IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I, Plaintiff-Appellee,

vs.

JOSEPH SUNDERLAND, Defendant-Appellant.

NO. 26641

APPEAL FROM THE DISTRICT COURT OF THE THIRD CIRCUIT
(REPORT NO. H-54084)

SEPTEMBER 21, 2007

NAKAYAMA, J., WITH WHOM DUFFY, J., JOINS;
MOON, C.J., CONCURRING AND DISSENTING; LEVINSON, J., DISSENTING;
AND ACOBA, J., CONCURRING AND DISSENTING SEPARATELY

OPINION OF THE COURT BY NAKAYAMA, J.
ANNOUNCING THE JUDGMENT OF THE COURT

Defendant-Appellant, Joseph Sunderland ("Sunderland"), appeals from the third circuit district court's[1] June 23, 2004 judgment convicting him of the offense of Promoting a Detrimental Drug in the Third Degree, in violation of Hawai'i Revised Statutes ("HRS") § 712-1249.[2] Sunderland's sole point of error on appeal asserts that his possession of marijuana at home and for religious purposes was protected by the free exercise clause of the first amendment to the United States Constitution, as well as his right to privacy under article I, section 6 of the Hawai'i Constitution.

For the following reasons, we hold that Sunderland's

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[1] The Honorable Colin L. Love presided.

[2] HRS § 712-1249 (1993) provides that "[a] person commits the offense of promoting a detrimental drug in the third degree if the person knowingly possesses any marijuana or any Schedule V substance in any amount."

argument is without merit and affirm the district court's judgment of conviction.

I. BACKGROUND

The material facts of the present case are not in dispute.

On June 27, 2003, Officer Denise Smith ("Officer Smith") was investigating a report of a missing adolescent. Officer Smith was informed that the missing child was known to retreat to the Sunderland residence. Upon arrival, Officer Smith spotted Sunderland on the lanai and inquired about the child. Sunderland responded that he did not know and went inside the house to check. From her vantage point on the lanai, Officer Smith observed three girls sleeping on a futon bed in the living room. She subsequently observed a six-inch marijuana pipe on the kitchen table. When Sunderland returned, Officer Smith asked him to retrieve the pipe. She asked him who the pipe belonged to, and Sunderland responded, "That's mine. I use it for religious purposes." Sunderland then produced a "religious card" from his wallet indicating his membership in a religious organization called the "Cannabis Ministry." Sunderland informed Officer Smith that it was his right to exercise his religious beliefs. Officer Smith instructed Sunderland not to say anything further and placed him under arrest.

At the police station, Sunderland waived his Miranda rights and made a statement. He claimed that he had been practicing his religion since he was sixteen years of age. He further indicated that he had used the pipe to smoke marijuana

that morning, and he forgot to put it away.[3]

On January 9, 2004, Sunderland was orally charged with committing the offense of Promoting a Detrimental Drug in the Third Degree. Sunderland thereafter filed a "Motion To Dismiss Or Judgment Of Acquittal" asserting that the charged conduct constituted protected activity pursuant to his constitutional right to the free exercise of religion.[4] The matter proceeded to trial on January 23, 2004.

At trial, the prosecution orally charged Sunderland for a second time, as follows:

> The charge is that on or about the 27th day of June, 2003, in the District of North Kohala, County and State of Hawaii, Joseph Sunderland did knowingly possess marijuana, thereby committing the offense of Promoting a Detrimental Drug in the Third Degree, in violation of Section 712-1249, Hawaii Revised Statutes, as amended.

Following the close of the prosecution's case in chief, Sunderland called Reverend Roger Christie ("Christie") to the witness stand. Christie testified that he was ordained in the "Religion of Jesus Church," and that he subsequently organized a sect called the "Hawaii Cannabis Ministry." Christie explained that his religion centers around the sacramental ingestion of cannabis, and that the use of cannabis is mandatory in his ministry. He pointed to multiple passages from the Bible and interpreted them as indirect references to the cannabis plant.

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[3] The parties stipulated that, if called as a witness, the criminologist would testify that the residue in the pipe was marijuana.

[4] The State of Hawai'i ("prosecution") filed a responsive "Trial Memorandum" on May 12, 2004. On May 13, 2006, Sunderland filed a "Supplemental Memorandum In Support Of Motion To Dismiss Or Judgment Or Acquittal."

For example, Christie claimed that "the word 'kannabosm' in the holy anointing oil of Moses and the christening oil of Jesus is cannabis." According to Christie, cannabis "has a unique way of elevating the consciousness[,]" distinct from other mind-altering substances, and that prohibiting the use of cannabis would have a "devastating" effect on his ministry.

Sunderland subsequently exercised his right to testify. Sunderland admitted possession of the pipe recovered by Officer Smith, and he further admitted that the residue in the pipe was marijuana. However, Sunderland thereafter testified that he was a member of Christie's ministry and used marijuana for religious purposes. Sunderland claimed that ingesting marijuana was a religious experience that produced a "very unique state of mind" that brought him closer to what he considered "God." Sunderland explained, "And . . . I believe that -- in part of . . . understanding God, I believe that God put the holy herb onto this earth to help mankind to better understand Him."

At the close of the evidentiary portion of trial, the court rejected Sunderland's argument that his constitutional right to the free exercise of religion precluded his prosecution for possessing marijuana. First, the court assumed that Sunderland's religious beliefs were sincere, as follows:

> THE COURT: The question of whether or not it is a legitimate, seriously held religious belief, that's something that is almost impossible for a Court to address, whether or not somebody sincerely believes in a religious matter. We fight wars over who has the only true God.
>
> If a judge happened to be an atheist, how would you convince him or her that it's just -- I'm not going there. I will assume that there is a -- that the religious aspect is met.

(Emphasis added.) The court nevertheless perceived a compelling

state interest in precluding the use and possession of illicit drugs in the presence of minors:

> This case is one where he's using and possessing marijuana in his home where at least at the time when he is arrested there's four minors. And the state does have a compelling interest in protecting minors, juveniles, children, from an environment where marijuana is being used, from an environment where its use is encouraged. Because minors use marijuana. And this Court sees the problems that are created by that all the time.
>
> So in this case, not some other case, in this case I do find a compelling state interest in prohibiting the possession or use of marijuana for religious purposes . . . in the home when minors are present[.]

The court thereafter found Sunderland guilty of the charged offense, and sentenced him to a $150 fine and $25 in fees.

Sunderland filed a timely notice of appeal on June 17, 2004.

II. STANDARD OF REVIEW

Sunderland's sole point of error on appeal questions the constitutionality of his prosecution for possessing marijuana in the privacy of his home for religious purposes. "We review questions of constitutional law de novo, under the right/wrong standard." Onaka v. Onaka, 112 Hawai'i 374, 378, 146 P.3d 89, 93 (2006).

III. DISCUSSION

A. Sunderland Failed to Preserve His Right to Privacy Argument on Appeal.

As an initial matter, we note that Sunderland failed to preserve his constitutional right to privacy argument on appeal.

In his opening brief, Sunderland claims that trial counsel "framed the constitutional question as a blend of freedom of religion and privacy interests . . . ." However, that

assertion is belied by the record. The parties did not address any right to privacy argument in any of their written submissions before the circuit court.[5] Sunderland attempts to bootstrap a privacy argument by referring to the following arguments orally presented before the circuit court at a hearing conducted on May 19, 2004:

> The next question is: Has the state shown a compelling interest? I say that these things about driving a car while you're under the influence of marijuana, all these things are red herrings because that's not what this case is about. This case is about someone in his own home possessing a small amount of marijuana for religious purposes. That is the only issue in this case.
>
> It is not an issue in this case whether or not you can smoke marijuana and drive a car, whether or not pregnant women should smoke marijuana, any of those others [sic] things. This is an adult male in his own home smoking marijuana for religious purposes. That is the issue. There's no issue beyond that.
>
> So whether or not any of these other things is a good idea isn't before this Court, and it's not what we're addressing. They're not asking, hey, he's going down the highway at ninety miles an hour smoking a large joint, and now you're getting him in trouble for that. No. He's getting in trouble for having it at his house. And that's all the issue is. The issue is not a precedent for doing it some place else, only in your own home for religious purposes.
>
> . . . .
>
> The state -- I'm not here to litigate whether or not to permit someone not to drive a car while intoxicated on marijuana. That's a totally different issue than can you do something at your own house, which would bring us to this general idea of what is a compelling state interest.
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> . . . .

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[5] We note that Sunderland cited Ravin v. State, 534 P.2d 494 (Alaska 1975) in his supplemental memorandum in support of his motion to dismiss or for a judgment of acquittal. In Ravin, the Alaska Supreme Court held that the defendant's personal, non-commercial use of marijuana in his home was constitutionally protected. Id. at 511. However, Sunderland did not cite Ravin for the purpose of asserting a right to privacy argument. Rather, Sunderland cited Ravin for its reasoning that the prohibition on the possession of marijuana in the privacy of the possessor's home did not further a legitimate state interest. Sunderland sought to use the Ravin court's reasoning to buttress his argument that the prosecution failed to demonstrate a compelling state interest in the case at bar.

> This case is only about the use of marijuana in the home. And the Supreme Court of Alaska, finally, in not addressing the same issue, addressing a slightly different issue, basically said that the privacy rights, okay -- and it's not an issue here. They have done that case in Hawaii. And on a privacy level, you're not allowed to have marijuana. They have raised that.
>
> . . . .
>
> So I would say that . . . it is not reasonable to say that there's a compelling state interest against the religious use of marijuana in your own home because that's the only issue here. He's found in his home with just a small amount. It's not I've got a ton in my home. Says a small amount in your home. That is what the issue is here. Not the driving.
>
> There may be a compelling state interest to say you cannot drive when you're intoxicated with marijuana, or pregnant women shouldn't, all those things could be compelling interest. That's not what we're asking for. We're asking a very limited thing here: Only in your own home because that's the issue presented here.

(Emphasis added.)

Although Sunderland asserted that he used marijuana for religious practices in his own home, he did not seek to draw the conclusion that his right to privacy was implicated. Indeed, as demonstrated by the afore-emphasized portion of the transcript, he expressly disavowed any right to privacy argument. Rather, Sunderland argued that, despite the inability to succeed on privacy grounds in this jurisdiction, his right to the free exercise of religion required the prosecution to demonstrate a compelling state interest justifying a prohibition on the personal, home-use of marijuana. His focus on the home was meant only to distinguish other potential compelling state interests in preventing public harm that may flow from the use of marijuana outside the home. That argument differs from the argument Sunderland now seeks to assert on appeal -- that his right to privacy encompasses the right to possess marijuana for religious purposes within the confines of his own home.

Therefore, inasmuch as Sunderland did not raise his right-to-privacy argument before the trial court, we do not address it. See HRS § 641-2 (Supp. 2004) ("The appellate court . . . need not consider a point that was not presented in the trial court in an appropriate manner."); State v. Naeole, 62 Haw. 563, 570, 617 P.2d 820, 826 (1980) (stating that it is well-established that "an issue raised for the first time on appeal will not be considered by the reviewing courts"); State v. Kahalewai, 56 Haw. 481, 491, 541 P.2d 1020, 1027 (1975) ("Generally, appellate courts will not consider questions which were not raised in the trial courts."); Territory v. Kelley, 38 Haw. 433, 435 (1949) ("[N]o question of constitutionality of the ordinance was . . . called to the attention of the trial court and ruled upon, nor has any failure to rule been preserved by proper exceptions. No such question, therefore, can be properly raised for the first time in this court."); Onaka, 112 Hawai'i at 386, 146 P.3d at 101 ("[T]he rule in this jurisdiction . . . prohibits an appellant from complaining for the first time on appeal of error to which he has acquiesced or to which he failed to object.") (Ellipses in original.) (Citations omitted.).

B. Enforcement of HRS § 712-1249 Does Not Violate Sunderland's First Amendment Right to the Free Exercise of Religion.

1. The parties' arguments

Sunderland's argument is thus reduced to his assertion that HRS § 712-1249 violates his right to the free exercise of religion guaranteed by the first amendment to the United States Constitution ("First Amendment"). Specifically, Sunderland refers this court to the analysis set forth by the United States

Supreme Court in Sherbert v. Verner, 374 U.S. 398 (1963). He asserts that under Sherbert, a governmental regulation will be scrutinized for a compelling interest where the party challenging the regulation's constitutionality has demonstrated that the regulation substantially burdens the party's religious practices. See, e.g., Sherbert, 374 U.S. at 406 ("We must next consider whether some compelling state interest . . . justifies the substantial infringement of appellant's First Amendment right."); Wisconsin v. Yoder, 406 U.S. 205, 214 (1972) ("[I]n order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."). Sunderland points out that the district court presumed that the "religious aspect" was met and argues that the district court erroneously found that the state had a compelling interest in protecting minors from an environment where marijuana was used and encouraged. He contends that the record is devoid of any evidence that (1) the minors present had actual knowledge of the marijuana pipe, or (2) Sunderland encouraged the use of marijuana in any way.

The prosecution appears to agree with Sunderland that the Sherbert/Yoder analysis is appropriate. The prosecution concedes that the district court presumed that the "religious aspect" was satisfied, but defends the district court's finding

of a compelling interest based upon the presence of the minors in close proximity to the marijuana pipe and the ease of access to it. The prosecution also asserts that in Employment Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872 (1990), superseded by Religious Freedom Restoration Act ("RFRA") of 1993, 42 U.S.C. § 2000bb-1 (Supp. V 1993), statute invalidated by City of Boerne v. Flores, 521 U.S. 507 (1997), the United States Supreme Court later "questioned" the propriety of a compelling interest analysis where the regulation in question (1) is of general applicability and (2) interferes with only the right to free exercise.

In reply, Sunderland asserts, inter alia, that the prosecution's reliance on Smith is misplaced. Sunderland argues that Congress enacted RFRA in an attempt to expressly supersede Smith's elimination of the compelling interest analysis in the context of generally applicable governmental regulation.

Contrary to Sunderland's assertions, however, Smith plainly controls.

2. Employment Div., Dep't of Human Res. of Oregon v. Smith

Ordinarily, when evaluating claims advanced under the free exercise clause of the First Amendment,

> it [is] necessary to examine whether or not the activity interfered with by the state was motivated by and rooted in a legitimate and sincerely held religious belief, whether or not the parties' free exercise of religion had been burdened by the regulation, the extent or impact of the regulation on the parties' religious practices, and whether or not the state had a compelling interest in the regulation which justified such a burden.

Korean Buddhist Dae Won Sa Temple v. Sullivan, 87 Hawai'i 217, 247, 953 P.2d 1315, 1345 (1998) (brackets in original) (citing

State ex rel. Minami v. Andrews, 65 Haw. 289, 291, 651 P.2d 473, 474 (1982); accord Yoder, 406 U.S. at 215-19.

Nevertheless, in Smith, the United States Supreme Court distinguished governmental regulations of general applicability, holding that they are, under certain circumstances, immune from claims or defenses raised under the free exercise clause of the First Amendment. See discussion infra. Specifically, the Smith Court addressed the issue whether applicants may be denied unemployment compensation benefits based upon an Oregon statute disqualifying persons terminated for work-related misconduct, if the misconduct relied upon as the basis for disqualification is the religiously motivated ingestion of a substance prohibited by Oregon's controlled substance law.

The Smith Court first reiterated the well-settled notion that religious beliefs are beyond the reach of permissible governmental regulation, to the extent that government may neither compel nor preclude acquiescence in a particular belief as such. 494 U.S. at 877 ("The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires."). Moreover, although attendant conduct does not enjoy the same degree of immunity, id. at 879 ("Laws . . . are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices . . . ."") (Quotation marks omitted.) (Some ellipses in original and some added.) (Citing Reynolds v. United States, 98 U.S. 145, 166-67 (1878).), governmental regulation that targets the religious motivation behind such

conduct would not pass constitutional muster. To wit, "a State would be prohibiting the free exercise of religion if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display." Id. at 877 (quotation marks omitted) (brackets removed).

Respondents, however, desired to expand the analysis one step further in seeking to preclude interference with religiously motivated conduct by a governmental regulation that does not target the religious motivation behind the conduct and that is concededly constitutional as applied to other persons seeking to engage in such conduct for non-religious reasons (i.e., recreational purposes). Id. at 878. The Court pointed out that previous opinions have upheld neutral and generally applicable laws against constitutional challenges based upon the free exercise clause of the First Amendment, citing such cases as Reynolds v. United States, 98 U.S. 145 (1878) (rejecting a claim that laws prohibiting polygamy could not be enforced against those whose religion commanded the practice), Minersville School Dist. Bd. of Educ. v. Gobitis, 310 U.S. 586, 594-95 (1940) ("Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs."), Prince v. Massachusetts, 321 U.S. 158 (1944) (holding that child labor laws may constitutionally be applied to preclude a mother from causing her children to distribute literature on the streets in spite of her

religious motivation), Braunfeld v. Brown, 366 U.S. 599 (1961) (plurality opinion) (upholding Sunday-closing laws against the claim that such laws burdened the religious practices of those whose religions precluded them from working on other days), Gillette v. United States, 401 U.S. 437 (1971) (upholding conscription against a claim asserted by persons who opposed the war on religious grounds), United States v. Lee, 455 U.S. 252 (1982) (rejecting a claim for a religious exemption from social security taxes on the ground that the Amish faith prohibited participation in governmental support programs, and Hernandez v. Commissioner, 490 U.S. 680 (1989) (rejecting a claim that the payment of income taxes burdened the free exercise of religion by making participation in religious activities more difficult). Smith, 494 U.S. at 879-80.

The Court acknowledged that it had, in the past, upheld First Amendment challenges to the application of neutral and generally applicable laws to religiously motivated conduct, but only in such cases where the free exercise clause was implicated "in conjunction with other constitutional protections, such as freedom of speech and of the press . . . or the right of parents . . . to direct the education of their children . . . ." Id. at 881 (internal citations omitted). Thus, the Court concluded that Reynolds and its progeny "plainly controll[ed]" inasmuch as Oregon's controlled substances law was neutral, generally applicable, and did not implicate other core constitutional concerns. Id. at 882.

Respondents also argued that "even though exemption

from generally applicable criminal laws need not automatically be extended to religiously motivated actors, at least the claim for a religious exemption must be evaluated under the balancing test set forth in [Sherbert]." Id. at 882-83. However, the Court expressly rejected the application of the Sherbert test to "a generally applicable criminal law." Id. at 884. The Court reasoned as follows:

> The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." Lyng[v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988)]. To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling"--permitting him, by virtue of his beliefs, "to become a law unto himself," Reynolds[, 98 U.S. at 167]--contradicts both constitutional tradition and common sense.

Id. at 885 (footnote omitted).[6]

Accordingly, the Court reversed the decision of the Oregon Supreme Court, concluding that "[b]ecause respondents' ingestion of peyote was prohibited under Oregon law, and because that prohibition is constitutional, Oregon may, consistent with the Free Exercise Clause, deny respondents unemployment compensation when their dismissal results from use of the drug." Id. at 890.

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[6] We note, however, that Smith left open the possibility that the Sherbert test might nevertheless retain its vitality where statutory conditions called for "individualized governmental assessment of the reasons for the relevant conduct[,]" id. at 884, thus creating a "mechanism for individualized exemptions." 494 U.S. at 883 (Citing Bowen v. Roy, 476 U.S. 693, 708 (1986); see also Sullivan, 87 Hawai'i at 246 n.31, 953 P.2d at 1344 n.31 (stating that although Smith makes generally applicable governmental regulation immune from First Amendment attack, Smith carves an exception where the regulation creates a system of individualized exemptions).

3. RFRA

As mentioned by Sunderland, in 1993 Congress reacted by enacting RFRA, which was designed to supersede the Smith decision and reinvigorate the Sherbert/Yoder analysis.[7] See RFRA, Pub. L. No. 103-141, 107 Stat. 1488 (1993). RFRA, 42 U.S.C. § 2000bb-1 set forth the following standard:

> **(a) In general**
>
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> **(b) Exception**
>
> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--
>
> (1) is in furtherance of a compelling governmental interest; and

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[7] RFRA's stated purposes were to (1) "restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened[,]" and (2) "provide a claim or defense to persons whose religious exercise is substantially burdened by government." RFRA, 42 U.S.C. § 2000bb(b). Congress additionally found that:

> (1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;
> (2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;
> (3) governments should not substantially burden religious exercise without compelling justification;
> (4) in Employment Division v. Smith, 494 U.S. 872 (1990), the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and
> (5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

RFRA, 42 U.S.C. § 2000bb(a).

> (2) is the least restrictive means of furthering that compelling governmental interest.

(Emphasis added.) RFRA purported to make that framework applicable to "all Federal and State law, and the implementation of that law, whether statutory or otherwise . . . ." RFRA, 42 U.S.C. § 2000bb-3(a).

However, this court has already taken note of the fact that the United States Supreme Court, in Boerne,[8] invalidated RFRA insofar as it "exceeded the enumerated powers of Congress and was, therefore, unconstitutional." Sullivan, 87 Hawai'i at 246, 953 P.2d at 1344. As a result, RFRA is inoperative as to the individual states. See Hankins v. Lyght, 441 F.3d 96, 105 (2d Cir. 2006) ("The Supreme Court held that the RFRA could not be enacted under Section 5 of the Fourteenth Amendment, which empowers Congress to enforce the Amendment's other provisions against the states."); Spies v. Voinovich, 173 F.3d 398, 403 (6th Cir. 1999) ("[T]he Supreme Court has declared [RFRA] unconstitutional as applied to the states."); Denson v. Marshall, 44 F. Supp. 2d 400, 402 (D. Mass. 1999) ("The Supreme Court recently held RFRA unconstitutional as applied to state governments.").[9]

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[8] In Boerne, the Court stated that "RFRA was designed to control cases and controversies, such as the one before us; but as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control." 521 U.S. at 536.

[9] RFRA remains effective, however, as applied to the federal government. See Hankins, 441 F.3d at 105-06 ("Since Boerne, '[e]very appellate court that has squarely addressed the question has held that the RFRA governs the activities of federal officers and agencies.") (Citing O'Bryan v. Bureau of Prisons, 349 F.3d 399, 401 (7th Cir. 2003).) (Brackets in original.). In 2000, Congress amended RFRA, expressly limiting its

(continued...)

4. HRS § 712-1249 is not subject to First Amendment attack.

The present matter involves a state criminal statute prohibiting, inter alia, the possession of marijuana. Thus, Smith, not RFRA, controls.

According to Smith, a generally applicable law is not subject to First Amendment attack unless (1) it interferes with "the Free Exercise Clause in conjunction with other constitutional protections," or (2) it creates a mechanism that calls for "individualized governmental assessment of the reasons for the relevant conduct[]" (i.e., individualized exemptions). See discussion supra.

Here, HRS § 712-1249 falls squarely within the scope of permissible governmental regulation, consonant with the rule enunciated in Smith. HRS § 712-1249 is a neutral law of general applicability to the extent that it purports to prohibit, without exception, the possession of marijuana and any other substance defined as a "Schedule V substance" by HRS chapter 329. Additionally, the statute does not, in this case, also interfere with other constitutional rights, such as

> freedom of speech and of the press, see Cantwell v. Connecticut, 310 U.S., at 304-307 (invalidating a licensing system for religious and charitable solicitations under which the administrator had discretion to deny a license to any cause he deemed nonreligious); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas); Follett v. McCormick, 321 U.S. 573 (1944) (same), or the right of parents . . . to direct the education of their children, see Wisconsin v. Yodel, 406 U.S. 205

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[9](...continued)
applicability to "all Federal law, and the implementation of that law, whether statutory or otherwise . . . ." Religious Land Use and Institutionalized Persons Act, Pub. L. No. 106-274, 114 Stat. 803, 806 (2000).

> (1972) (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school).

Smith, 494 U.S. at 881 (footnote omitted). Thus, the present matter does not present the type of hybrid rights situation that Smith implies would merit a strict scrutiny analysis. Rather, we are faced with "a free exercise claim unconnected with any communicative activity or parental right." Id. at 882. Moreover, HRS § 712-1249 does not create a mechanism for governmental assessment of individual applicants for exemptions. Rather, HRS § 712-1249 presents an across-the-board prohibition on specific conduct deemed to be socially harmful by the legislature.

Therefore, pursuant to Smith, we hold that, under the circumstances of the present case,[10] the free exercise clause of the First Amendment is not a viable defense to prosecution under HRS § 712-1249. See 494 U.S. at 884 ("Even if we were inclined to breath into Sherbert some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law."); People v. Tripped, 56 Cal. App. 4th 1532, 1542, 66 Cal. Rptr. 2d 559, 565 (Cal. Ct. App. 1997) ("Under Smith, therefore, a state may enact and enforce generalized criminal sanctions for marijuana possession and transportation without running afoul of the Free Exercise clause of the First Amendment."); State v. Meyers, 95 F.3d 1475,

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[10] We express no opinion as to what effect a properly preserved privacy argument may have had on the analysis, insofar as a privacy argument may present the type of hybrid rights scenario that Smith implies would merit a strict scrutiny analysis.

1481 (10th Cir. 1996) (rejecting a criminal defendant's claim that his prosecution for and conviction of the offenses of (1) conspiracy to possess with intent to distribute and to distribute marijuana, and (2) aiding and abetting possession with intent to distribute marijuana violated the free exercise clause of the First Amendment).

IV. CONCLUSION

Based upon the foregoing analysis, we affirm the district court's June 23, 2004 judgment.[11]

Deborah L. Kim,
Deputy Public Defender,
for defendant-appellant

Janet R. Garcia,
Deputy Prosecuting Attorney,
for plaintiff-appellee

[11] As a technical matter, we note that the district court erred by applying a compelling interest test. Nevertheless, our disagreement with the district court's methodology does not preclude our affirmance of its ultimate conclusion. See Aluminum Shake Roofing, Inc. v. Hirayasu, 110 Hawai'i 248, 256, 131 P.3d 1230, 1238 (2006) ("This court may affirm a judgment of the trial court on any ground in the record which supports affirmance.") (Quoting Taylor-Rice v. State, 91 Hawai'i 60, 73, 979 P.2d 1086, 1099 (1999).) (Quotation marks omitted.).