UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MOTION FOR SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS ON THE ISSUE OF THE LEAST RESTRICTIVE MEANS AND, IN THE ALTERNATIVE, RENEWED MOTION FOR RECONSIDERATION OF THE GRANT OF PARTIAL SUMMARY JUDGMENT FOR PLAINTIFF

Defendants respectfully move for summary judgment in their favor pursuant to Fed. R. Civ. P. 56. There are no genuine issues as to any material fact and defendants are entitled to judgment as a matter of law, given that the undisputed facts establish that the Bureau of Prisons ("BOP") has employed the least restrictive means for protecting the government's compelling interest in maintaining security within the prison setting. In the alternative, pursuant to Fed. R. Civ. P. 7, 54, and 56(f), 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 to 5 ounces for several religious rituals and the substantial burden on his religious practice in light of the revelations in discovery that were not available when the Court earlier ruled.

In support of this motion, the BOP relies upon the accompanying memorandum and the statement of material facts not in dispute filed with this court. A proposed order is also attached.

Respectfully submitted,

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/s/
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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS ON THE ISSUE OF THE LEAST RESTRICTIVE MEANS AND, IN THE ALTERNATIVE, RENEWED MOTION FOR RECONSIDERATION OF THE GRANT OF PARTIAL SUMMARY JUDGMENT FOR PLAINTIFF

INTRODUCTION

Defendants submit that summary judgment in their favor is warranted as set forth below. Plaintiff has filed this action under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb-1, et seq., seeking accommodation of his purported belief in consuming several ounces of wine during Jewish religious rituals of Kiddush and Passover Seder. Complaint, ¶¶ 9-10. Plaintiff has failed to show he has a sincerely held belief in drinking wine as part of his religious rituals and that the BOP policy substantially burdened his religious practice. In any event, the policy plaintiff seeks to challenge is justified by the government's compelling interest in maintaining security in the prison system. The BOP has also met the least restrictive means test in RFRA by offering Plaintiff several alternatives to satisfy his alleged belief in the use of wine, but the plaintiff has refused those alternatives.

ARGUMENT

> [The RFRA] was enacted to overturn Employment Div., Dep't of Human Resources of Ore. v. Smith, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), a decision which held that the First Amendment permits governments to apply neutral generally applicable laws to religious practice without a showing of a compelling state interest. Cutter [v. Wilkinson, 544 U.S. 709, 125 S.Ct. 2113, 2118 (2005)]; Caldwell v. Caesar, 150 Supp.2d 50, 55 (D.D.C. 2001). RFRA provides that a government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the government demonstrates that it "is in furtherance of a compelling government interest" and "is the least restrictive means of furthering that compelling government interest." 42 U.S.C. § 2000bb.

Jefferson v. Gonzales, Civil Action No. 05-442 GK, 2006 WL 1305224, *2 (D.D.C. May 10, 2006).

The RFRA requires the Plaintiff to demonstrate that a government action substantially burdens his sincerely held religious beliefs. See 42 U.S.C. § 2000bb-1(a) and § 2000b-2(3). But, where the plaintiff has established that his religious practices have been substantially burdened by the BOP, "the burden is on the Defendants to prove that the policy is the least restrictive means of achieving a compelling interest." Jefferson v. Gonzales, Civil Action No. 05-442 GK, 2006 WL 1305224 at *2 (citing 42 U.S.C. § 2000bb-1(b)(2)).

> In applying the compelling interest test, "context matters." Gonzalez v. O Centro Espirita Beneficente Uniao Do Vegetal, --- U.S. ----, ----, 126 S.Ct. 1211, 1221, 163 L.Ed.2d 1017 (2006), quoting Grutter v. Bollinger, 539 U.S. 306, 327, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003). The BOP has the statutory duty of providing for the safety of inmates. See 18 U.S.C. § 4042(a). Prison officials have broad administrative and discretionary authority over the institutions they manage. See Hewitt v. Helms, 459 U.S. 460, 467, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983). Courts are to afford deference and flexibility to officials trying to manage the safety of the prison environment. Sandin v. Conner, 515 U.S. 472, 482, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995). "[P]rison security is a compelling state interest" and "deference is due to institutional officials' expertise in this area." Cutter, 125 S.Ct. at 2124 n.13.

Jefferson v. Gonzales, Civil Action No. 05-442 GK, 2006 WL 1305224 at *3. In Jefferson, the Court concluded that the BOP had met this burden in its restrictions on the wearing of turbans by inmates. Jefferson v. Gonzales, Civil Action No. 05-442 GK, 2006 WL 1305224 at *2-*4. A similar result is merited here.[1]

I. GENUINE ISSUES EXIST AS TO THE SINCERITY OF PLAINTIFF'S PURPORTED BELIEF IN THE USE OF WINE DURING RELIGIOUS RITUALS

One of the most delicate issues a court may be confronted with is the examination of the religious beliefs of a litigant who is incarcerated. Congress, in passing RFRA, attempted to protect one of the "most treasured birthrights of every American", "the right to observe one's faith, free from Government interference." S. Rep. No.111, 103rd Cong., 1st Sess. 1993, 1993 U.S.C.C.A.N. 1892, 1893-94 (Leg. Hist.). In so doing, Congress intended "a workable balancing of the legitimate interests of prison administrators with the Nation's tradition of protecting the free exercise of religion." Id. at 1899.

Congress did not define the precise contours of the elements of the RFRA test and as a result, summoned courts to look for guidance at cases decided prior to the Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990), which overruled the compelling governmental interest test. See 1993 U.S.C.C.A.N. at 1898-99. In one of those cases, the Supreme Court asserted that "the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct [namely, religious beliefs or practice] in which

[1] Defendants recognize that a favorable ruling on the least restrictive means issue would moot out the question of whether Plaintiff can establish that the BOP has substantially burdened his sincerely held religious beliefs. Defendants nevertheless feel compelled to address first the misconceptions regarding Plaintiff's past claims, because such inconsistencies as have been identified in Plaintiff's claims of sincerity are recognized even by Plaintiff's expert as significant in his assessment of whether offering wine to a particular prisoner is appropriate.

society as a whole has important interests." Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972). This statement holds especially true in the prison setting. Although courts will not examine the truth of a belief, courts are "presumed capable of evaluating the sincerity with which a person holds a religious belief." Sample v. Lappin, 470 F.Supp.2d 120, 123 (D.D.C. 2007). ". . .[W]hile the "truth" of a belief is not open to question, there remains the significant question of whether it is 'truly held.'" Thacker v. Dixon, 784 F.Supp. 286 (E.D.N.C. 1991) (quoting United States v. Seeger, 380 U.S. 163, 185 (1965)).

Courts must be cautious to separate real from fictitious religious beliefs. See id. (quoting Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 713-16 (1981)). In so doing, a court may also consider "whether the litigants are merely relying on a self-serving view of religious practice." Levitan v. Ashcroft, 281 F.3d 1313, 1321 (D.C. Cir. 2002). Mr. Sample relies on his own self-serving view of Judaism and the religious practice. This does not meet the RFRA standard.

A. Prior to incarceration, Brandon Sample was not practicing Judaism with any regularity and only participated in rituals two or three times in his life.

Brandon Sample, Register No. 33949-037, mastermind of a conspiracy to commit money laundering, abetting the possession of counterfeit security and aiding and abetting the possession of stolen mail matter is serving his sentence of one hundred and sixty eight months in BOP custody. Mr. Sample filed a complaint in which he asserts that he has a sincerely held belief in drinking wine during Jewish religious rituals, which at that time only included the ceremonies to commemorate the Sabbath[2] and the Passover Seder.[3] (See Complaint, ¶¶ 9-12).

[2] Shabbos and Shabbat both are the Hebrew word for Sabbath. The Holy Sabbath is considered as

In his complaint, Plaintiff stated that he "believes that he must drink at least 3.5 ounces of red wine while saying Kiddush . . . during Friday night and Saturday shabbos services." Complaint, ¶ 9. He also stated that "he must drink four cups containing at least 3.5 ounces of wine during the Passover seder." Id., ¶ 10. He proclaimed this belief was dictated by "Jewish sages, the Code of Jewish Law, and by practice." Id., ¶ 9. Plaintiff claimed to be "an observant Jew [who] practiced Judaism before his incarceration . . ." Id., ¶ 8. "For example, before his incarceration, plaintiff said Kiddush over wine during his Friday night and Saturday morning

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> . . . the most important of all Jewish Holy days. The Sabbath is considered as a sign to bear witness that, 'In six days God made the heavens and the earth and that is in them, and He rested on the seventh day. This belief, that God is the creator of the universe, is the foundation of the Jewish faith.
>
> The Sabbath begins 18 minutes before sunset on Friday night and ends approximately one hour after sunset on Saturday night.

Exhibit 1: Institutional Handbook of Jewish Practice and Procedure, at 4-1 (9/98)("Handbook").

[3] Passover Seder is described as follows:

> The two Passover Seders are not simply 'meals' - they are religious rituals that require certain foods as part of their proper observance. Observant Jews are obligated to partake in two Seders on Passover, on the first two eves of the holiday.
>
> During the Seder, the 'Haggadah' is recited. The Haggadah is a collection of prayers, songs and text recounting the Exodus from Egypt.
>
> Matzo, bitter herbs and wine (or grape juice), 'Charoses' (see below), a chicken neck or other piece of roasted meat, horseradish and romaine lettuce, potatoes, onions, salt water and a hard-boiled whole egg are religious items that are required to complete the Seder rituals, as are the other foods comprising a religious meal.
>
> Among other rituals, Jews are mandated to drink four cups of wine at each of the two Seders. . . . If, however, for health or other reasons, wine is unavailable, kosher grape juice may be used instead.

Handbook, at 6-20.

shabbos services." Id., ¶ 9.

Plaintiff later explains his early involvement with Judaism as follows:

> Around my 14th birthday, I began to seriously examine the Jewish religion, including studying the Torah, the Talmud, and the Code of Jewish Law.
>
> At the age of 17, I left my parents home, and lived by myself. During this time, I was able to explore, and practice Judaism, although my level of observance at the time was sporadic. I observed Shabbat in my home, and occasionally attended Congregation Beth Yeshurun in Houston. During Shabbat, I would always say Kiddush over wine and challah bread. During Pesach, I would always drink four glasses of wine ...

(September 20, 2005 Declaration of Brandon Sample, ¶¶ 17-18, found as Exhibit 1 to the Plaintiff's Cross Motion for Summary Judgment as to Count I, and Response to Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment or to Transfer, filed September 29, 2005)(hereinafter Pl.'s Cross-Mot.).

Plaintiff then explained that his "occasional" attendance at the Congregation of Beth Yeshurun consisted of attending worship 2 or 3 times for Sabbath between 1998 and 2000. See Exhibit 2 (Plaintiff's Discovery Responses, Admis. Nos. 14-15). His "sporadic" observance of the Sabbath consisted of participating in Kiddush no more than two or three times. See Exhibit 3 (Deposition Transcript of Brandon Sample ("Sample Depo.") at 46), that on those occasions he used red wine (id. at 47), and that during the ritual he was the only person present. (Id. at 101). Plaintiff celebrated the ritual of Passover Seder at his home one or two times between 1998-2000, and he celebrated it according to his "own knowledge and understanding of how things work." (Id. at 99). See also Exhibit 2 (Plaintiff's Discovery Responses, Admis. No. 18).

Additionally, prior to his incarceration, Plaintiff's "serious" study of Judaism did not include seeking spiritual guidance from any Rabbis, studying with others or following the

religious practices of his parents, who do not practice the Jewish faith. (Plaintiff's Discovery Responses, Inter. Nos. 5, 9). Plaintiff's beliefs are based on the Code of Jewish Law and the Jewish Book of Why (see Plaintiff's Discovery Responses, Inter. No. 11; Complaint, ¶ 9; Sample Depo. at 101), but Plaintiff does not accept what a Rabbi says, and he disagrees with the Code of Jewish Law insofar as it "deem[s] it permissible for a healthy adult to make Kiddush over grape juice, boiled wine, or diluted wine." See Sample Depo. at 104, see also id. at 34-35 (Plaintiff disagrees with Rabbis); Plaintiff's Discovery Responses, Admis. No. 18. In spite of only celebrating Kiddush by himself on two or three occasions prior to incarceration, Plaintiff claims he "knows" that "no one" uses matzoh during Kiddush. (Sample Depo. at 100). At the same time Plaintiff asserts he was "practicing" Judaism between 1998 and 2000, he was only nineteen years old and the mastermind of a conspiracy to violate the laws of the United States. See Plaintiff's Discovery Responses, Admis. Nos. 1-5. This is the Plaintiff.

Throughout this litigation, Plaintiff has made contradictory statements. In his Complaint, he suggests that he was practicing Judaism long before incarceration (see Complaint, ¶ 8) and, he maintains, he would "always" drink wine during Sabbath and Passover rituals. September 20, 2005 Declaration of Brandon Sample, ¶¶ 17-18. Later, he has stated that his level of observance was sporadic and that he only participated in each ritual two or three times before incarceration. Plaintiff's Discovery Responses, Inter. Nos. 4-7 and Admis. No. 14. Plaintiff also states that he began to "seriously" study Judaism at age 14, yet before his incarceration he never sought guidance from a Rabbi and only attended a place of worship two times. See September 20, 2005 Declaration of Brandon Sample, ¶¶ 17-18; Plaintiff's Discovery Responses, Inter. Nos. 5-7. It would be without foundation to conclude, as Plaintiff has suggested in his Complaint, that

Plaintiff practiced Judaism with any consistency prior to his incarceration or that he "seriously" studied Judaism. His participation in a ritual two or three times in his life, does not support the implication in his Complaint that he was practicing the Jewish faith with any regularity. At a minimum, this and the remaining bases to doubt his assertions raise a genuine issue that should be addressed by the Court if the matter were ever to reach a hearing requiring the taking of testimony.

The Court of Appeals has looked at inmates' former practices "for years prior to their incarceration" to show that the drinking of wine was not "an unimportant part of [his] religious practice." See Levitan v. Ashcroft, 281 F.3d 1313, 1322 (D.C. Cir. 2002).[4] In this case, Mr. Sample partook of the wine for the Sabbath and Passover on two or three occasions. Plaintiff's Discovery Responses, Inter. Nos. 5-7. In contrast with Levitan, Plaintiff's observance of the rituals prior to incarceration shows that partaking of the wine during the religious rituals was not an important part of his religious practice before his incarceration. His level of observance reflects that he could not have had the level of spirituality and religiousness to state that he "practiced Judaism," not in accordance with the framework recognized in Levitan.

B. Mr. Sample's Level of Observance increased During his Incarceration Immediately Prior to this Litigation.

In his Complaint, Plaintiff contended that "he continue[d] his practice of Judaism while confined. Plaintiff frequently attends Jewish services, events, etc . . ." (Complaint, ¶ 8). However, he later explains that in 2000, he did not partake in any observances and in 2001, he

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

participated in an occasional Sabbath during the Summer months. (Plaintiff's Discovery Responses, Inter. No. 17) (Exhibit 2). He alleges that it was not until 2002 that he observed the Sabbath weekly, Yom Kippur[5] and Rosh Hashanah[6], and from 2003-2007, he observed the Sabbath weekly and the rituals of Passover, Rosh Hashanah, Yom Kippur, and observed the other religious holy days of Succos, Purin, Shavuos, Tisha B'av, Fast of Ester, Fast of Tevet, Fast of Gedliah, and the Fast of Tamzuz. (Plaintiff's Discovery Responses, Inter. No. 17). Plaintiff asserts he developed a higher level of spirituality and decided to commit to learning, exploring and practicing Judaism as part of his daily life. (Plaintiff's Discovery Responses, Admis. No. 16). This is the same person who said he "seriously" studied Judaism at the same time he engaged in a criminal enterprise.

Plaintiff's sincerity in a religious belief to drink wine is highly suspect. He admits to being a social drinker. (Sample Depo. at 110-111; Plaintiff's Discovery Responses, Admis. No. 11 ("Plaintiff admits that he enjoys drinking liquor and wine socially like many other adults. . .")). His BOP records raise questions about his adherence to Judaism. (See Inmate History Religion found in Exhibits 6 and 1, to the August 8, 2005 Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment or to Transfer (hereinafter "Def.'s Mot. to Dismiss")).

Although Plaintiff's BOP records may not be determinative of his faith now, the

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[5] Yom Kippur is considered the day of atonement. "The holiest and most solemn day of the Jewish year, it is the only Biblically-mandated holiday that is also a fast day. Its central theme is repentance, atonement and reconciliation, and the day customarily is fully occupied with prayer. Handbook, at 6-5.

[6] Rosh Hashanah is the "Jewish spiritual New Year, [and it] is characterized by prayer, repentance and the blowing of a complicated series of blasts on the shofar at and throughout the morning/afternoon prayer service." Handbook, 6-2.

inconsistency in his religious affiliation and the exaggerations in his Complaint, as well as his criminal convictions, give strong reason to question his credibility. Moreover, his delay in identifying himself to BOP as Jewish raises a question about the legitimacy of his belated claim to have a sincerely held belief in the need for wine. BOP records reflect that he did not identify himself as Jewish until September 17, 2001, after more than fifteen months of being in custody. See, e.g., Plaintiff's Discovery Responses, Admis. No. 19; Inmate History-Religion. Consistent with that, his first administrative remedy request regarding a religious accommodation is dated September 14, 2001. See Exhibit 4 (Declaration of Bruce Plumley), ¶ 5. For an inmate so familiar with the administrative remedy system, who filed 12 requests within the first seventeen months of being in custody, it is clear that the practice of Judaism was not as important to him. See id.

In addition, Plaintiff did not enroll in the religious diet (Plaintiff's Discovery Responses, Admis. No. 19) and did not participate in the Sabbath weekly until 2002, two years after coming into BOP custody. (Plaintiff's Discovery Responses, Inter. No. 17). His enrollment in the religious diet was sporadic as he was removed from it several times possibly because of noncompliance and he also withdrew from the religious diet at one point. (Sample Depo. at 70-71). These actions are not consistent with his previous statements that he practiced Judaism during his incarceration.

Moreover, Plaintiff waited four years after his incarceration to file his first administrative remedy request for wine. See Plaintiff's Discovery Responses, Admis. No. 20. It is noteworthy that Plaintiff's tendency to file administrative remedy requests continues for the rest of his incarceration. BOP records reflect that from June 12, 2000, (the date he arrived in BOP custody)

until the time he filed the first administrative remedy request for wine on August 31, 2004, plaintiff had filed a total of one hundred and twenty nine administrative remedy requests. See Plumley Decl., ¶ 8. It is a telling statement that, although Plaintiff was so familiar with the administrative remedy system, he waited almost four years formally to request wine.

Plaintiff asserts that upon arriving in prison, he was confused and "overwhelmed with emotion." (Plaintiff's Decl., ¶ 19). He also asserts that BOP records were inaccurate and that he corrected the mistake when he realized his religious affiliation was identified as Protestant. (Id., ¶ 27). However, the fact remains that it took him 15 months to file an administrative remedy request regarding his alleged religion, two years to enroll in the religious diet and practice the Sabbath weekly, and four years following his arrival in BOP custody to request wine for the Jewish religious rituals in which he asserts to have a sincerely held belief that precedes incarceration.

Moreover, he asserts he has a sincerely held belief in the use of wine during these rituals in which he participated one or two times in his lifetime, by himself, prior to entering prison. See Plaintiff's Discovery Responses, Inter. Nos. 6-7. If his statements were true, it is highly suspect that he only participated in the rituals once or twice prior to incarceration and that it took him so long to identify himself as a Jewish person, to enroll in the religious diet, to make a request regarding his religion, and that it took him approximately four years to request the wine through the administrative remedy procedures. Plaintiff's Discovery Responses, Inter. Nos. 16-17 and Admis. Nos. 14-15, 17, 19-20. This is not the behavior of an inmate with a sincerely held belief in drinking wine for religious reasons. Indeed, his alleged sincerely held belief in drinking wine during the Kiddush and Passover is highly questionable and he has failed to meet that

burden.

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. The inconsistencies in his statements and actions shed light into his mindset. Plaintiff merely seized the opportunity to obtain wine under the pretense of a belief that coincidentally blossomed while in prison. There is no reason why an individual who sincerely believes in the consumption of wine during the rituals since before his incarceration would take four years to request the wine, or take two years to enroll in the religious diet and participate in the Sabbath weekly, or participate and partake of the wine in the rituals two or three times before his incarceration. Instead, it is more likely that he simply wishes to "enjoy[] drinking . . . wine socially like many other adults. . ." See Plaintiff's Discovery Responses, Admis. No. 11. Plaintiff has failed to meet the RFRA standard.

C. Plaintiff's Practices and Beliefs Significantly Changed during the Pendency of this Action

During the pendency of this action, Plaintiff's allegedly sincere beliefs have been in constant flux. In his complaint, he first stated that he believes in drinking 3.5 ounces of wine for the Sabbath observance and four glasses of 3.5 ounces of wine for the Passover Seder. Subsequently, the Plaintiff changed the initial amount of wine (3.5 ounces) he seeks to 3 to 5 ounces of wine for each ritual. (See Pl.'s Cross-mot. at 3-4 and Plaintiff's Decl., ¶ 2 ("It is my sincerely held religious belief that I must consume between 3 to 5 ounces of wine every Friday and Saturday during the saying of Kiddush . . . . and 3 to 5 ounces of wine four times during the Pesach . . . Seder."). Cf Complaint, ¶¶ 9-10 (stating "Plaintiff sincerely believes that he must

drink at least 3.5 ounces of red wine while saying Kiddush ... [and] 3.5 ounces of wine during Passover seder.").

Plaintiff changed his belief to state that he needs 3 to 5 ounces of wine during the Passover Seders and mentions two rituals. See Exhibit 5 (Inmate Request to Staff Member, April 13, 2006). Most recently, although Plaintiff has never participated in the ritual of havdalah,[7] he has stated that "it is my sincerely and important belief that I must consume 3 to 5 ounces of Kosher red wine during the hadvolah [sic] in addition to the other Sabbath rituals every week." (Sample Depo. at 88-89). (See also Exhibit 6: Administrative Remedy Request 475362, dated December 3, 2007). He has not met any other Jewish inmates who observe the havdalah ritual in prison. (Sample Depo. at 88-89). But Plaintiff still wants the wine to observe this newly added ritual. Id. Plaintiff has received the following offer: "[c]onsistent with your asserted religious needs and the facility's duty to maintain security and good order, it has been determined to allow you to receive kosher grape juice; three ounces of kosher grape juice with a drop of low-alcohol kosher wine; or a three-ounce mixture of a low-alcohol kosher wine and water, approximately one part wine and five parts water. If you desire the three-ounce water and wine mixture, the above grape juice options would be available for the other three glasses requested for the Passover Seders." Id.; see also Plaintiff's Discovery Responses, Admis. No. 18. Plaintiff appealed, but after further review within the Bureau of Prisons, the agency concurred with the institution's offer.

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[7] The Havdalah service is a "solemnization of the Sabbath's parting by a blessing over wine or grape juice, the sniffling of cloves or other aromatic incense and the lighting of a twined multi-wicked candle or two flames from any source brought together to form a single 'torch' for the duration of the ceremony." Institutional Handbook, 4-10.

The evolution of the Plaintiff's belief system reflects no differently than what the BOP prison security expert, David Rardin, describes as a "child in the candy store" effect. He explains that,

> From the prison administrator's point of view, allowing an inmate to obtain wine in the amounts of his preference is analogous to a child in a candy store. There is no difference. A small child is overwhelmed by opportunity and wants all the candy. In prison, wine is something different than the norm and it is an intoxicant. All inmates are going to want it. Prison administrators would carry a unique and heavy burden when the door is open to offer inmates considerable amounts of wine. This is a very dangerous slippery slope that is predictable and will evolve into a cycle that would never stop. *The more the inmate gets the more the inmate wants. A prime example of this slippery slope is present in this case. BOP policy allows the use of small amounts of wine for religious rituals. Inmate Sample seeks substantial amounts of wine which would further increase the use of wine in prison.*

See Exhibit 7 (David Rardin's Revised Expert Report, March 14, 2008) (emphasis added). Mr. Sample's claimed sincerely held beliefs keep evolving in ways that demand a more frequent consumption of wine, and thus larger amounts of wine each week. His beliefs have changed from seeking wine for his religious rituals twice per week in the beginning of this litigation to three times a week, and from one Passover Seder to two Passover Seders each year.

Additionally, while at Jesup, Plaintiff states he participated in all the Jewish religious rituals. Indeed, he was an inmate representative for the other Jewish inmates. See Exhibit 8 (January 3, 2008 Deposition Transcript of Chaplain Raymond Ortiz) at 97:15-22). Also, he had been the Jewish faith group representative while housed at Beaumont Low. (Plaintiff's Decl., ¶ 23). These two institutions had a significant number of inmates who observed the Jewish rituals and plaintiff assumed somewhat of a leadership role in the Jewish community. (Id., ¶ 21, and Ortiz Depo. at 97).

Plaintiff arrived in Texarkana on October 17, 2007. Plaintiff states his religious practice

changed when he arrived in Texarkana Camp. In December of 2007, Plaintiff asserted that he had continued to participate in the Jewish rituals in spite of the denial of the wine. (Plaintiff's Discovery Responses, Admis. No. 26). Just two months later, however, Plaintiff changed his story and stated he was no longer saying kiddush while at Texarkana because he does not have wine and does not want to say it with grape juice or bread. (Sample Depo. at 78). For the first time, he now says that it is better not to participate in the rituals than to perform them wrongly, i.e., without wine. (Id. at 107-108). He explains that he participated in the rituals before absent wine, not because of his "sincerely held belief", but out of respect to other Jewish inmates and their beliefs. (Sample Depo. at 79). He now states that although he had previously participated in the religious rituals between 100-500 times while incarcerated, he feels he never satisfied his obligation. (Id. 79-80; see also Plaintiff's Discovery Responses, Admis. No. 26). At Texarkana Camp, there is only one other Jewish inmate and plaintiff no longer enjoys a "leadership role" in the community. It is not a coincidence that he now abandons practicing in his religious rituals while he is housed at Texarkana.

In a desperate attempt to justify the many inconsistencies in his beliefs and practices, he has recently revealed that God spoke to him about stopping his participation in the rituals (Sample Depo. at 78), and that this is the reason why he has not participated in any rituals since his arrival at Texarkana. (Id. at 78-80). Also recently, Plaintiff has asserted that the source of his beliefs in the use of wine are his twenty or so conversations with God. (Id. at 31-33). These conversations, he now asserts, started at around the time he filed his first administrative remedy request while at Beaumont, but he failed to mention them ever before in this litigation or in the many administrative remedy requests he has filed regarding religious issues. (Id. at 49-50).

Indeed, in his Complaint, Plaintiff explained that the sources of his beliefs are "the Code of Jewish law, the Jewish Sages, and by practice." (Complaint, ¶ 10). He did not mention any conversations with God. Nor, until faced in his deposition with the provisions in the Code of Jewish Law that describe how to perform Jewish rituals in the absence of wine, did he ever state that his contrary position was based on his personal conversations with God. Indeed, Plaintiff acknowledged that no Rabbi has told him that it was unacceptable to use grape juice as a substitute for wine in the Jewish ritual. Sample Depo. at 34-35.

Regarding an inmate's assertion that his purported need for wine is based on conversations with God, James Aiken, the Plaintiff's own expert on prison security, has indicated that he would question any inmate whose purported religious need for wine was based on claimed discussions with God: "[a]nd certainly in this case, if that was said to me, to which it wasn't, you know, that would cause negative -- more of a negative than a positive." (Exhibit 9: Deposition Transcript of James Aiken at 107-08). Mr. Aiken further explains that if an inmate told him, ". . . 'God talked to me last night,' and I won't doubt that, 'And he says that I can have a bottle of wine in my cell to drink whenever I feel like it,' I'm not going to grant that." (Id. at 21-24). Indeed, Mr. Aiken asserts he would be suspicious of something as unverifiable as the assertion of having conversations with God to justify a request for wine in prison. (Id. at 107-09).

Additionally, Plaintiff claims to follow the teachings of Jewish sages[8] and the Code of Jewish Law, but he follows his own interpretation of Judaism regardless of what the Rabbis say or the Code of Jewish Law states, as he does not necessarily accept what they state. See Sample

[8] Plaintiff defines sages as rabbis. (Sample Depo. at 81).

Depo. at 18-19; 34-35. Indeed, Plaintiff has stated he would not accept what a Rabbi tells him. (Id.). It is noteworthy that Mr. Sample wants a glass with 3 to 5 ounces of wine while in prison. However, Sample admits that in the community, while one person would drink the wine, he would just drink a sip of wine. (Id. at 41-42). He admits this is an acceptable practice in the community. (Id.) Yet he rejected the BOP's offers for the nonalcoholic wine, or the one drop of wine in grape juice, or the diluted wine which would be consistent with the amount of wine he would obtain in the community. See Inmate Request to Staff Member dated May 9, 2006 filed as Exhibit C to Plaintiff's Opposition to Defendants' Motion to Dismiss as Moot, or, in the Alternative, to Reconsider Grant of Partial Summary Judgment for Plaintiff and to Transfer; Exhibit 13 (Central Office Administrative Remedy Appeal 414949); Exhibit 6 (Regional Administrative Remedy Appeal 475362).

Plaintiff asserts that if he had some interaction with the Rabbi or staff presiding over the ritual and knew they were Jewish and sincere, it would be acceptable to him that the Rabbi or staff consume the wine on his behalf. (Sample Depo. at 44-45). In the restrictive prison environment, Plaintiff wants to know the sincerity of the person praying the kiddush while in the community he did not even know the Rabbi in the synagogue he attended and who presided over the rituals. (Id. at 44). He also admits the Code of Jewish Law does not require that the participant know the person presiding over the ritual. (Id. at 43).

Plaintiff readily admits that in the past, he has misrepresented facts to obtain benefits. (Sample Depo. at 51). He previously represented himself as a Baptist University student to obtain a credit card. (Id. at 50-51). He was also convicted of a misdemeanor for attempting to obtain by fraud a prescription for codeine which he wanted for resale. (Id. at 39). Lastly, Mr.

Sample was the mastermind of a conspiracy to defraud the government, which is the reason he is in federal prison. At such a young age, his criminal history is already plagued with fraudulent acts.

This behavioral pattern has not changed during his incarceration. In prison he continues to seek privileges under false pretense. For example, he readily admits that it is his intention to participate in the BOP drug treatment program (id. at 38) even though he states he does not have a substance abuse program and does not need treatment. (Id. at 60). The BOP drug abuse treatment program was designed for non-violent offenders who are "determined to have a substance abuse problem," Exhibit 10 (June 26, 1995 Program Statement 5330.10, Drug Abuse Programs Manual), Chapter 6, at 1, and inmates who successfully complete the program become eligible for a sentence reduction of up to one year. 18 U.S.C. § 3621(e). Even knowing the intent of the program and that he does not need treatment, Plaintiff still intends to reap a benefit he is not entitled to. He states all inmates want to participate in the program because of the time off so it is justifiable for him to also want it, even if under false pretense. See Sample Depo. at 60.

Following this same line of reasoning, about 40% of the individuals incarcerated have been under the influence of alcohol or some intoxicants during the commission of the crime for which they are convicted. See February 25, 2008 Deposition Transcript of David Rardin (Exhibit 11) ("Rardin Depo.") at 59. Plaintiff may also want wine as it is a very valuable commodity or currency in prison. Wine is desirable to other inmates just as desirable as the participation in the drug abuse program. He has already unequivocally stated that he enjoys alcohol and wine socially. (Plaintiff's Discovery Responses, Admis. No. 11; Sample Depo. at 47). So, Plaintiff

intends to do both: obtain wine and participate in the drug abuse program.

Additionally, Mr. Sample seeks other benefits through claimed adherence to Judaism: a diet with more vegetables and fruits, which is perceived by inmates as a healthier diet. (Ortiz Depo. at 62-63). Mr. Sample himself recognizes that about 50% of inmates participate in the religious diet for non- religious reasons. (Sample Depo. at 69). Judaism is also the religion with the most days of work proscription,[9] a total of 13 days in a year, a significantly higher number of days than all the other religions. See Exhibit 12 (Days of Work Proscription). Thus, inmates who identify their preferred religion as Judaism get the most days off from work than any other religious group.

Plaintiff asserts he follows teachings of the Code of Jewish Law. (Complaint, ¶ 9). However, Plaintiff qualifies this statement, as he chooses not to believe in the provisions that deem it permissible for a healthy adult to make Kiddush over grape juice, boiled wine, or diluted wine. (Plaintiff's Discovery Responses, Admis. No. 18). Even though Plaintiff admits that, to his knowledge, Judaism does not require a particular percentage of alcohol for the celebration of the rituals. (Sample Depo. at 66 and Sample Depo. Exh. 5 (Code of Jewish Law)).

Courts have articulated that a religious belief must be more than just a philosophy or a way of life. United States v. Meyers, 95 F.3d 1475 (10th Cir. 1996); Thiry v. Carlson, 78 F.3d 1491 (10th Cir. 1996). The plaintiff has changed his beliefs so often that now it is more of a personal preference. He has changed the amounts of wine he seeks. He has also changed the

[9] Judaism has 13 holy days per year of work proscription. See Exhibit 12: Chaplaincy Services Guidance for the Recognition of Holy Days Calling for Work Proscription and Public Fast Days (hereinafter Days of Work Proscription). The second religion with the most holy days Catholicism with five days of work proscription. See id.

number of rituals and has even added new rituals to his request. He has also changed the frequency in which he wants the wine. The only thing constant in his request is that he wants wine with alcohol in it. He has indicated that he likes wine and has consumed wine in the past. (Plaintiff's Discovery Responses, Admis. No. 11; Sample Depo. at 47). He also used codeine as part of his "experimenting" with drugs (Sample Depo. at 39), and used marijuana and cocaine since a young age. (See Presentence Report, ¶¶ 82-83 submitted as Exhibit 15 of Pl.'s Cross-mot.). Thus, Plaintiff enjoys consuming intoxicants, notwithstanding that one state judge has required his participation in Alcoholics Anonymous. See Plaintiff's Depo. at 58-59; Plaintiff's Discovery Responses, Admis. No. 9.

A personal preference to consume intoxicants does not rise to the level of a sincerely held belief under RFRA. See Ochs v. Thalacker, 90 F.3d 293 (8th Cir. 1996)(stating that "[p]urely secular views or personal preferences will not support a Free Exercise Clause claim.")(quoting Frazee v. Illinois Employment Sec. Dept., 489 U.S. 829, 833 (1989)).

Under RFRA, the government cannot always substantially burden a person's exercise of religion. "Inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hac rationalizations will not suffice to meet the act's requirements." 1993 U.S.C.C.A.N. at 1900. At the same time, courts must be mindful that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." Price v. Johnston, 334 U.S. 266, 285 (1948). Under RFRA, the plaintiff bears the burden of demonstrating that a sincerely held religious belief has been substantially burdened by the government policies. Henderson v. Kennedy, 253 F.3d 12 (D.C. Cir. 2001); Jackson v. District

of Columbia, 89 F. Supp.2d 48 (D.D.C. 2000). As set forth herein and for the reasons previously set forth in support of Defendant's earlier motion seeking partial reconsideration (Docket No. 36), Plaintiff's self-serving claims that he maintains a sincerely held religious belief are subject to substantial doubt. Therefore, if the Court is not inclined to grant summary judgment in favor of Defendants for the reasons reflected herein, the Court should reverse the partial summary judgment rendered in favor of Plaintiff and consider the sincerity of his claims to remain at issue in the litigation.

II. SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS ON THE ISSUE OF THE LEAST RESTRICTIVE MEANS IS WARRANTED

A. Plaintiff's Security Expert Has Recognized the Need to Control Wine in Prison.

Plaintiff's security expert, James Aiken, recognizes that there are security concerns in allowing alcohol in prison. Specifically, Mr. Aiken admits that allowing substantial amounts of wine in prison creates a security concern (Aiken Depo. at 24), that BOP must control the amount of wine inmates receive, (id. at 112), and that it is not always safe to give an inmate the amount of wine he wants. (Id. at 68-69, 81, 113). Mr. Aiken opines that generally allowing alcohol to prison inmates is not consistent with the security and good order of the institution. See Aiken Depo. at 68-69. Indeed, Mr. Aiken believes that giving an inmate possession of 3 to 5 ounces of wine raises a security concern. (id. at 25). Mr. Aiken explains that alcohol has to be controlled (id. at 80) because "[w]ine as with other substances, if not properly managed and controlled can be detrimental to the operation of the facility." (Id. at 81). He asserts that inmates are more disruptive and potentially violent inmates when using alcohol (Id. at 9, 68, 81) and that allowing inmates alcohol threatens the security of the institution. (Id. 68, 81). Mr. Aiken never agreed

with Plaintiff that the use of low alcohol wine in prison is consistent with security (id. at 68-70) and in fact recognizes that inmates generally should not possess wine in prison. (Id. at 77).

Mr. Aiken agrees with the general concept that prison administrators must anticipate problems and be proactive instead of reactive. (Id. at 47). He has even resorted to the BOP model and methods in attempting to fix correctional systems plagued with administrative deficiencies back in the 1990s when he was still working in prison. (Id. at 82-83). As the record demonstrates, Mr. Sample does not meet the elements necessary for the accommodation of a religious ritual involving the use of wine even under his expert's theories.

Mr. Aiken developed a model to assess an inmate's request for an intoxicant for religious purposes. He states that he would examine the following factors: (1) if the religion has a long-standing tradition (Id. at 89); (2) if the inmate has professed his religious faith (Id. at 90-91); (3) if the inmate adheres or complies with the mandates of his religion (Id.); (4) if the inmate exhibits good behavior while in prison (Id.); and finally, (5) the inmate's reaction to the denial of his request. (Id.).

Mr. Aiken asserts that an inmate's compliance with the mandates of his religion is one of the elements in favor of granting his request. (Id. at 90-91). In this case, Mr. Aiken's assumptions that BOP should accommodate Plaintiff's request are based on his understanding that inmate Sample has continued his participation in the Jewish religious rituals even after being denied his request for wine. (Id. at 90, 94-95). He describes Mr. Sample as an inmate trying to practice his religion. (Id. at 97). Unbeknownst to Mr. Aiken, however, inmate Sample has not continued to participate in the Jewish religious rituals. Inmate Sample now states that it is better not to observe the ritual at all rather than to practice the observance in what he calls the "wrong"

way. (Sample Depo. at 107-108).

Mr. Aiken concedes that in order to adopt a program in prison that would permit the distribution of significant amounts of wine to prisoners, BOP would have to attempt to determine if the inmate is sincere in his beliefs. See Aiken Depo. at 89, 112, 133. In assessing an inmate's sincerity, Mr. Aiken would consider the inmate's criminal history, including the inmate's Judgment and Commitment Order, Presentence Investigation Report, and prior convictions. (Id. at 103). Mr. Aiken would also look at the Court's recommendations. (Id. at 61). When assessing the inmate's sincerity, Mr. Aiken stated that he would also examine the absence of the kind of activity that led to the plaintiff's incarceration, (id. at 104), in this case, fraud.

A review of Sample's Judgment and Commitment Order reflects that the court issued a recommendation for the inmate's participation in the BOP drug abuse program, which was designed for inmates with a drug addiction. The fact that the sentencing judge recommended drug abuse treatment in addition to Sample's documented history of alcohol and drug use since an early age (see Presentence Investigative Report, at ¶¶ 82-84, filed as Exhibit 15 to the Pl.'s Cross-mot) is significant. Based on this information, Mr. Sample's efforts to secure alcohol -- ostensibly for his religious rituals -- is highly suspect.

Significantly, Mr. Aiken asserts that criteria to determine whether to accommodate religious rituals must be based on Jewish law, rather than some mere self-proclaimed desire for wine. (Aiken Depo. at 196-98). In determining how to accommodate an inmate's religious practice, Mr. Aiken asserts that reliance on Jewish leaders in the community is part of the process. (Id. at 197). He confirms that having a staff member administer the wine is an acceptable way of ensuring a level of control over the wine. (Id. at 134). He also accepts that it

is important to have someone knowledgeable of the religion present during the ritual. (Id. at 183, 193). Yet, Mr. Aiken acknowledges that there are limits to what inmates can have in prison. (Id. at 184). Mr. Aiken also asserts that in order to make accommodations he would also look at the general accepted practice in the United States. (Id. at 72).

In assessing accommodations for an inmate's religious practices, the BOP acts in compliance with Mr. Aiken's suggestions. See Aiken Depo. at 81-83. That is, the BOP policy tracks Mr. Aiken's model on this point. BOP relies on Jewish leaders for information and guidance regarding religious accommodations in its prisons. Jewish texts are also consulted. The BOP policy requires that a clergy person authorized by the BOP be present during the rituals where wine is dispensed to inmates. The clergy person is knowledgeable about the rituals and requirements of the religion. See Program Statement 5360.09, Religious Beliefs and Practices 7B (December 31, 2004) (filed as Exhibit 9 of Pl.'s Cross-mot). BOP policy limits the amounts of wine an inmate can obtain to "small amounts of wine." Id. The BOP has looked at the general accepted practice of Judaism in the United States. Many Jewish individuals consume grape juice or what plaintiff calls a "sip of wine." (Sample Depo. at 41-42). The BOP offered Mr. Sample grape juice, a mixture of wine and grape juice (one drop of wine to 3 to 5 ounces of grape juice, and diluted wine (1 part of wine to 5 parts of water), which was consistent with the small amount of wine he might receive in the community. In the community, he would have gotten a sip of wine and that would be acceptable to him. (Id. at 42). In prison, however, Mr. Sample wants 3 to 5 ounces of wine, more than he would normally receive in the community thereby clearly reflecting the "child in a candy store effect" described by the defendants' security expert.

Even Plaintiff's security expert agrees that a prisoner's claims of conversations with God are not a reliable source of religious beliefs and practices. Mr. Aiken asserts that an inmate cannot do whatever he wants just because he says he had conversations with God. See Aiken Depo. at 80, 107-109, 113-17, 119-20, 133, 135. He also asserts that an inmate statement that his beliefs are based on his conversations with God "does not serve as a foundation for [inmate] being sincere." (Id. at 116). Plaintiff's expert would, in fact, be suspicious of something as unverifiable as an inmate's assertion that the source of his beliefs are conversations with God. (Id. at 25 and 109). Mr. Aiken recognizes that in prison inmates lie to get benefits, (id. at 120), and specifically that inmates lie about the religious nature of their desire in order to get better food or food they like better. (Id. at 141). Indeed, Plaintiff himself has observed this to apply to approximately half of the prisoners on the religious food diet. Sample Depo. at 69.

Mr. Aiken supports the establishment of criteria to determine the accommodations an inmate would receive for his religious rituals. He states that criteria must not be based on an inmate's assertion that he had conversations with God (Aiken Depo. at 196), but instead it should be based on Jewish law. The following exchange reflects his opinion:

Q. And the criteria is going to be based upon Jewish law, right?

A. Based on Jewish law as well as how it is in relationship to operational practice.

Q. But it's not going to be dictated by the inmate saying "God told me I must have something"?

A. Of course.

Q. It really will not?

A. If an inmate comes to me and says "God told me to get 12 ounces," you're not going to get it.

Q. Okay. And you would think that would be appropriate under Bureau of Prisons' policy?

A. Yes, sir.

Aiken Depo. at 196.

Plaintiff, himself, has admitted that the basis for his claim to require wine, rather than any of the substitutes permitted by the Code of Jewish Law and by Rabbis he has consulted, is founded only on his, obviously uncorroborated, conversations with God. Sample Depo. at 31-35; see also id. at 107-08. Thus, the uncontested facts would not support the provision of wine to Mr. Sample, even if he could establish a sincerely held religious belief in the need for wine to practice his religion. Rather, the self-proclaimed religious need for wine by an inmate who has previously been required to undergo Alcoholics Anonymous, who has been recommended for drug abuse treatment, who admittedly enjoys alcohol and who has fraudulently sought to secure a prescription drug (codeine) in the past (Sample Depo. at 31-39, 58-59), cannot reasonably support the provision of significant amounts of wine in the prison setting in the face of the serious security concerns that it would pose. (See Aiken Depo. at 68-69, 81, 107-09, 112-17, 119-22, 132-35, 138-39).

B. Defendant's Security Expert Also Establishes that Wine in Other than Small Amounts Presents a Serious Threat to the Secure and Orderly Running of Prisons.

David Rardin who worked in federal prisons for 28 years states that BOP policy is grounded on safety and security. (Rardin Depo. at 31). The accommodation of plaintiff's request for wine presents a security problem even if its use were limited to Texarkana Camp. (Id. at 36). Courts consider whether there is a compelling governmental interest to apply the regulation to the individual plaintiff. Kikimura v. Harley, 242 F.3d 950, 962 (10th Cir. 2001).

There are security concerns related to Sample's own ability to conform and to control his impulses when he is under the influence of alcohol. (Id. at 38). He is requesting substantial amounts of wine. (Id. at 39). Just as RFRA recognizes the standard "should be interpreted with regard to the relevant circumstances in each case," Mr. Rardin makes an important distinction in the allowance of wine in prison when he explains that "[t]he appropriateness of allowing considerable amounts of wine (3 to 5 ounces) is relative to location. While in the community 3 to 5 ounces is not much, in the prison setting 3 to 5 ounces on Friday nights and Saturday mornings is a substantial amount." (Rardin Report, ¶ 8.3).

While there are serious concerns related to the plaintiff himself as outlined above, in a correctional environment, it is impossible to make security-based decisions in isolation, rather BOP must deal with the entire organization (Id. at 66) because, among other factors, what is approved for Mr. Sample, will ultimately be approved for thousands of inmates in BOP custody. (Id. at 36).[10] See Turner v. Safley, 482 U.S. 78, 90 (1987)("In the necessarily closed environment of the correctional institution, few changes will have no ramifications on the liberty of others or on the use of the prison's limited resources for preserving institutional order. When accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or on prison staff, courts should be particularly deferential to the informed decision of corrections officials.")

1. The Accommodation of Plaintiff's Request would Require a Great Deal of Resources.

Mr. Rardin explains that accommodating Plaintiff's request would have a major impact

[10] Indeed, Mr. Sample recognizes that other inmates would try to get alcohol even if they do not have a religious reason for doing so. Sample Depo. at 61-62.

on prison operations. He explains,

> To give inmates substantial amounts of wine touches on every important aspect of prison life. Currently, the BOP has more than 3000 Jewish inmates incarcerated in one hundred and fourteen institutions throughout the federal system. To allow considerable amounts of wine would mean to have large amounts of wine in institutions with large concentrations of Jewish inmates. This would present a serious security threat. Large amounts of resources would have to be expended to safely store and distribute the large amounts of wine needed for the rituals and protect the religious practice from abuse. Moreover, the BOP would need to make major adjustments, including but not limited to the following: (1) develop and implement further correctional procedures to cover the acquisition, distribution, and secure storage of large amounts of wine; (2) major reallocation of staff resources since the wine would be offered on Fridays and Saturdays when the institutions already have fewer staff available; (3) provide greater supervision to guard the wine; and (4) provide intensive[11] training for all staff.

(Rardin Report, ¶ 8.4). With approximately 3,000 inmates who identify themselves as Jewish dispersed among the different institutions, the amount of wine that would have to be purchased, stored, and dispensed every week in institutions with high concentrations of Jewish inmates presents a challenge. Once you multiply the three to five ounces of wine for the two or possibly three weekly rituals for hundreds, if not thousands, of inmates, the cost of the wine to the BOP is exorbitant. In addition, the expenses related to the supervision and accommodation of the rituals is significant. (Rardin Depo. at 47-48).

2. It Is Not Feasible for the BOP to Test an Inmate's Sincerity in his Religious Beliefs

The BOP has no way to test the sincerity of an inmate's beliefs. (Rardin Depo. at 53). Forty percent of inmates who come into custody were under the influence of alcohol when committing the crimes for which they are convicted. (Id. at 59). Thus, at least forty percent of

[11]All BOP staff is required to participate in Annual Refresher Training every year and receives training on religious matters. Chaplaincy Services staff receive intensive training and are the subject matter experts in religious matters within the BOP.

the inmate population has an alcohol problem. It is highly predictable that inmates will change their religious preference in order to obtain wine. See Sample Depo. at 61-62. This is a major challenge to prison administrators.

> Testing the inmates' religious sincerity is not workable in the prison setting because,
>
> ... there are serious obstacles to the BOP design of a test to measure the 'sincere beliefs' of inmates. The different gradations of faith or spirituality in the test administrators may affect their judgment about the religious beliefs of inmates. The BOP should not get involved in determining 'how committed are inmates to their faith.' The BOP, however, is committed to providing inmates of all religious affiliations with reasonable and equitable opportunities to practice their beliefs, within the confines of the security of the institution and availability of resources.

Rardin Report, ¶¶ 7-8; see also Sample Depo. at 69 (estimating that half of the prisoners participating in the religious diet program do so for reasons other than religion). BOP policy does not encourage or discourage inmates from changing their religious affiliations because it is not in the government's interest to be involved in the inmates' declaration of faith. (Rardin Depo. at 63). But, testing the sincerity of the inmate is not something that the BOP can effectively accomplish. Id.

3. Empowerment of an Inmate is not Appropriate in the Prison Setting

Wine is valuable and is deemed a currency in prison. See Rardin Depo. at 48; accord Sample Depo. at 61-62 (opining that other inmates would likely try to buy wine from Plaintiff). Mr. Sample would thus empower himself with the use of wine in the amounts he seeks for the religious rituals. He would be able to manipulate "currency" by showing other inmates how to get substantial amounts of wine. (Rardin Depo. at 52). And, if Mr. Sample does not succumb to pressure by other inmates, he may suffer retaliation. (Id. at 49). It is predictable that he will be

victimized. (Id. at 50-51). Acts of retaliation and abuses by inmates upon inmates as well as on staff, have long existed and will continue to exist. (Id. at 116).

As the BOP's has explained:

> From the prospective of prison management, when an inmate is able to empower himself in a special way and succeeds, he is perceived as a powerful inmate, one with an identity, by other inmates and staff. Not just to protect the government and prevent the use of wine in prison, but also from a prison administrator's point of view, inmates should not empower themselves in leadership roles nor should they assume an identity of their own. Prison management is grounded on the principle that all inmates are treated and managed equally. In other words, while in prison, inmates do not have any authority or power over others. When an inmate is perceived by others to have power, not only does the inmate become a threat to the secure operation of the facility, but also becomes a potential target for extortion or coercion from other inmates. If he is unwilling to succumb to the pressure due to his status, there is a potential confrontational situation regardless of security level. Therefore, putting an inmate in a position of power by acquiescing to his demands is a threat to the management of the institution, the staff, the inmate population, and the inmate himself.

(Rardin Report, ¶ A1).

C. Defendants Have Established that The Limitations On Wine in Federal Prisons Meet the Least Restrictive Means Test Of The RFRA

BOP has met its burden under the least restrictive means test of RFRA. To accomplish this task does not mean that prison officials must analyze every conceivable option in order to satisfy this prong of RFRA. See Hamilton v. Schriro, 74 F.3d 1545, 1556 (8th Cir. 1996), cert. denied 519 U.S. 874 (1996)("It would be a herculean burden to require prison administrators to refute every conceivable option in order to satisfy the least restrictive means prong of RFRA. Moreover, such an onerous requirement would be irreconcilable with the well-established principle, recognized by the Supreme Court and RFRA's legislative history, that prison administrators must be accorded due deference in creating regulations and policies directed at the maintenance of prison safety and security."). "Prisons are not required to allow inmates to

participate in any and all activities which the inmate may claim is based upon religious exercise." Crocker v. Durkin, 159 F.Supp.2d 1258, 1278 (D.Kan. 2001) (citing Kikimura v. Harley, 242 F.3d 950,956 (10th Cir. 2001)).

Prison administrators examined different alternatives and offered what constituted the least restrictive means in their respective institutions.

(I) FCI Beaumont Low

At the beginning of this litigation, plaintiff was housed at FCI Beaumont Low,[8] where he was able to participate in all the rituals of his religion and even enjoyed a "leadership" position in the Jewish community. He filed his first administrative remedy request regarding the use of wine while at Beaumont Low. Plaintiff requested 3.5 ounces of Kosher red wine for Kiddush prayers on Friday nights and Saturday mornings and 4 glasses of 3.5 ounces of Kosher red wine for Passover Seder. (See Plaintiff's Administrative Remedy Request and Appeals No. 349743 filed as Attachment A to Defendant's Motion to Dismiss (hereinafter "First Remedy Request")). The Warden explained that "[w]ine has been deemed a security issue at the institution and therefore is not provided to any religious faith for inmate consumption." Id. Therefore, the Warden offered plaintiff the use of grape juice as a substitute for the wine. In so doing, the Warden consulted with the religious staff who confirmed that the use of grape juice was an accepted practice within the Jewish community. Jewish Law itself, upon which the BOP relies and which Plaintiff contends he follows (Pl.'s Compl. ¶ 9), provides grape juice as an alternative to celebrate the Kuddish and Passover Seder when wine is not available. See Handbook, at 4-7 and 6-20, respectively. (See also Stipulation of Rabbi Goldstein ¶ 4 filed as Exhibit 3 to Pl.'s

[8] Plaintiff was housed at FCI Beaumont from April 8, 2003 through January 10, 2006.

Cross-mot).

(ii) FCI Jesup Camp

Subsequently, Plaintiff was moved to FCI Jesup-Camp.[9] While at Jesup Camp, he sent an Inmate Request to Staff Member dated April 13, 2006, addressed to the Warden. See Exhibit 5. At Jesup, he requested 3 to 5 ounces of red wine for Kiddush on Friday evenings and Saturday morning and four glasses of 3 to 5 ounces for the Passover Seders. See id. After examining the inmate's request in light of the security of the institution, the Warden offered plaintiff nonalcoholic wine for both the Sabbath Services and the Passover Seders. See id. Plaintiff refused the non-alcoholic wine because it appeared he wanted it to be Kosher and the warden sought clarification about what plaintiff was seeking. See Inmate Request to Staff Member dated April 17, 2006, filed as Attachment 5 to the Defendant's 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 ("Def.'s Br."). Plaintiff clarified he wanted Kosher red wine. See Inmate Requests to Staff Member dated April 20, 2006, May 1, 2006 and May 9, 2006 filed as Exhibits A, B and C to the Pl.'s Opp'n. The Warden neither denied nor granted his requests for the kosher alcoholic red wine, but gave the inmate the choice to await his response or to file an administrative remedy request since the Plaintiff's request was still under evaluation in light of the security concerns at Jesup. See Inmate Request to Staff and Warden's response, Exhibit C to Pl.'s Opp'n.

Plaintiff filed an administrative remedy request, No. 414949-F1, dated May 22, 2006, in

[9] Plaintiff was housed at the FCI Jesup Camp from February 10, 2006, through October 15, 2007.

which he repeated his request to the warden. See Admin. Rem. Req. and Appeals No. 414949. The Warden explained that his request was still being assessed in light of the security of the institution and neither denied nor granted his request. Plaintiff filed a Regional Administrative Remedy Appeal and the Regional Director responded that "[t]he Warden at Jesup has decided to partially grant your request by offering you a blend of a small amount of kosher red wine (one drop) and three to five ounces of kosher grape juice for your religious rituals. I concur with the Warden's determination." Id.; see also Vazquez Depo. at 147 ("Going by what the program statement says, we found the least restrictive means to accommodate the inmate which is one drop [of wine] in three ounces of grape juice."). Plaintiff also rejected this option and appealed to the Central Office. Central Office concurred with the Warden and the Regional Director and offered plaintiff the same blend of kosher grape juice with one drop of kosher red wine. See id.

(iii.) FCI Texarkana Camp

Plaintiff was transferred to FCI Texarkana Camp on October 15, 2007, where he filed an administrative remedy request, dated December 3, 2007. Plaintiff requested 3 to 5 ounces of Kosher red wine for the Sabbath rituals on Friday evenings and Saturday mornings, and then added, the same amount of wine for Saturday evenings also. He also requests four cups of 3 to 5 ounces of kosher red wine during the two Passover Seders. See Admin. Rem. Req. and Appeals No. 475362. The Warden at Texarkana made the following offer to the plaintiff,

> [c]onsistent with your asserted religious needs and the facility's duty to maintain security and good order, it has been determined to allow you to receive kosher grape juice, three ounces of kosher grape juice with a drop of low alcohol kosher wine; or a three-ounce mixture of a low-alcohol kosher wine and water, approximately one part wine and five parts water. If you desire the three-ounce water and wine mixture, the above grape juice options would be available for the other three glasses requested for the Passover Seders.

See id. This decision was upheld at both the regional and the central office levels.

Plaintiff would not accept other alternatives based on the Code of Jewish Law. The Code of Jewish Law provides alternatives to wine to observe the rituals such as grape juice, raisin wine, boiled wine, and bread alone. (Sample Depo. at 32-34). Plaintiff has asserted that these other alternatives are not acceptable to him.

The use of grape juice is acceptable under the Code of Jewish Law for the saying of Kiddush and Passover Seder. See Goldstein's Stip., ¶¶ 4 and 8. Plaintiff asserts that he talked to two Rabbis, who indicated that grape juice was an acceptable alternative. (Sample Depo. at 34-35). He also asserts that no Rabbi has ever told him that grape juice is unacceptable. (Id. at 35). However, Plaintiff disagrees with the Rabbis and rejects grape juice as an alternative. (Id. at 31-32).

He asserts that raisin wine is not acceptable either. (Id. at 32-33). Plaintiff rejects boiled wine (id. at 33); and he has never discussed the raisin wine with a Rabbi. (Id. at 34). Plaintiff recognizes that wine is used during Jewish religious rituals if wine is available. (See Plaintiff's Reply in Support of Cross-Motion for Summary Judgment at 5-6 (December 21, 2005)). Wine, however, is not available in prison. Thus, the Jewish religion envisions situations in which the wine is not available. In those situations, the ritual can still be observed and the prayers can be said over bread instead. (Goldstein Stip., ¶ 5). However, Plaintiff also rejects praying over bread alone.

Plaintiff's "all or nothing" posture and escalating requests for wine undermine the sincerity of his position and actually bolsters the restriction on the amount of wine espoused by BOP policy. Security in a prison is not automatic simply because there are correctional staff.

There also have to be controls in place, policies that govern inmate behavior and set limitations on the kinds of activities in which inmates can engage. Statements of prison administrators, including plaintiff's own security expert, bolster the justifications for the BOP to control the amounts of and the use of wine in prison. The alternatives offered to plaintiff further the government interest in preserving security in the nation's prisons.

Plaintiff does not live in isolation; he lives in a prison system with thousands of inmates. Whatever accommodations are done for him, in time, will have to be extended to all Jewish inmates. This will no doubt have consequences for the rest of the institutions and inmate population. (See Rardin's Report, ¶¶ 8.4-8.6).

If Plaintiff's request were accommodated, the BOP's limited resources which have been subject to even more reductions as a result of the war effort "would be stretched beyond their ability to effectively manage the facility." (Rardin Depo. at 62-63). Accommodating Plaintiff's practice would have a definite impact on the BOP's ability to accommodate the religious practices of the rest of the inmate population as resources allocated for that purpose would be depleted. It is undeniable that an alternative means cannot be deemed as the least restrictive if "if it places additional burdens on other believers." Hamilton, supra, at 1556. To find otherwise would be a very dangerous proposition.

One court explained that in order "[t]o meet the least restrictive means prison administrators generally ought to explore at least some alternatives, and their rejection should generally be accompanied by some measure of explanation." Spratt v. Rhode Island Dept. Of

Corrections, 482 F.3d 33, 21 fn.11 (1st Cir. 2007).[10] It is extremely difficult for prison administrators to evaluate and accommodate individual requests for special treatment under RFRA while maintaining the integrity of their policy. "The most effective and fair means of applying prison regulations is across the board to avoid resentment . . ." among inmates. Blanken v. Ohio Department of Rehabilitation and Correction, 944 F.Supp. 1359, 1368 (S.D. Ohio 1996). The BOP has justified the alternative means offered to Plaintiff based on the security of the institution as explained in the discussion on the government's compelling interest in controlling wine consumption even if for religious purposes. First, BOP has carefully examined Plaintiff's request in light of the prison's security concerns. Second, Plaintiff refused any of the alternatives offered to him as he continued insisting on getting the substantial amounts of wine he seeks for the rituals and in fact, at least administratively, he has increased the amounts of wine he seeks on several occasions. Third, the BOP does not have the resources to make the kind of accommodation for wine that Plaintiff seeks.

[10] Although Spratt was a case decided under RLUIPA, RFRA and RLUIPA apply essentially the same standards. See RLUIPA 42 U.S.C. § 2000cc et seq. Cf RFRA 42 U.S.C. §2000bb et seq.

CONCLUSION

For these reasons, summary judgment should be entered in favor of the Defendants.

Respectfully submitted,

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RUDOLPH CONTRERAS, DC Bar #434122
Assistant United States Attorney

/s/
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.,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' STATEMENT OF MATERIAL
FACTS AS TO WHICH THERE IS NO GENUINE DISPUTE

Defendants submit this statement of material facts as to which there are no genuine disputes in accordance with Local Rule 7(h).

1. Plaintiff was convicted of a misdemeanor for attempting to obtain by fraud a prescription for codeine which he wanted for resale. See Deposition Transcript of Brandon Sample ("Sample Depo.") (Exhibit 3) at 39.

2. Plaintiff was the mastermind of a conspiracy to commit money laundering, abetting the possession of counterfeit security and aiding and abetting the possession of stolen mail matter (Sample Depo. at 52; Plaintiff's Discovery Responses, Admis. Nos. 1-3); and he is currently serving a sentence of one hundred and sixty eight months in the custody of the Federal Bureau of Prisons ("BOP"). Plaintiff's Discovery Responses, Admis. No. 5.

3. The Judgment and Commitment Order reflects that the Court made a recommendation to the BOP that Plaintiff participate in the Comprehensive Residential Drug Abuse Treatment Program. Plaintiff's Discovery Responses, Admis. Nos. 3 and 6; see also Judgment and Commitment Order attached to Defendants' Statement of Material Fact as to Which There is No

Genuine Dispute attached to Defendants' Motion to Dismiss or, in the Alternative for Summary Judgment or To Transfer ("Defendants' Motion to Dismiss").

4. In 2002, the BOP amended its policy to provide inmates may receive "small amounts of wine" as part of a religious ritual. See Program Statement 5360.08, Religious Beliefs and Practices (August 22, 2002) attached as Attachment C to Defendants' Motion to Dismiss.

5. The Bureau of Prisons' administrative remedy database reflects that while at Beaumont Low Plaintiff filed an Administrative Remedy Request # 349793, in which he requested at least 3.5 ounces of wine every Friday and Saturday for the Kuddish prayer and at least 3.5 ounces of wine four times during the Passover Seder, a request that was denied and which Plaintiff appealed to the Regional Director and then to the Central Office, where his appeal was also denied. The administrative remedy responses explained that the restriction on wine consumption for inmates is based on the need to maintain the secure and orderly running of the institution and the institution is utilizing Kosher grape juice as it is an acceptable substitute for wine according to Jewish law as confirmed by the Rabbi. See Administrative Remedy Request and Appeals 349793 as Attachment A to the Defendants' Motion to Dismiss.

6. In his complaint, plaintiff stated that he "believes that he must drink at least 3.5 oz of red wine while saying Kiddush . . . during Friday night and Saturday shabbos services." (Complaint, ¶ 9).

7. Plaintiff also stated that "he must drink four cups containing at least 3.5 ounces of wine during the Passover seder." (Id., ¶ 10).

8. Plaintiff proclaimed this belief was dictated by "Jewish sages, the Code of Jewish Law,

and by practice." Id.

9. Plaintiff has claimed to be "an observant Jew [who] practiced Judaism before his incarceration . . ." (Id., ¶ 8). "For example, before his incarceration, plaintiff said Kiddush over wine during his Friday night and Saturday morning shabbos services." Id.

10. Plaintiff contends that "he continue[d] his practice of Judaism while confined" frequently attending Jewish services and events. Id.

11. Plaintiff was the Jewish faith group representative while housed Beaumont Low. See Plaintiff's Decl., ¶ 23 attached to Plaintiff's Cross Motion for Summary Judgment and Response to Motion to Dismiss ("Plaintiff's Cross-Mot").

12. Prior to incarceration on or about June 12, 2000, Plaintiff attended the Congregation of Beth Yeshurun 2 or 3 times between 1998 and 2000. See Plaintiff's Discovery Responses, Admis. Nos.14-15; Declaration of Bruce Plumley ("Plumley Decl.")(Exhibit 4), ¶ 3.

13. Prior to incarceration, plaintiff participated in Kiddush no more than two or three times (Sample Depo. at 46), on those occasions he used red wine (id. at 47), and during the ritual he was the only person present. Id. at 101.

14. Plaintiff celebrated the ritual of Passover Seder at his home one or two times between 1998-2000, and he celebrated it according to his "own knowledge and understanding of how things work." Id. at 99; see also Plaintiff's Discovery Responses, Admis. No.7.

15. In 2000, Plaintiff did not partake in any observances and in 2001, he participated in an occasional Sabbath during the Summer months. (Plaintiff's Discovery Responses, Inter. No. 17).

16. Plaintiff admits to being a social drinker. (Sample Depo. at 110-111).

17. Plaintiff filed his first administrative remedy request regarding a religious

accommodation on September 14, 2001. See Plumley Decl., ¶ 5.

18. Plaintiff enrolled in the religious diet in 2002. (Plaintiff's Discovery Responses, Admis. No. 19).

19. Plaintiff filed his first administrative remedy request for wine on August 31, 2004, more than four years after being in custody; and BOP records reflect that prior to August 31, 2004, he had filed a total of one hundred and twenty eight administrative remedy requests. (Plumley Decl., ¶ 8).

20. Plaintiff changed the initial amount of wine (3.5 ounces, according to the Complaint) and now seeks to 3 to 5 ounces of wine for each ritual. See Pl.'s Cross-mot. at 3-4 and Plaintiff's Decl., ¶ 2 ("It is my sincerely held religious belief that I must consume between 3 to 5 ounces of wine every Friday and Saturday during the saying of Kiddush . . . . and 3 to 5 ounces of wine four times during the Pesach . . . Seder.").

21. Plaintiff changed his belief to 3 to 5 ounces of wine during the Passover Seders, increasing the rituals to two Seders. (See Inmate Request to Staff Member, April 13, 2006 attached as Exhibit 5; see also Plaintiff's Discovery Responses, Inter. No. 11).

22. Upon Plaintiff's arrival at FCI Jesup, he stated he participated in all the Jewish religious rituals. Plaintiff was an inmate representative for the other Jewish inmates. (Deposition Transcript of Chaplain Raymond Ortiz, 97:15-22, January 3, 2008, attached as Exhibit 8).

23. Plaintiff filed an Inmate Request to Staff Member requesting wine, and the warden offered him nonalcoholic wine, which Plaintiff refused. Plaintiff then filed an Administrative

Request and Appeal for wine, whereupon the Warden offered him one drop of wine in 3 to 5 ounces of grape juice, an offer concurred with by the Regional Director and Central Office. (See Administrative Remedy Request and Appeals 414949, attached as Exhibit 13).

24. Plaintiff arrived in Texarkana in 2007, and filed a new Administrative Remedy Request and Appeals for wine, following which the Warden offered Plaintiff the following alternatives: kosher grape juice; three ounces of kosher grape juice with a drop of low-alcohol kosher wine; or a three-ounce mixture of a low-alcohol kosher wine and water, approximately one part wine and five parts water. If plaintiff desired the three-ounce water and wine mixture, the above grape juice options would be available for the other three glasses requested for the Passover Seders. Plaintiff rejected these offers also. See Administrative Remedy Request and Appeals #475362 attached as Exhibit 6.

25. In December of 2007, plaintiff asserted that he had continued to participate in the Jewish rituals in spite of the denial of the wine. (Plaintiff's Discovery Responses, Admis. No. 26) (Exhibit 2).

26. In February of 2008, plaintiff stated he was no longer saying kiddush while at Texarkana because he does not have wine and does not want to say it with grape juice or bread. (Sample Depo. at 78).

27. Plaintiff said that it is better not to participate in the rituals than to do it wrong. (Id. at 107-08).

28. Plaintiff explained that he participated in the rituals, not because of his "sincerely held belief", but out of respect to other Jewish inmates and their beliefs. (Pl.'s Dep. 0079:4-12).

29. Plaintiff stated that, although other alternatives to wine were available to him

according to the Code of Jewish Law and according to Rabbis, God spoke to him about stopping his participation in the rituals (Sample Depo. at 78), and this is the reason why he has not participated in any rituals since his arrival at Texarkana. (Id. at 80).

30. According to Plaintiff, the source of his beliefs in the need for wine are his twenty or so conversations with God. (Id. at 31-33).

31. Regarding an inmate's assertion that his purported need for wine is based on conversations with God, James Aiken, the Plaintiff's own expert on prison security, has indicated that he would question any inmate whose purported religious need for wine was based on claimed discussions with God: "[a]nd certainly in this case, if that was said to me, to which it wasn't, you know, that would cause negative -- more of a negative than a positive." See Deposition Transcript of James Aiken ("Aiken Depo.") (Exhibit 9) at 107-08.

32. Mr. Aiken further explains that if an inmate told him, ". . . 'God talked to me last night,' and I won't doubt that, 'And he says that I can have a bottle of wine in my cell to drink whenever I feel like it,' I'm not going to grant that." (Aiken Depo. at 21-24).

33. Indeed, Mr. Aiken asserts he would be suspicious of something as unverifiable as the assertion of having conversations with God to justify a request for wine in prison. (Aiken Depo. at 107-09).

34. Plaintiff claims to follow the teachings of Jewish sages (also referred to as Rabbis) and the Code of Jewish Law, but he follows his own interpretation of Judaism regardless of what the Rabbis say or the Code of Jewish Law states regarding any substitutions for wine in the Jewish religious rituals. See Sample Depo. at 18-19; 34-35.

35. Indeed, Plaintiff has stated he would not accept what a Rabbi tells him. (Id.).

36. James Aiken is not an expert in Jewish matters, but recognizes the need to assess prisoner's requests only in light of the dictates of the Jewish religious leaders, rather than any self-serving statements of what the prisoner says God told him. See Aiken Depo. at 68-69, 89, 137-38.

36. It is an acceptable practice in the community, that while the person presiding over the rituals drinks the wine, others would just drink a sip of wine. (Sample Depo. at 41-42).

37. Plaintiff asserts that if he had some interaction with the Rabbi or staff presiding over the ritual and knew they were Jewish and sincere, it would be acceptable to him that the Rabbi or staff consume the wine on his behalf. (Id. at 44-45).

38. The Code of Jewish Law does not require that the participant know the person presiding the ritual. (Id. 43).

39. Plaintiff did not know the Rabbi in the synagogue he attended while in the community and who presided over the rituals. (Id. at 44).

40. Plaintiff states that although he has never participated in the ritual of havdalah, he now "believes" in getting 3-5 ounces of wine at the institutional level for this ritual in addition to the other weekly Sabbath Observances. (Sample Depo. at 88-89; see also Administrative Remedy Request 475362-F1).

41. Plaintiff readily admits that in the past, he has misrepresented facts to obtain benefits. (Sample Depo. at 51).

42. Plaintiff previously represented himself as a Baptist University student to obtain a credit card. (Id. at 50-51).

43. Plaintiff provided a "materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation [of the crime he was charged with]."

(Presentence Investigative Report, ¶48 attached as Exhibit 15 to the Plaintiff's Cross-Mot.).

44. Plaintiff seeks to participate in the BOP drug treatment program (Sample Depo. at 38), even though he states he does not have a substance abuse program and does not need treatment. (Id. at 60).

45. The BOP drug abuse treatment program was designed for non-violent offenders who are "determined to have a substance abuse problem," (Program Statement 5330.10, Drug Abuse Programs Manual, Chapter 6, at 1 (June 26, 1995) , attached as Exhibit 10).

46. Jewish inmates can enroll in the religious diet, a religious diet which consists of more vegetables and fruits, which is perceived by inmates as a healthier diet. (Ortiz Depo. at 62-63).

47. Judaism is also the religion with the most days of work proscription, a total of 13 days in a year. (See Chaplaincy Services Guidance for the Recognition of Holy Days Calling for Work Proscription and Public Fast Days, attached as Exhibit 12).

48. Judaism does not require a particular percentage of alcohol for the celebration of the rituals. (Sample Depo. at 66 and Sample Depo. Exh. 5).

49. Plaintiff has consumed intoxicants and has used codeine (id. at 39:11-21), marijuana and cocaine since a young age. (See Presentence Report, ¶ 82-83).

50. Plaintiff also consumed wine and beer since age 15. (Id. , ¶ 82).

51. Plaintiff asserts that he participated in the rituals of his religion for most of his incarceration in spite of not having wine. (See Plaintiff's Decl., ¶ 21; see also Plaintiff's Discovery Responses, Admis. No. 26).

52. Plaintiff's attitudes toward Judaism have not been affected by the denial of the wine. (Plaintiff's Discovery Responses, Admis. No. 24).

53. The practice of Judaism allows for the use of wine if wine is available. (Plaintiff's Reply in Support of Cross-Motion for Summary Judgment, at 5-6 (December 21, 2005)).

54. The BOP has accommodated many of the plaintiff's request for religious accommodations. (Sample Depo. at 28-29).

55. BOP has not denied plaintiff any benefits because of his desire to seek wine for his religious rituals. (Plaintiff's Discovery Responses, Admis. No. 28).

56. Plaintiff had an altercation with his cell mate over plaintiff's refusal to assist his cell mate with a legal issue. (Sample Depo. at 63).

57. Allowing substantial amounts of wine in prison creates a security concern (Aiken Depo. at 24-25); and not all circumstances are safe to give an inmate the amount of wine he wants. (Id. at 113).

58. BOP must control the amount of wine inmates receive. (Id. at 112).

59. Alcohol consumption has to be controlled in prison. (Id. at 80).

60. Inmates are more disruptive and potentially violent inmates when using alcohol. (Id. at 9).

61. Even in a well operated facility, there are no guarantees that inmates will not commit violent actions. (Id. at 161).

62. Criteria to determine whether to accommodate religious rituals must be based on the law of the religion. (Id. at 196).

63. Reliance on religious leaders in the community is part of the process of assessing whether to accommodate a religious practice in prison. (Id. at 197).

64. It is important to have someone knowledgeable of the religion present during the

ritual. (Id. at 183, 193).

65. In order to accommodate a religious practice, prison administrators should look at the general accepted practice in the United States. (Id. at 72).

66. An inmate's statement that his beliefs are based on his conversations with God "does not serve as a foundation for [the inmate] being sincere." (Id. at 116).

67. In prison, inmates lie to get benefits. (Id. at 120).

68. Inmates lie about the religious nature of their desire in order to get better food or food they like better. (Id. at 141; see also Sample Depo. at 69).

69. BOP policy is grounded on safety and security. (Deposition Transcript of David Rardin at 31).

70. The provision of wine to plaintiff in the amounts he seeks would present a security problem even if its use were limited to Texarkana Camp. (Rardin Depo. at 36).

71. There are security concerns related to Plaintiff's own ability to conform and to control his impulses when he is under the influence of alcohol. (Rardin Depo. at 38).

72. In the prison setting 3 to 5 ounces of wine on Friday nights and Saturday mornings is a substantial amount. (Revised Expert Report of David Rardin, ¶ 8.3).

73. In a correctional environment, it is impossible to make assessments relating to security based on an isolated inmate; rather, prison administrators have to deal with the entire organization (Rardin Depo. at 66) because, among other factors, what is approved for one inmate, will ultimately be approved for thousands of inmates in the BOP custody. (Id. at 36).

74. To give inmates substantial amounts of wine touches on every important aspect of prison life. (Rardin Report, ¶ 8.4).

75. With approximately 3,000 inmates who identify themselves as Jewish dispersed among the different institutions, the amount of wine that would have to be purchased, stored, and dispensed every week in institutions with high concentrations of Jewish inmates presents a challenge. (Id.)

76. Once the three to five ounces of wine for the two or possibly three weekly rituals is multiplied by the hundreds, if not thousands, of inmates, the cost of the wine to the BOP is exorbitant. (Id.)

77. The BOP has no effective method to test the sincerity of an inmate's religious beliefs. (Rardin Depo. at 53; see also Plaintiff's Depo. at 69).

78. Forty percent of inmates who come into custody were under the influence of alcohol when committing the crimes for which they are convicted. (Rardin Depo. at 59).

79. There is a significant difference between the use of tobacco and wine in religious rituals; tobacco is not an intoxicant. (Id. at 78).

80. There is nothing intoxicating about a job or the different jobs that may be desirable in prison (id. at 80); all inmates are required to work or they would be subject to punishment. (Id. at 80).

81. There is nothing intoxicating about intramural games or acting as a referee; such games and sports activities are supervised by the recreation specialist. (Id. at 106-07).

81. Dispensation of medication is very staff intensive and certain steps must be followed: the doctor's medical evaluation of a health condition which requires medication (id. at 64-66); a license pharmacist filling the prescription; and either the pharmacist or a nurse dispensing the medication to the inmate and observing the inmate swallow the medication. (Id.) Inmates are

asked to stand in a line and medical staff will dispense medication and observe medication intake one inmate at a time. Correctional staff will monitor inmates after taking their medications. (Id. at 66).

82. Medications are used to control conditions that have been diagnosed with the use of objective criteria; for instance, psychotropic medications are used to calm inmates down and not to make them lose their inhibitions such as alcohol does. (Id. at 81).

83. In order to control abuse, a certain number of controlled substances are administered by injections. Rardin Depo. at 117; Deposition Transcript of Pharmacist Mark Rayburn at 27-28 (Exhibit 14).

84. BOP allows inmates the use of certain tools to perform their jobs, but classifies the tools and the inmates who use the tools, conducting threat assessments on the tool and the inmate based on his past behavior. See Rardin Depo. at 125 (Exhibit 11).

85. The BOP "ha[s] no ability to classify" [wine for religious consumption]. Id.

86. The BOP has the same concerns about drunken disruptive inmates at a camp that it has at a high security institution. (Id. at 35).

87. Regardless of the security level of the institution, the security problem lies with the person being incarcerated and what has to occur with the management of that wine; whether the institution is a high security facility or a minimum security it matters not. (Id. at 109).

88. In the restrictive prison environment, Plaintiff wants to know the sincerity of the person praying the kiddush; however, in the community, he did not even know the Rabbi in the

synagogue he attended. (Sample Depo. at 44).

89. The Code of Jewish Law does not require that the participant know the person presiding the ritual. (Id. at 43).

Respectfully submitted,

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United States Attorney

RUDOLPH CONTRERAS, DC Bar #434122
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/s/
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Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing Defendants' Motion For Summary Judgment In Favor Of Defendants On The Issue Of The Least Restrictive Means And, In The Alternative, Renewed Motion For Reconsideration Of The Grant Of Partial Summary Judgment For Plaintiff and a proposed order has been made through the Court's electronic transmission facilities on this 9th day of June, 2008.

/s/

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

ORDER

Upon consideration of Defendants' Motion For Summary Judgment In Favor Of Defendants On The Issue Of The Least Restrictive Means And, In The Alternative, Renewed Motion For Reconsideration Of The Grant Of Partial Summary Judgment For Plaintiff, for the reasons set forth by Defendants, and based upon the entire record herein, it is this _____ day of _____, 2008

ORDERED that Defendants' Motion For Summary Judgment In Favor Of Defendants On The Issue Of The Least Restrictive Means And, In The Alternative, Renewed Motion For Reconsideration Of The Grant Of Partial Summary Judgment For Plaintiff be and is hereby granted; and it is

FURTHER ORDERED that judgment be and is hereby entered in favor of Defendants.

_____
UNITED STATES DISTRICT JUDGE

copies to:

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