying Mr. Cordingly's Motion To Dismiss Based Upon Idaho Code § 73-402 (FERPA)?

Applicable Law

The right to religious freedom is guaranteed by the First Amendment to the United States Constitution, and by Article I, Section 4 of the Idaho Constitution. Prior to 1990, the United States Supreme Court interpreted the Free Exercise Clause of the First Amendment to protect religious practices which have been substantially burdened by governmental regulation unless the government could show a compelling state interest. However, despite this Amendment's broad grant of religious liberty made applicable to the States by virtue of the adoption of the Fourteenth Amendment, the Supreme Court has all but shut the door to using the compelling state's interest test to protect an individual's religious interests, with the limited exception of requests for unemployment compensation, lowering the burden of proof to a "reasonable" standard to individual requests to exempt from state laws certain religiously motivated conduct, as long as the law forbidding such conduct is both neutral and of general applicability. To give protection and require the State to show a compelling state interest test in those situations would be difficult to sustain and because of such, the Court warned that "[permitting] this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." *Employment Division, Department of Human Resources of Oregon v. Smith,* 494 U.S. 872, 886-888 (1990). Accordingly, Mr. Cordingly does not bring his appeal based on the First Amendment's Free Exercise Clause.

As a result of *Smith,* Congress enacted the Religious Restoration Act of 1993 (hereinafter RFRA), Pub. I. No. 103-141, 107 Stat. 1488 (1993) and codified as 42 U.S.C. §§ 2000bb-2000bb-4. This was enacted to restore to the States the high burden previously required of any governmental regulation, even if the burden results from a rule of general applicability which substantially burdened an individual's free exercise of religion to use the least restrictive means of furthering or protecting a compelling state interest.

However, just four years later the U.S. Supreme Court struck down the RFRA as it applied to the States, reasoning that such legislation exceeded the authority of Congress to enforce such legislation. *City of Boerne v. Flores*, 521 U.S. 507 (1997). This in turn lead many states, including Idaho to enact their own legislation in order to bolster their state's protection of religious liberty. *Combs v. Homer-Center Sch. Dist.,* 540 F.3d 231, 244-247 (3rd Cir. 2008) (per curiam).

In 2000, Idaho enacted the Free Exercise of Religion Protected Act, Idaho Code § 73-402, (hereinafter "FERPA"), resurrecting the higher "compelling interest test" standard in religious exercise cases. This Act allows the State government to "substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person is both: (a) [e]ssential to further a compelling governmental interest; [and] (b) [t]he least restrictive means of furthering that compelling governmental interest." I.C. § 73-402(3). The Act also provides that a person may assert a violation as a defense in a judicial proceeding and obtain appropriate relief

against the government, including attorney's fees and costs. § 73-402(4). It is indisputable that Idaho's lawmakers have chosen to afford Idaho citizens a higher degree of protection from laws that burden religious beliefs. Since its enactment, our Idaho appellate courts have had several occasions to interpret Idaho's Free Exercise of Religion Protected Act.

In *Roles v. Townsend*, 138 Idaho 412, 64 P.3d 338 (Idaho Ct. App. 2003), the Idaho Court of Appeals heard from Mr. Roles, who was an inmate at the Idaho Department of Correction (IDOC) in 1995. He was also a smoker of tobacco. When the Board of Prisons made the decision to make IDOC a smoke-free environment Mr. Roles challenged the policy. The district court granted summary judgment to the State and Roles appealed on the basis of Idaho's new FERPA, claiming that he smoked tobacco religiously because the smoke carried his prayers, kept evil and sickness away and purified his spirit. The Appellate Court's decision mirrored the balancing approach called for in FERPA, which was the test used pre-*Smith*, in all First Amendment Free Exercise cases, i.e., whether the government's action substantially burdened Roles' right to exercise his religious belief and practice versus the State's belief that if Roles were permitted to smoke it would be a hardship on the staff of IDOC and it's resources to regulate such use would compromise prison staff and would expose other inmates and staff to second-hand smoke. In finding for the State, the Court said, "Roles has failed to develop . . . any evidence that disputes that the state's interests are compelling,

that the tobacco-free policy is essential to its interests, and that the tobacco-free policy is the least restrictive means to further those interests. *Id.* at 414.

In *Lewis v. State. Dept. of Transp.,* 143 Idaho 418, 146 P.3d 684 (Idaho Ct. App. 2006), Lawrence D. Lewis appealed the Department of Transportation's requirement that he give the Department of Transportation his social security number as part of his application for a driver's license. Lewis claimed that the number issued to him by the Social Security Administration was a precursor to and actually was the "mark of the beast" mentioned in the Bible. Following the Administrative Hearing Officer's decision sustaining the department's requirement, he appealed unsuccessfully to the Director of the Department of Transportation and finally to the district court. The district court remanded the case back to the department for findings consistent with the FERPA. The department concluded that Lewis had a sincere belief and religious motivation for his refusal, but articulated the State's compelling state interests which included being in compliance with federal law, which it argued preempted State law in that area and mandated all states to collect the social security numbers of applicants. The department concluded that it could not think of a less restrictive means of compliance with federal law than simple compliance.

The Idaho Court of Appeals found that 42 U.S.C. § 666, which was the department's mandate, did preempt Idaho's FERPA if any of it's provisions, which Lewis maintained protected his right to refuse to comply, and found that the effective collection

of child support was a compelling State interest and outweighed Lewis' religious practice. *Id.* at 691.

In *Hyde v. Fisher,* 143 Idaho 782, 152 P.3d 653 (Idaho Ct. App. 2007), an Idaho inmate housed at the Idaho Maximum Security Institute (IMSI) filed for a *Writ of Habeas Corpus* attempting to overturn the warden's decision to shut down the sweat lodge, which he claimed violated his right to practice his Native American religion under the Federal and State Constitutions, the Religious Exercises in Land Use and by Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc, *et. seq;* and FERPA, Idaho Code § 73-401, *et seq.* Warden Fisher had shut down the sweat lodge due to other inmates roasting hotdogs over the sweat lodge fire. Prior to this ban, the Idaho Department of Correction (IDOC) had permitted other Native American religious practices including smudging, wearing a choker, possessing a feather and certain herbs, kinnikinnik and ceremonial pipe smoking. *Id.* at 654. Following the district court's denial of his motion, Hyde appealed. The Idaho Court of Appeals denied the claims under the RLUIPA as well as FERPA because Hyde had failed to file the required bond prior to filing suit. The Court remanded the case to the district court to make findings of fact and conclusions of law on the federal claims. However, in dicta, the Court's opinion strongly suggests that it is a balancing test between the competing interests of religious liberty and governmental interests. The Court stated:

> In *Smith*, the Court abandoned the earlier standard and held that the First Amendment is not offended by laws of general applicability that only incidentally burden religious conduct.

> Subsequently, the Idaho legislature adopted the FERPA, declaring that "[f]ree exercise of religion is a fundamental right that applies in this state, even if law, rules or other government actions are facially neutral. I.C. § 73-402(1). In its statement of legislative intent, the Idaho legislature recognized that "[t]his state has independent authority to protect the free exercise of religion by principles that are separate from, complementary to and more expansive than the first amendment of the United States Constitution. (citations omitted). The legislature indicated its finding that the "compelling interest, as set forth in the federal cases of *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) and *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965, (1963) is a workable test for striking sensible balances between religious liberty and competing governmental interests *Id.* at 655.

The *Yoder* case, decided in 1972, dealt with Amish parents who did not want to obey the Wisconsin law requiring compulsory school attendance and claimed that being required to continue informal education past the eighth grade violated their rights under the Free Exercise Clause of the First Amendment. The Amish supported their religious claims cogently and persuasively with expert witnesses and scholars on religion and education. The State of Wisconsin argued that the State had a huge responsibility to educate it's citizens and that reasonable regulations were necessary to accomplish this supremely important responsibility, even if it impinged on the religious practices of citizens living within it's borders.

The United States Supreme Court utilized a classic balancing approach, as the following quote illustrates:

> There is no doubt as to the power of a State, having high responsibility for education of its citizens to impose

> reasonable regulations for the control and duration of basic education, in *Pierce,* made to yield to the right of parents to provide an equivalent education in a privately operated system. . . Thus, a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment,. . . *Wisconsin v. Yoder*, 406 U.S. 205, 213-214, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972).

*Sherbert v. Verner* was decided in 1963 by the United States Supreme Court. It dealt with a member of the Seventh Day Adventist religion who was fired after she refused to work on Saturday, the Sabbath Day. She was unable to obtain unemployment compensation benefits because she would not take work offered to her. She appealed to the South Carolina Supreme Court who sustained the commission's decision. She appealed to the U.S. Supreme Court. The Court, in another balancing approach of the competing interests of religious practices versus the flimsy contention that such unemployment claims may be fraudulently prepared and thus dilute the State's compensation fund, found for the Appellant stating:

> It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation. *Sherbert v. Verner,* 374 U.S. 398, 406, 83 S.Ct. 1790 (1963) (quoting from *Thomas v. Collins,* 323 U.S. 516, 530 (1945).

In a recent decision from Idaho, *State v. White*, 152 Idaho 361, 271 P.3d 1217 (Ct. App. 2011), review denied (Mar. 21, 2012), the Court of Appeals for Idaho

determined that the defendant, Cary W. White's use of marijuana was not supported by evidence of use for substantial religious beliefs.

## ARGUMENT

I.

### The District Court Erred In Denying Mr. Cordingly's Motion To Dismiss Because He Was Denied His Right To Religious Freedom As Guaranteed By Idaho Code Section 73-402

A. Standard of Review

On review of a decision of the district court, rendered in its appellate capacity, this court reviews the decision of the district court directly. *State v. White*, 152 Idaho 361, 271 P.3d 1217 (Ct. App. 2011). The Court must "examine the magistrate record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings." *State v. DeWitt*, 145 Idaho 709, 711, 184 P.3d 215, 217 (Ct.App.2008). The court exercises free review of the application and construction of statutes. *State v. White*, 152 Idaho 361, 271 P.3d 1217 (Ct. App. 2011).

B. Argument

The Magistrate's reliance on 10th Circuit case law was error. Throughout its decision, the trial court made reference to *United States v. Meyers,* 95 F.3d 1475 (10th Cir. 1996). *Meyers* is not controlling law in Idaho. *Meyers* is a case from the 10th Federal Circuit construing the identical federal statute involving dissimilar facts with the exception that the controlled substance at issue was marijuana as in the instant case. However, the federal statute Federal Religious Restoration Act of 1993 (RFRA) was declared unconstitutional in *Boerne v. Flores*, *supra* at p. 9, and the trial court's reliance

on non-controlling case law construing an unconstitutional federal statute to decide Idaho cases is manifestly wrong and must be overturned.

This case must be decided under Idaho's FERPA, § 73-402 *et. seq.* intentionally providing higher protection for diverse religious practices than the federal constitution now provides. Idaho law has maintained that where the language of a statute is clear, that is, when the language of the statute defines the conduct to be proscribed with sufficient clarity that ordinary people can understand what conduct is prohibited and in a manner that does not demonstrate arbitrariness or discriminatory enforcement, it must be given its plain and obvious meaning, without any statutory construction. *State v. Martin,* No. 63 slip. op. September 4, 2009 (Idaho Ct. App. 2009).

Idaho's and other states' lawmakers took legislative action invited by the Supreme Court's rejection of RFRA in *Boerne.* This understanding, coupled with the plain, unambiguous language in the statute, and our appellate court's interpretation of the statute thus far, requires this Court to overturn Mr. Cordingly's conviction for violating I.C. §§ 37-2732 and 37-2734(A), laws which otherwise are valid, neutral laws of general application, but which unquestionably burden Mr. Cordingly's right to practice his religion.

The bill's original statement of purpose and fiscal impact is instructive:

> STATEMENT OF PURPOSE
> RS 09829C1 (Senate Bill No. 1394)
>
> The purpose of this legislation is to reestablish a test which courts must use to determine whether a person's religious

> belief should be accommodated when a government action or regulation restricts his or her religious practice. The test, known as the "compelling interest test," requires the government to prove with evidence that its regulation is (1) essential to achieve a compelling governmental interest and (2) it is the least restrictive means of achieving the government's compelling interest.
>
> Prior to 1990 the U.S. Supreme Court used the above test—the "compelling interest test"--when deciding religious claims. However, in a 1990 decision (*Employment Div. of Oregon v. Smith*) the Court tipped the scales of justice in favor of government regulation by throwing out the compelling interest test, which had shielded our religious freedom from onerous government regulation for more than 30 years. The *Smith* decision reduced the standard of review in religious freedom cases to a "reasonableness standard." While all other fundamental rights (freedom of speech, press, assembly, etc.) remain protected by the stringent "compelling interest test," the Court singled out religious freedom by reducing its protection to the weak "reasonableness test."
>
> A widely recognized principle of law is that states are free to protect an individual's right with a much higher standard than the U.S. Constitution itself affords. Thus, in light of this principle in conjunction with the *Boerne* decision, states are free to enact their own RFRA's thereby choosing to apply the higher "compelling interest test" standard in their own religious freedoms cases...

Contrary to the erroneous *Meyer* decision and the trial court's misguided use of the same, the statute does not involve a micro-inspection of an individual's belief system to determine whether a belief is sincerely held or is an actual religious conviction. This language in *Meyer* undoubtedly came from the Supreme Court's decision in *Smith, supra*. In her concurring opinion, Justice O'Connor wrote:

> Respondents also note that the sacramental use of peyote is central to the tenets of the Native American Church, but I agree with the Court, that because it is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, our determination of the constitutionality of Oregon's general criminal prohibition cannot, and should not, turn on the centrality of the particular religious practice at issue. This does not mean, of course, that courts may not make factual findings as to whether a claimant holds a sincerely held religious belief that conflicts with, and thus is burdened by, the challenged law. *Smith* (Justice O'Connor Concurring Opinion).

Idaho Courts have had one opportunity to address whether I.C. §§ 37-2732 (c) and 37-2734(A) substantially burden an individual's right to religious use of a controlled substance covered under these sections. In *State v. White*, 152 Idaho 361, 271 P.3d 1217 (Ct. App. 2011), review denied (Mar. 21, 2012), the Court of Appeals for Idaho determined that the defendant, Cary W. White's use of marijuana was not supported by evidence of use for substantial religious beliefs. In that case, the defendant did not consider himself to be a "member of any legally-recognized religion [...]" Id. at 1223. The Court goes further to list some of the legally-recognized religions: "several recognized organized religious groups, including the Church of Cognitive Therapy, Rastafarianism (which the Ninth Circuit has recognized as involving the use of marijuana as a sacrament), and Native American Medicine." Id. Furthermore, in *United States v. Bauer,* 84 F.3d 1549, 1559 (9th Cir. 2002), the Ninth Circuit recognized that in applying this Act to possession of small amounts of marijuana for personal use may indicate possession for a sincere religious purpose. *Bauer*, 84 F.3 1549.

This case differs from the *White* case in several respects. First, in the *White* case, the defendant acknowledged that he was not a member of a legally-recognized church or religion. Here, Mr. Cordingly has stated that he is a founding member of the Church of Cognitive Therapy. Mr. Cordingly has never stated that he was not a member of a legally recognized church. Based on the decision in *White*, the Church of Cognitive Therapy is a "recognized organized religious group." *State v. White*, 152 Idaho 361, 271 P.3d 1217 (Ct. App. 2011). Because Mr. Cordingly's membership is with a legally-recognized church, his right to utilize the sacrament is protected as a fundamental part of his exercise of his religious freedom.

Second, Mr. Cordingly's religion is Rastafarianism. This religion is one which "the Ninth Circuit has recognized as an organized religious group using marijuana as a sacrament" as quoted in *White*, 271 P.3d 1217 at 1223. Because Mr. Cordingly's church and religion are legally recognized, his free exercise of the right to use the sacrament cannot be seriously challenged in this case. The Magistrate and District Court erred in this analysis.

At the core of the Magistrates decision was the argument that the use of marijuana is not a serious religious ritual, but reflective of a mere philosophy of some sort, or something other than a sincerely held religious belief. The reasoning of the magistrate is that the use of marijuana is not religious because that would send the court down "the slippery slope" assuring any individual "the absolute freedom to worship what he or she chooses in the way he or she chooses." Apparently this concept could

include "criminals" who could "thwart prosecution for crimes done in the name of religion." Memorandum Opinion on Motion to Dismiss at p. 5. The District Court readily adopted this analysis finding that COCT presents an "ideology of philosophical belief as to how people can become spiritual or enlightened, but it does not have a comprehensive belief system with the trappings of a religion." Memorandum Decision and Order, pp. 6-7. These conclusions are not supported by the record and testimony before the court.

The Magistrate and District Court were greatly confused by the difference between the church and a religion. COCT is a church organized for the purposes of using a common sacrament – cannabis – that one uses in the free exercise of one's religion, which in Mr. Cordingly's case is Rastafarianism. Rastafarians have a wide ranging belief system which incorporates the Old Testament, the New Testament, modern day prophecy and fulfillment of the scriptures. Haile Salise I and Bob Marley are only recent and well known examples of leaders of a movement that include millions of people in Africa, Jamaica and throughout the world, people that use cannabis as a sacrament to connect to the higher power of God. To say that Mr. Cordingly's use of marijuana was not done in the free exercise of his religion is unsupported by this record. It would only be fair to say that a substantial portion of Mr. Cordingly's entire life is devoted to use of cannabis. He is a minister and founder of a church, an organized group that is formed for a religious purpose.

It is impossible to separate the practice of smoking or utilizing the sacrament from Mr. Cordingly's religious beliefs. To do so is a futile attempt to define what an acceptable religious belief is. The court cannot separate out yoga, fasting, tai chi, or any other form of acceptable non-violent behavior that may be integral to attainment of spiritual enlightenment or communion with the Judeo-Christian concept of God. To do so is to reject the fact that the majority of the religious people on this planet utilize a wide variety of techniques to attain enlightenment in daily life. Prayer, meditation and yoga are but a few of the fine examples of how religious groups incorporate the teachings of their religion into the routines of their lives. No one has said that yoga or cannabis are religions, but the practice of each may be a part of an organized religious group's belief. The court below fundamentally missed this point in the denial of Mr. Cordingly's free exercise of his religious belief.

The Idaho Legislature created the great protection now relied upon by Mr. Cordingly under FERPA. He has demonstrated that his sincere religious belief includes the use of cannabis as sacrament. If this freedom conflicts with controlled substance acts of Idaho, it should be the concern of the courts in its analysis of whether Mr. Cordingly is entitled to protection. There is no support in the record for the finding that Mr. Cordingly was not engaged in the free exercise of his religion.

Application of FERPA to the Instant Case; Compelling Interest Analysis

Idaho law makes no exceptions for the use of marijuana (cannabis) in Idaho and Idaho Code §§ 37-2732 and 37-2734(A), laws which are otherwise valid, neutral laws of

general application, unquestionably burden Mr. Cordingly's right to practice his religion. The State has not provided any evidence of a compelling state interest in preventing marijuana use in Idaho. The State must show that the limited, spiritual use of cannabis by ordained ministers of COCT is so dangerous or unreasonable that nothing short of a total ban can advance the State's arguable interest in preventing use and abuse of dangerous drugs. The State did not offer any such evidence below. There is no record of any evidence. One could surmise that cannabis is dangerous or that it leads to drinking alcohol, criminal behavior, drug use, or other well established dangerous activities, but there is no evidence in this record. Mr. Cordingly testified that he uses the sacrament to help others in distress and for his own spiritual religious purpose. That is the record before the court.

## CONCLUSION

Mr. Cordingly asserts that the Magistrate and District Court erred when they relied upon non-controlling, federal case law interpreting an unconstitutional federal statute in deciding whether the Idaho statutes burdened his right to practice his religion. He argues that he is the member of an organized church and religion and uses the sacrament to help only those who have a sincere religious interest in the use of cannabis. Finally, he cites the lack of any evidence to support the City of Boise's complete ban on the religious, limited use of cannabis without a compelling state interest. Mr. Cordingly is entitled to relief under the Idaho's Free Exercise of Religion Protected Act.

DATED this 12th day of July, 2012.

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Attorney for Defendant-Appellant

## CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 17th day of July, 2012, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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