UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRANDON SAMPLE, Plaintiff,	)	
v.	)	Civil Action No. 05-596 PLF
HARLEY LAPPIN, et al., Defendants.	)	

DEFENDANTS' MOTION TO DISMISS AS MOOT OR, IN THE ALTERNATIVE, TO RECONSIDER GRANT OF PARTIAL SUMMARY JUDGMENT FOR PLAINTIFF AND TO TRANSFER AND OPPOSITION TO THE PLAINTIFF'S MOTION FOR RECONSIDERATION

Defendants respectfully move, pursuant to Fed. R. Civ. P. 12(b)(1) and 12(h); and 42 U.S.C. § 1997e(e), to dismiss the Complaint in light of the transfer of Plaintiff from his former institution and his failure to formally seek wine from his current Warden in Jesup, Georgia.[1] In the alternative, this Court should reconsider the grant of partial summary judgment in favor of plaintiff regarding the sincerity of his purported religious belief that he requires wine in units of 3-5 ounces and, defer ruling on the issue pending discovery, pursuant to its inherent powers and Fed. R. Civ. P. 7, 54, and 56(f). Should the Court deny defendants' motion to dismiss as moot, defendants renew their request that the Court transfer this action pursuant to 28 U.S.C. § 1404(a), but submit that now the proper venue

[1] Plaintiff was transferred to Georgia in February, after he changed the address where he anticipates he will live upon release from prison to Jesup, Georgia.

would be the Southern District of Georgia, because the transfer would promote the interests of justice and the Court there would be a more convenient forum.

In support of this motion, Defendants rely upon the accompanying memorandum and the filings previously submitted in support of Defendants' Motion To Dismiss Or, In The Alternative, For Summary Judgment Or To Transfer, filed August 8, 2005 and in opposition to Plaintiff's Cross Motion For Summary Judgment As To Count I. A proposed order is also attached.

Respectfully submitted,

KENNETH L. WAINSTEIN, DC Bar #451058
United States Attorney

RUDOLPH CONTRERAS, DC Bar #434122
Assistant United States Attorney

W. MARK NEBEKER, DC Bar #396739
Assistant United States Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRANDON SAMPLE	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 05-596 PLF
	)	
HARLEY LAPPIN, ET AL.	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AS MOOT OR, IN THE ALTERNATIVE, TO RECONSIDER GRANT OF PARTIAL SUMMARY JUDGMENT FOR PLAINTIFF AND TO TRANSFER AND IN OPPOSITION TO THE PLAINTIFF'S MOTION FOR RECONSIDERATION

INTRODUCTION

Plaintiff has been transferred from the Federal Correctional Institution in Beaumont, Texas, where he was earlier housed and where security concerns, as evaluated by its Warden, precluded him from consuming wine in the amounts requested. Defendants believe that this transfer has rendered this case moot because the inmate is in a new institution with other prison administrators and the decision denying the wine that led to the filing of this complaint was made under the Bureau of Prisons' ("BOP") past version of then program statement 5380.08, Religious Beliefs and Practices, which was effective from August 25, 1997 until December 30, 2004.

Plaintiff was transferred from Beaumont Low because he changed his release address to a location in Jesup, and requested to be transferred to Jesup, Georgia. See Declaration of Dee-Ann

Stephens ("Stephens Decl.") (Attachment 1). Plaintiff arrived at the Federal Correctional Institution in Jesup, Georgia, on February 16, 2006. The Warden and the prison administrators at Jesup, Georgia, are different from those at Beaumont Low; the decision made at Beaumont Low is not binding on the Jesup administrators; and Plaintiff has not exhausted the BOP administrative remedy procedures under the new policy and in the new institution. See Declaration of Carolyn Lanphear ("Lanphear Decl.") (Attachment 2). Thus, insofar as Plaintiff has sought to challenge the decision not to afford him his desired amount of wine under the practice adopted by his past warden, this action is moot; and his failure to exhaust administrative remedies at his new institution so that his request can be considered in light of the safety and security concerns at that new facility and under the new policy bars this action.

THE PLAINTIFF'S TRANSFER TO JESUP, GEORGIA AND THE MOST RECENT AMENDMENT TO THE BUREAU OF PRISONS RELIGIOUS POLICY HAVE RENDERED THE PLAINTIFF'S CASE MOOT

"No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 37 (1976) (citation omitted). Article III of the Constitution limits our jurisdiction to "actual, ongoing controversies." Honig v. Doe, 484 U.S. 305, 317 (1988).

The power of the courts does not extend to moot cases. People for the Ethical Treatment of Animals, 396 F.3d 416 (D.C. Cir. 2005) (citing Central Soya Company v. Consolidated Rail Corporation, 614 F.2d 684, 689 (7th Cir. 1980). Therefore, a federal court cannot decide a question which will not affect the rights of the litigation and must resolve the mootness issue before assuming jurisdiction over such a case. Pharmachemie B.V. v. Barr Laboratories, 276 F.3d 627, 631 (D.C. Cir. 2002).

"If events outrun the controversy such that the court can grant no meaningful relief, the case must be dismissed as moot." McBryde v. Comm. to Review, 264 F.3d 52, 55 (D.C. Cir. 2001), cert. denied, 537 U.S. 821 (2002). Thus, there must be a live controversy throughout all stages of the case or the case will be moot. Chiles v. Thornburgh, 865 F.2d 1197 (11th Cir. 1989).

In Ross v. Reed, 719 F.2d 689 (4th Cir. 1983), mootness was discussed in the context of a prisoner's continued ability to seek relief after transfer:

> To be justiciable under Article III of the Constitution, the conflict between the litigants must present a "case or controversy" both at the time the lawsuit is filed and at the time it is decided. If intervening factual or legal events effectively dispel the case or controversy during pendency of the suit, the federal courts are powerless to decide the questions presented.

719 F.2d at 693-94. Because the inmate in that litigation was no longer incarcerated under the conditions he claimed to be unconstitutional, and he himself would no longer be affected by

any relief fashioned by the Court, it was held that there was no justiciable case or controversy and those claims were dismissed.

Likewise in Rhodes v. Stewart, 488 U.S. 1 (1988), where one prisoner had died during the litigation and the other had been released, the case was moot before judgment had been entered and therefore the parties were not entitled to relief. Once an inmate who complains about conditions of confinement is no longer subject to those conditions, the case is moot. See, Forbes v. Trigg, 976 F.2d 308 (7th Cir. 1992), Strader v. Blalock, 405 F.Supp. 1155 (W.D. Va. 1975); see also, Murphy v. Hunt, 455 U.S. 478 (1982); Flast v. Cohen, 392 U.S. 83 (1968).

Similarly, in this case, Plaintiff Brandon Sample has been transferred to Jesup, Georgia which is administered by different prison administrators. The decision of Beaumont prison administrators to deny him wine is not binding in Jesup. Thus, Plaintiff is no longer subjected to the denial of the wine under the decision reached while he was housed at Beaumont Low, and he has not formally requested the wine through the appropriate administrative remedy procedures at Jesup.

Moreover, on December 31, 2004, the BOP issued a new policy on Religious Beliefs and Practices, Program Statement 5360.09. The amendment of old regulations is among those "intervening events as can moot a challenge to the regulation in its original form." Save Our Cumberland Mountains, Inc. v. Clark, 725 F.2d

1422, 1432 n.27 (D.C. Cir. 1984)(stating that "[t]here is no question that a case can be mooted by promulgation of new regulations or by amendment or revocation of old regulations."); see also Natural Res. Def. Council v. United States Nuclear Regulatory Comm'n, 680 F.2d 810, 813-815 (D.C. Cir. 1982) (stating that "[c]orrective action by an agency is one type of subsequent development that can moot a previously justiciable issue.")

In this case, the BOP amended its religious policy statement on December 31, 2004, which was subsequent to the filing of the Plaintiff's old administrative requests. This new program statement incorporates elements of the Religious Freedom Restoration Act ("RFRA") that were not explicitly identified in the policy under which the Plaintiff's Beaumont Low requests were denied. The new policy explains to prison administrators that "[w]hen necessary, Wardens may identify alternative practices and implement the least restrictive alternative consistent with the security and orderly running of Bureau institutions." Program Statement 5360.09, Religious Beliefs and Practices, at page 5 (December 31, 2004). Thus, the new policy substantively changed the guidance provided to prison administrators thereby rendering the Plaintiff's case moot.

Furthermore, the Court is not able to provide the Plaintiff with the injunctive relief he is seeking. The inmate is no

longer housed at Beaumont Low and an order by the Court addressed to the Beaumont Low officials will have no effect because the Plaintiff is no longer housed at Beaumont Low. Moreover, the BOP has amended its policy since the filing of the case. Under these circumstances, the Court cannot fashion an appropriate remedy.

For these reasons, Plaintiff's complaint should be dismissed as the matter in controversy, insofar as it may have been ripe for review, is now moot.

PLAINTIFF HAS NOT EXHAUSTED THE BUREAU OF PRISONS ADMINISTRATIVE REMEDY PROCEDURES AT FCI JESUP

Defendants submit that Plaintiff does not currently have any judicial remedies available to him. The BOP religious policy was amended on December 31, 2004, after the Plaintiff exhausted the administrative remedy procedures. Plaintiff was transferred to Jesup, Georgia on February 16, 2006. However, to this date, the Plaintiff has not filed any administrative remedy requests for the wine at Jesup, Georgia. See Lanphear Decl. ¶¶ 3-5.

Instead, Plaintiff filed two Inmate Requests to Staff, which are informal requests filed at the institution level and do not constitute the required administrative remedy procedures. See 28 C.F.R. Part 542; 42 U.S.C. § 1997e(e). The first request for the wine was addressed to the institution chaplain. The institution chaplain denied the request. See Attachment 3. The second request was addressed to the Warden. See Attachment 4. The Warden offered Plaintiff non-alcoholic red wine. See Attachment

4.[2]

Clearly, under these circumstances, the Plaintiff needs to exhaust the BOP administrative remedy procedures. The inmate is now housed in a different institution with different prison administrators and regional director; there is a new policy in effect; and at least some wine has been offered to Plaintiff at this new institution. The balance of equities as well as the text and spirit of the PLRA (42 U.S.C. § 1997e(e)) mandate that this inmate be required to exhaust the administrative remedy procedures so that his current institution, the regional director, and central office have the opportunity to review Plaintiff's request in light of the amended policy and any differing security circumstances at FCI Jesup. Thus, this case should be dismissed.

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[2] Plaintiff has not rejected this option but requested information as to whether the non-alcoholic wine was Kosher. See Attachment 5. The Warden explained that no research had been done on Kosher wine as the inmate did not specify Kosher in his informal request. The Warden also asked whether the non-alcoholic wine would satisfy his request or he was now requesting Kosher wine as the initial request made no reference to Kosher. See Attachment 5. As of this date, the inmate has not responded to the Warden's inquiry. Since the inmate has not exhausted the BOP administrative remedy procedures, it is unknown whether the non-alcoholic wine would satisfy the inmate's request for the wine and whether this is a matter that can definitely be established at Jesup, Georgia as the administration is looking into alternatives to accommodate the inmate's request.

THE PLAINTIFF HAS NOT MET HIS BURDEN OF SHOWING HE HAS A SINCERELY HELD BELIEF TO DRINK WINE AS PART OF HIS RELIGIOUS PRACTICE

This Court found that "[p]laintiff is Jewish and he believes that he must consume a certain quantity of wine – not grape juice – as an important part of his observances of the Jewish Sabbath and Passover." March 31, 2006 Mem. Op. at 8-9; Sample v. Lappin, 2006 WL 833130 at *5 (D.D.C.). The Court later explained that "[a]t all times relevant to the complaint, plaintiff declares his Jewish faith, and his religious preference, Jewish, is duly reflected in BOP's records." Id.

A careful reading of the Opinion reflects that inmate Sample has not met his burden to show that he has a sincerely held belief to drink wine as part of the religious rituals. Instead, plaintiff has merely shown that for the last four years he has identified himself as Jewish in the BOP's records. His adherence to the Jewish faith alone, however, does not show that he has a sincerely held belief to drink wine. Within the prison setting and outside the prison setting, many individuals of the Jewish faith utilize grape juice as an adequate substitute to pray Kiddush and to participate in Passover Seder, and some even pray Kiddush with just bread, and do not feel that their religious rights are being violated. Thus, the mere fact that plaintiff claims adherence to the Jewish faith does not in itself lead to the conclusion that he has a sincerely held belief to drink wine.

Moreover, the Plaintiff first came into the BOP custody on June 12, 2000, and identified himself as Jewish on May 18, 2001. However, he did not request wine for the religious rituals until August 31, 2004, more than four years after he entered BOP custody. See Administrative Remedy requests attached to Defendants' Statement of Material Facts, Exhibit 2. If the plaintiff had a sincerely held belief to drink wine, it is highly suspect that it took him more than four years to request wine. A review of the administrative remedy computerized records reflects that since his arrival in BOP custody the Plaintiff has been well acquainted with the administrative remedy program. From the time he came into custody until the time he filed his first administrative remedy request for wine, he filed a total of one hundred and twenty nine administrative requests. See Lanphear Decl., ¶¶ 3-4. None of those requests involved wine for his religious rituals. This behavior is inconsistent with an inmate with a sincerely held belief to drink wine during the Jewish religious rituals. This Court recognized part of the inconsistencies in Plaintiff's claimed belief that he required a certain amount of wine to satisfy his religion. March 31, 2006 Mem. Op. at 8 n.5 (recognizing Plaintiff's inconsistent statements about the amount of wine he requires -- 3.5 ounces versus 3-5 ounces, but concluding that the issue was not material, because either amount would be forbidden if the lesser

amount were). The Court failed to recognize that in Plaintiff's initial years within the BOP, he never indicated that he needed wine. This offers at least some evidence that his sincerely held religious beliefs have never included a need for any wine. Plaintiff merely seized the opportunity to seek wine under the pretense of a sincerely held belief that coincidentally blossomed years after entering the prison system. At no time has the Plaintiff explained why it took him four years to request the wine that he so sincerely believes he must consume during religious rituals. This is particularly telling, since his (controverted) assertion is that he has been of the Jewish faith all of his life.

DISCOVERY REGARDING THE PLAINTIFF'S RELIGIOUS PRACTICES IS NECESSARY TO ESTABLISH WHETHER PLAINTIFF HAS A SINCERELY HELD BELIEF IN WINE

In cases where inmates have been found to hold a sincere belief, this Circuit court has looked at the inmates' previous practices to assess whether there is a sincerely held belief. In Levitan v. Ashcroft, 281 F.3d 1313, 1322 (D.C. Cir. 2002),[3] the court looked at the inmates' practices and the "record had established that appellants have regularly attended Mass and taken wine at Communion throughout their incarceration and for years prior to their incarceration." In Levitan, the record

[3] Although Levitan involved a claim under the First Amendment, the analysis for the sincerely held belief is similar under both standards.

supporting the Court's finding that the plaintiffs had a sincerely held belief to drink wine was developed. In contrast, this record regarding what Plaintiff's sincerely held religious beliefs are and have been far from uncontroverted.

In his previous filings, the Plaintiff relied on Rabbi Goldstein's stipulated information in support of his proposition that "Sample's beliefs are deeply entrenched in the practice of Judaism, and there is no factual question at issue." Plaintiff's Reply at 6. The Plaintiff's reliance on the stipulation is, however, misplaced. At no time did Rabbi Goldstein attest to the truthfulness of the Plaintiff's purported beliefs. See Rabbi Goldstein Stipulation (found as Exhibit E to the Plaintiff's Cross-Motion). Indeed, in the Stipulation, the Rabbi made no reference to the Plaintiff or his beliefs or his participation in the Jewish rituals and meetings at Beaumont Low. Id. See Stipulation of Rabbi Goldstein. Cf. Gartrell v. Ashcroft, 191 F.Supp.2d 23 (D.D.C. 2002)(where the defendants stipulated the Plaintiffs had a sincerely held belief in not shaving or cutting their hair); Western Presbyterian Church v. Board of Zoning Adjustment of District of Columbia, 862 F.Supp. 538 (D.D.C. 1994) (where the plaintiffs ***established*** that their actions were motivated by a sincerely held belief and the defendants did not challenge the plaintiff on that point).

Defendants in this case clearly did not stipulate to the

Plaintiff's assertion that he has a sincerely held belief in wine. Indeed, Defendants have challenged Plaintiff's conclusory statements about his belief in drinking wine in the amounts he seeks as there is no information or documentation on this record to support those assertions. The Plaintiff makes conclusory statements that he has been active in the practice of the Jewish faith at the different BOP institutions in which he has been housed. See Declaration of Brandon Sample, ¶ 21 (attached as Exhibit 1 to the Plaintiff's Memorandum of Points and Authorities in Support of Plaintiff's Cross-Motion for Summary Judgment as to Count I). However, no discovery has been conducted into the accuracy of those assertions. Indeed, this Court takes the Plaintiff's statements at face value with no corroboration even in light of the defendants' persistent challenges.

This Court has intertwined the Plaintiff's religious practices in the Jewish rituals with a belief in drinking wine. Participating in the Jewish rituals generally, however, does not necessarily mean the Plaintiff has a sincerely held belief in the need to drink wine or in drinking wine in the amounts Plaintiff requests. Many Jewish individuals participate in their religious rituals with the use of grape juice. In light of these reasons, this Court should allow the defendants to seek discovery about the plaintiff's alleged sincerely held belief in drinking red wine in the amounts he seeks.

When initially opposing Plaintiff's request for summary judgment, Defendants did not believe that discovery was necessary in order to raise a genuine issue as to Plaintiff's sincerely held religious beliefs regarding wine. Indeed, Defendants maintain that material issues are already evidenced by Plaintiff's impeaching convictions and the evidence already available about Plaintiff's numerous inconsistencies in his statements and actions. Nevertheless, Defendants have attached a declaration in an effort to show why discovery is needed, should the Court not find sufficient reason in the earlier record to question the sincerity of Plaintiff's religious belief that he needs wine, needs 3.5 ounces of wine, or needs 3-5 ounces of wine. See Declaration of Alma Lopez.

The discovery that is needed would include an assessment of the truth of his claim that Plaintiff has always practiced Judaism, as he asserts, including any historical use of wine by Plaintiff in religious ceremonies. Among those who would have this information would be the members of his family. And, at least Plaintiff's mother is now living in Jesup, Georgia, where Plaintiff is also now housed at his request. See Stephens Decl., ¶ 3. Thus, not only would transfer to Georgia make discovery from Plaintiff more accessible, it would make discovery from his family, such as depositions, more convenient to the parties and

witnesses.[4]

Thus, this case should be transferred to the Southern District of Georgia as Plaintiff and his records, and the prison administrators, current custodian of the plaintiff, are located in Georgia.

PLAINTIFF'S MOTION FOR RECONSIDERATION HAS NO MERIT AS DEFENDANTS HAVE SHOWN THE EXISTENCE OF A COMPELLING GOVERNMENTAL INTEREST IN NOT GIVING WINE TO THE PLAINTIFF

The Plaintiff challenges this Court's finding that the BOP has shown a compelling governmental interest in support of its denial of the Plaintiff's request for wine. The Plaintiff relies on the recent Supreme Court decision in Gonzales v. Centro Esperita Beneficente Uniao Do Vegetal, 126 S.Ct. 1211, 1220 (2006) in support of his proposition that "the compelling interest is satisfied through application of the challenged law 'to the person' - - the particular claimant whose sincere exercise of religion is being substantially burdened." He contends that the BOP has not met its burden as the defendants do not explain how not giving wine to the Plaintiff rises to an interest of the highest order. The Plaintiff then asserts that BOP policy allows two ounces of alcohol for religious purposes.

[4] Specifically, counsel would be assigned from the United States Attorney's office in that district and that attorney would not have to travel long distances at significant cost to take depositions. Similarly, if a trial ever took place, expensive transportation costs and inconvenience of plaintiff and his family members would be avoided if the action were pending where they live.

Plaintiff's Motion for Reconsideration at 4-5. The arguments the Plaintiff advances in his motion for reconsideration clearly have no merit.

In Centro, the Supreme Court commenced its analysis by stating that ". . . the Federal Government may not, as a statutory matter, substantially burden a person's exercise of religion, 'even if the burden results from a result of general applicability.' The only exception recognized by the statute requires the Government to satisfy the compelling interest test- to 'demonstrat[e] that application of the burden to the person- (1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling governmental interest.'" Centro, supra, at 1217. The Court explained that the Government must prove that the compelling government interest is satisfied through the application of the policy to the individual. Id. at 1220. The Court further explained that through the development of the case law the court has looked at the harm that would ensue from granting exemptions to rules of general applicability, and have still permitted exemptions. Id. The Court explained, however, that the compelling government interest test is not rigid and it allows "for a case-by-case determination of the question, sensitive to the facts of each particular claim." Id. at 1221 (quoting Employment Div., Dept. Of Human Resources of Ore. v. Smith, 494

U.S. 872, 899 (1990)). The Court further explained ". . . that '[c]ontext matters' in applying the compelling test, . . ., and . . . 'strict scrutiny does take 'relevant differences' into account-indeed, that is its fundamental purpose.'" Id.

The instant case is distinguishable from Centro, supra. Centro did not address the uniqueness and complexity of the considerations existing in the prison setting when dealing with the use of intoxicants. Moreover, in Centro, the government completely barred the use of *hoasca* for religious rituals. However, the statute at issue allowed the use of *peyote* for the Native American religions even though the analysis under the Controlled Substance Act and the compelling government interest test would apply equally to both substances. 126 S.Ct. 1222-23. Although Congress intended only one compelling governmental interest test to apply in both contexts, prison and the free community, the outcome of the case could vary depending on the context. See Hamilton v. Schriro, 74 F.3d 1545, 1552 (1996). In our case, the BOP policy allows the use of wine in "small amounts" consistent with the security concerns at the prisons. To allow large amounts of wine as the Plaintiff requests would seriously hamper the security of the institution.

Under the line of reasoning employed in Centro, it follows that the BOP can impose limitations on the Plaintiff's religious beliefs through rules of general applicability so long as the BOP

shows a compelling governmental interest implemented through the least restrictive means. Centro, supra at 1217. The BOP advances a compelling governmental interest through the application of its religious policy to inmates which are allowed to receive "small amounts of wine."

The kind of environment and relationship among the inmates and staff is unique to the prison setting. Prison administrators are tasked with the challenging responsibility of accommodating inmates' rights and privileges while maintaining the security of the institution. In so doing, prison administrators must

> consider the character of the inmates confined in the institution, recent and longstanding relations between prisoners and guards, prisoners inter se, and the like. In the volatile atmosphere of a prison, an inmate may constitute an unacceptable threat to the safety of other prisoners and guards even if he himself has committed no misconduct; rumor, reputation, and even more imponderable factors may suffice to spark potentially disastrous incident. The judgment of prison officials . . . turns largely on 'purely subjective evaluations and on predictions of future behavior.'

Hewitt v. Helms, 459 U.S. 460, 473 (1983)(quoting Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 464 (1981)).

As explained in Centro, the compelling government interest is not applied in a vacuum and equally across the board. "Context matters." The legislative history of RFRA highlights the importance of addressing the unique characteristics of the prison setting and it even designates a section to the distinct application of RFRA in prison. The legislative history explains:

> The RFRA would establish one standard for testing claims of Government infringement on religious practices. This single test, however, should be interpreted with regard to the relevant circumstances in each case.
>
> * * *
>
> The Committee does not intend the Act to impose a standard that would exacerbate the difficult and complex challenges of operating the nations' prisons and jails in a safe and secure manner. Accordingly, the committee expects that the courts will continue the tradition of giving due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with considerations of costs and limited resources.

S. Rep. 103-111, 1993 U.S.C.C.A.N. 1892, 1899-1900 (1993).

With this background, the BOP has, quite logically, determined that alcohol consumption jeopardizes the security of the prisons, and has shown that it has a compelling interest in not allowing the consumption of alcohol in its prisons. The BOP introduced the Declaration of Linda Thomas, the Assistant Administrator of the Correctional Services Branch, who has extensive experience in the areas of security, inmate discipline, case management, and religious services. Based on her experience and knowledge in the area of corrections, Ms. Thomas concludes that "[t]here are legitimate penological interests for restricting inmates access to alcohol, such as security and order of the prison, rehabilitation, punishment, deterrence of criminal behavior, and a non-hostile work environment for prison staff." Declaration of Linda Thomas (attached to the Defendant's Motion

to Dismiss as Exhibit 5). The declaration distinguishes the inmate population from the population at large and explains the violent tendencies of inmates housed in BOP facilities which could be exacerbated by alcohol use. See id.

In spite of the security concerns involved, the BOP has carved an exception to this general rule by allowing inmates to receive "small amounts of wine" as part of their religious practices. The BOP, however, limits the amount of wine to only a "small amount of wine." This exception advances the government's compelling interest of maintaining the security of the institution and meets the RFRA standard.

The BOP has also met the compelling interest test as it relates to the Plaintiff himself. The Plaintiff requests 3 to 5 ounces of wine on Fridays and Saturdays and 4 glasses of 3 to 5 ounces of wine on Passover Seder. In his Memorandum of Points, the Plaintiff mentions that BOP policy "allows 'an exception' to its alcohol regulations by allowing for the consumption of two ounces of regular wine for religious purposes." Plaintiff's Mem. at 4. Contrary to the Plaintiff's assertion, the BOP still allows inmates to receive wine in "small amounts."

The portion of the policy that the Plaintiff mislabels as an exception, is consistent with the policy allowance of "small amounts of wine," and refers to the two ounces of wine utilized by the Clergy, for instance, during the celebration of mass and

that is shared by all members of the congregation, including the Clergy.[5] This is consistent with the BOP policy of allowing inmates "small amounts" and the compelling governmental interest in maintaining security of the institution that allows inmates to receive "small amounts of wine."

The Plaintiff in this case seeks 3 to 5 ounces of red wine during the Sabbath on Friday evenings and Saturday mornings and four glasses each with 3 to 5 ounces of red wine during Passover Seder. The unique characteristics of the prison setting and the security concerns at stake did not allow prison administrators[6] to accommodate the Plaintiff's request. In the prison setting, 3 to 5 ounces of conventional wine is a large amount in light of the security concerns at stake. Moreover, 4 glasses of 3 to 5 ounces of such wine to be consumed at one time could clearly be regarded as a very large amount, up to twenty ounces of wine, which could seriously compromise the security of the institution. The amount of the wine has to be placed in the proper context, the prison setting, with its unique characteristics and security

[5] During communion, for example, the Catholic Priest places the two ounces of wine in the chalice and takes the bread, dips it in the wine, and gives it to the inmate to eat. The Priest drinks the amount of wine remaining in the chalice. Thus, two ounces of wine are used to serve the entire congregation, including the priest, and not to each inmate.

[6] This assertion applies to Beaumont Low administrators and does not include the Jesup administrators, as the Plaintiff has not yet exhausted the BOP administrative remedy procedures with regards to his request for wine while at Jesup.

issues. The BOP allows inmates to receive small amounts of wine and this is consistent with the practice used, for example, in the Catholic mass. To do otherwise would seriously compromise the security of the institution.

Clearly, the BOP has established a compelling governmental interest in keeping alcohol consumption out of the prisons and in limiting the use of alcohol in religious services to "small amounts of wine" based on the security of the institution.

THE COURT'S FINDING THAT BOP DID NOT MEET THE LEAST RESTRICTIVE MEANS TEST IS NO LONGER APPLICABLE

This Court found that the BOP "failed to demonstrate that an outright ban at Beaumont Low on this plaintiff's consumption of wine as part of a religious ritual is the least restrictive means of furthering the government's compelling interest. '[T]he government cannot meet its burden to prove the least restrictive means unless it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." March 31, 2006 Mem. Op. at 12-13.

As noted above, this portion of the Court's opinion is moot, as the Plaintiff has been transferred to Jesup, Georgia, and Beaumont Low officials, who decided not to give Plaintiff wine, are no longer involved in his care. At this point, the inmate must exhaust the BOP administrative remedies at Jesup, since it is now unknown how the Plaintiff's request will be addressed at the new institution, in the new region, and under the new policy.

CONCLUSION

For these reasons, this action should be dismissed or summary judgment entered in favor of the Defendants. If the action is not dismissed, it should be transferred.

Respectfully submitted,

KENNETH L. WAINSTEIN, DC Bar #451058
United States Attorney

RUDOLPH CONTRERAS, DC Bar #434122
Assistant United States Attorney

W. MARK NEBEKER, DC Bar #396739
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing Defendants' Motion To Dismiss As Moot Or, In The Alternative, To Reconsider Grant Of Partial Summary Judgment For Plaintiff And To Transfer And Opposition To The Plaintiff's Motion For Reconsideration, its attachments, and a proposed order has been made through the Court's electronic transmission facilities on this 27th day of April, 2006.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRANDON SAMPLE,

Plaintiff,

v.

HARLEY LAPPIN, Director,
Federal Bureau of Prisons, et al.,

Defendants.

Civil Action No. 05-596 PLF

DECLARATION OF DEE-ANN STEPHENS

I, Dee Ann Stephens, hereby declare and state the following:

1. I am currently a Case Manager at the Federal Correctional Institution, Jesup, Georgia, Federal Bureau of Prisons ("BOP"), and have held this position since June, 2000.

2. As a Case Manager, I conduct individual and group counseling for inmates in areas such as interpersonal relations, institutional adjustment and release planning. I routinely deal with the development of release plans for inmates assigned to my workload to prepare inmates to re-enter the community. In the course of carrying out my duties, I review inmate files and records and ensure compliance with BOP policy.

3. Inmate Brandon Sample, Register Number 33949-037, is housed in the unit assigned to me. A review of his records reveals that he recently changed his release address to a location in Jesup, Georgia because his mother moved to the area. The inmate also stated his preference to be moved to Jesup, Georgia. As a result, inmate Sample was moved to Jesup, Georgia on February 16, 2006.

I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.

April 7, 2006
Dated

D. Stephens
D. Stephens
Case Manager
Federal Correctional Institution
Jesup, Georgia

Attachment 1
Sample v. Lappin

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRANDON SAMPLE,

Plaintiff,

v. Civil Action No. 05-596 PLF

HARLEY LAPPIN, Director, et al.,

Defendants.

DECLARATION OF CAROLYN LANPHEAR

I, Carolyn Lanphear, hereby declare and state the following:

1. I am currently employed by the Federal Bureau of Prisons as an Administrative Remedy Specialist in the Office of General Counsel. My business office is located at the Central Office in Washington, D.C. I have held my current position since February 23, 2003.

2. As Administrative Remedy Specialist, I have access to the various databases and files concerning Administrative Remedy claims filed pursuant to the Administrative Remedy Program which are maintained by the Bureau of Prisons in the ordinary course of business. In particular, I have access to SENTRY, a computerized data base which maintains records of all administrative remedies filed by inmates housed in federal prisons, the dates thereof, and their dispositions.

3. On April 25, 2006, I searched the SENTRY computer system for all the administrative remedies filed to date by Plaintiff Brandon Sample, Register Number 33949-037. Plaintiff first arrived in federal custody on June 12, 2000. Review of his Administrative Remedy Record reflects that from June 12, 2000, through August 31, 2004, Plaintiff filed one hundred and twenty nine administrative remedy requests.

4. SENTRY reflects that on August 31, 2004, Plaintiff filed a request to drink wine every Friday and Saturday during the saying of the Kiddush and four times during the Passover Seder at the Federal Correctional Complex, Beaumont-Low, Texas, which was denied on September 14, 2004. On September 22, 2004, Plaintiff filed an appeal of the Warden's denial with the Regional Office, which was denied on October 22, 2004. On November 30, 2004, Plaintiff appealed the Regional Director's

Attachment 2
Sample v. Lappin

denial to the Central Office level, which was denied on January 27, 2005.

5. SENTRY further reflects that to this date Plaintiff has not filed any administrative remedy request while incarcerated at the Federal Correctional Institution, Jesup, Georgia.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 27th day of April 2006 in Washington, D.C.

Carolyn Lanphear
Administrative Remedy Specialist
Office of General Counsel
Federal Bureau of Prisons

UNITED STATES GOVERNMENT
memorandum
FEDERAL BUREAU OF PRISONS
Federal Correctional Institution
2600 Highway 301 South
Jesup, Georgia 31599

April 13, 2003

MEMORANDUM FROM KEITH O'NEILL, CHAPLAIN

TO: Sample, Brandon
33949-037

SUBJECT: Request For Wine

This is in response to your Request To Staff Form in which you state the need for wine for Passover and for Friday services.

Wine is considered a contraband substance in the Bureau of Prisons, it can be dispensed only under strict control and supervision. Inmates will not be allowed to give wine to other inmates. Wine used for the Sabbath services in the Jewish faith may be substituted with grape juice or another non-alcoholic drink suitable for serving a distinguished guest. This is common practice.

I trust this adequately addresses your concerns.

Attachment 1

Attachment 3
Sample v. Lappin

** TOTAL PAGE.03 **

BP-S148.055 INMATE REQUEST TO STAFF CDFRM
SEP 98

U.S. DEPARTMENT OF JUSTICE **FILE COPY** FEDERAL BUREAU OF PRISONS

TO: (Name and Title of Staff Member) Warden Vazquez	DATE: 4-13-06
FROM: Brandon Sample	REGISTER NO.: 33949037
WORK ASSIGNMENT: Education	UNIT: A1

APR 1 : 2006
WARDEN'S OFFICE

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

Recently, I requested that the Chaplain provide me with 3-5 ounces of red wine during Friday and Saturday Sabbath services for the saying of Kiddush. Also, I requested that I be permitted to consume four cups of 3-5 ounces of red wine during the two Passover Seders. These requests are premised on my sincere and important belief that grape juice / bread is not an adequate substitute for wine during these rituals. The Chaplain on April 13, 2006, denied my request. See Attachment 1. While I realize that you will probably defer to his decision, I thought I would at least run it by you to see if you felt differently.

Thanks for your consideration.

(Do not write below this line)

DISPOSITION: This is in response to your Inmate Request to Staff Member dated April 13, 2006, in which you request 3 to 5 ounces of red wine for your consumption during Friday and Saturday Sabbath Services and four cups of 3 to 5 ounces of red wine during the two Passover Seders. You contend that your request is premised on your sincere and important belief that grape juice and bread are not adequate substitutes for wine during these rituals.

I have reviewed your request in light of the government's compelling interest in maintaining the security of this institution. Staff will dispense non-alcoholic red wine for your consumption during the religious rituals of Sabbath and Passover Seders. This constitutes the least restrictive alternative of accomodating your request consistent with the security and orderly running of this institution.

Signature Staff Member	Date 4-14-06

Routed from Attachment 1

and BP-S148.070 APR 94

Attachment 4
Sample v. Lappin

BP-S148.055 INMATE REQUEST TO STAFF CDFRM
SEP 98
U.S. DEPARTMENT OF JUSTICE

RECEIVED
APR 1 [illegible]
WARDEN'S OFFICE

FILE COPY
FEDERAL BUREAU OF PRISONS

TO: (Name and Title of Staff Member)	DATE:
Warden Vazquez	4-17-06
FROM:	REGISTER NO.:
Brandon Sample	33949037
WORK ASSIGNMENT:	UNIT:
Education	A1

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

Please see attached.

(Do not write below this line)

DISPOSITION:

This is in response to your Inmate Request to Staff Member dated April 17, 2006, in which you ask for clarification about whether the non-alcoholic wine offered to you to accommodate your request for wine is Kosher.

Research was conducted only about non-alcoholic red wine as your previous request made no mention of Kosher. It appears that you are now seeking Kosher red wine. Would you clarify whether the non-alcoholic red wine would accommodate your request or whether your request is only for Kosher red wine?

Signature Staff Member	Date
Jimmy	4-18-06

Record Copy - File; Copy - Inmate

and BP-S148.070 APR 94

Attachment 5
Sample v. Lappin

Thank you for your April 14, 2006, response to my Inmate Request to Staff Member Form for 3 to 5 ounces of red wine during Friday and Saturday Sabbath rituals and four cups of 3 to 5 ounces of red wine during the two Passover seders. While I appreciate your willingness to work with my requests for religious accommodation, I am, nonetheless, a bit confused by your response.

Your response indicates that "staff will dispense non-alcoholic red wine for your consumption during the rituals of Sabbath and Passover seders." However, I am unaware of a Kosher, much less Kosher for Passover, non-alcoholic wine. Rather, the lowest alcohol content Kosher/Kosher for Passover red wine that I know of is the Kedem Concord Cal red grape wine, which has a 3.5% alcohol content. See Attachment from www.kosher.com. I'd appreciate a little clarification as to what exactly your referring to when you say "non-alcoholic" red wine (e.g., name of proposed Kosher/Kosher for Passover red wine).

Once again, thanks for your assistance.

New York
5% Alcohol
750 ml

Dry, fresh, and crisp with soft, floral aroma. Best Served With: Fish, cheeses, snacks.

Kosher for Passover
Item #: 8775200283
Price: $5.62
Qty: 1

Kedem Concord Grape

New York
12% Alcohol
750 ml

Extra Heavy, specially sweetened natural grape wine.

Kosher for Passover
Dairy
Item #: 8776200129
Price: $3.44
Qty: 1

Kedem Concord Kal

New York
3.5% Alcohol
750 ml
A light low alcohol red grape wine. The lowest alcohol content wine we carry.

Kosher for Passover
Item #: 8776200689
Price: $4.59
Qty: 1

Kedem Cream Malaga

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** TOTAL PAGE.05 **

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRANDON SAMPLE, Plaintiff, v. HARLEY LAPPIN, Director, Federal Bureau of Prisons, et al., Defendants.	)	Civil Action No. 05-596 PLF

ORDER

Upon consideration of Defendants' Motion To Dismiss As Moot Or, In The Alternative, To Reconsider Grant Of Partial Summary Judgment For Plaintiff And To Transfer And Opposition To The Plaintiff's Motion For Reconsideration, for the reasons set forth by Defendants, and based upon the entire record herein, it is this _____ day of _____, 2006

ORDERED that Defendants' motion to dismiss as moot be and is hereby granted and this action is dismissed; and it is

FURTHER ORDERED that plaintiff's motion for reconsideration is denied as moot.

_____
UNITED STATES DISTRICT JUDGE

W. MARK NEBEKER
Assistant United States Attorney
Judiciary Center, Civil Division
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Washington, DC 20530

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