No. 12-11735

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRUCE RICH,
Plaintiff–Appellant,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, *ET AL.*,
Defendants–Appellees.

On Appeal from the United States District Court
for the Northern District of Florida, Gainesville Division
No. 1:10-CV-00157-MP-GRJ – Hon. Maurice M. Paul

PLAINTIFF-APPELLANT'S OPENING BRIEF

Luke W. Goodrich
Eric C. Rassbach
THE BECKET FUND FOR
RELIGIOUS LIBERTY
3000 K St., NW, Suite 220
Washington, DC 20007
T (202) 955-0095
F (202) 955-0090

Counsel for Bruce Rich

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, the following is a complete list of all trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this appeal, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party:

1. Rich, Bruce: Plaintiff-Appellant;
2. Goodrich, Luke W.: The Becket Fund for Religious Liberty, counsel for Plaintiff-Appellant;
3. Rassbach, Eric C.: The Becket Fund for Religious Liberty, counsel for Plaintiff-Appellant;
4. Buss, Edwin G.: Defendant-Appellee, Secretary of Florida Department of Corrections;
5. McNeil, Walter: Defendant-Appellee, former Secretary of Florida Department of Corrections;
6. Hicks, Milton: Defendant-Appellee, former retired warden;

7. Robinson, S.T.: Defendant-Appellee, former Assistant Warden of Programs;
8. Andrews, Jeffrey: Defendant-Appellee, Food Service Director;
9. Furman, Kathleen: Defendant-Appellee, Registered Dietician;
10. Deno, Julie: Defendant-Appellee, Food Service;
11. Taylor, Alex: Defendant-Appellee, Chaplaincy Services Administrator;
12. Thigpen, Albert: Defendant-Appellee, Food Service Administrator;
13. Bondi, Pam: Office of the Attorney General, counsel for Defendants-Appellees;
14. Stubbs, Joy A.: Office of the Attorney General, counsel for Defendants-Appellees;
15. Maher, Susan Adams: Office of the Attorney General, counsel for Defendants-Appellees;
16. Belitzky, Joe: Office of the Attorney General, counsel for Defendants-Appellees;
17. Paul, Maurice M.: Senior District Judge;
18. Jones, Gary R.: Magistrate Judge.

August 1, 2012

s/ Luke Goodrich

Luke W. Goodrich
THE BECKET FUND FOR RELIGIOUS LIBERTY
3000 K St., NW, Suite 220
Washington, DC 20007
T (202) 955-0095
F (202) 955-0090

Counsel for Bruce Rich

STATEMENT REGARDING ORAL ARGUMENT

Plaintiff Bruce Rich respectfully requests oral argument. This case presents important questions regarding the interpretation of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc *et seq.*, and the religious liberty of prisoners incarcerated within the Eleventh Circuit. Rich respectfully submits that oral argument is necessary for a full exposition of the legal issues and relevant facts inherent in the case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

REGULATIONS

TABLE OF RECORD REFERENCES IN THE BRIEF

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331. The court entered final judgment on March 5, 2012. Plaintiff filed a notice of appeal on March 26, 2012. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the Florida Department of Corrections has established as a matter of law that the denial of a kosher diet is the least restrictive means of furthering a compelling governmental interest.
2. Whether the district court erred by denying plaintiff's request for additional discovery under Federal Rule of Civil Procedure 56(d).

INTRODUCTION AND STATEMENT OF THE CASE

The Religious Land Use and Institutionalized Persons Act ("RLUIPA") prohibits the government from imposing a "substantial burden" on an inmate's religious exercise, "unless the government demonstrates that imposition of the burden on that person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1. The question in this case is whether RLUIPA requires the Florida Department of Corrections ("DOC") to provide a kosher diet to an Orthodox Jewish inmate.

Experience and precedent say that it does. Currently, at least thirty-five states and the federal government provide a kosher diet to observant Jewish inmates. Many of these states have been court-ordered to do so, with over a dozen courts—including the Second, Seventh, Eighth, Ninth, and Tenth Circuits—concluding that the denial of a religious diet violates the First Amendment or RLUIPA. Florida's DOC is the largest remaining holdout.

Like prisons in previous cases, it claims that providing a kosher diet would compromise allegedly compelling interests in cost-control and

security. And on that ground, the district court granted summary judgment to DOC.

But DOC's refusal to provide a kosher diet cannot satisfy strict scrutiny—particularly on summary judgment—for several reasons. *First*, DOC offers no competent evidence on the cost of a kosher diet. Its only evidence is a conclusory affidavit from a prison official, who estimates that providing a kosher diet would cost "$12,154,463.35 to $14,952,283.40 per year." Record Excerpts ("RE") 95. But this estimate is wildly implausible given the experience of others states, including Texas, Michigan, and Indiana, where the cost of providing a kosher diet ranges from $28,324 to $272,000 per year. It is also implausible given Florida's own experience, in which it provided a Jewish diet for hundreds of inmates over three years at a cost of $146,000 per year—or less than *two-tenths of one percent* (0.16%) of its annual food budget. Such a *de minimis* cost cannot, as a matter of law, constitute a compelling interest. *Beerheide* v. *Suthers*, 286 F.3d 1179, 1191 (10th Cir. 2002) (Colorado DOC lacked even a "valid penological interest" where a kosher diet would have increased the annual food budget by ".158 percent").

Second, DOC cannot carry its heavy burden of proving that a kosher diet would compromise security. Again, its only evidence is a conclusory affidavit from a prison official, who says that a kosher diet would cause "a negative impact on inmate morale," opportunistic conversions to Judaism, and "[l]ogistical issues." RE 98-99. But DOC offers no evidence of any security problems from the three years it offered a Jewish diet. It offers no evidence of any security problems in the thirty-five state and federal prison systems that offer a kosher diet. And it offers no evidence of any security problems in its *current* program providing a kosher diet to select inmates at its South Florida Reception Center. Since Florida and other states have provided kosher diets for years without security problems, a "self-serving affidavit[]" is "insufficient to defeat a motion for summary judgment, let alone to sustain one." *Spratt* v. *R.I. Dep't of Corr.*, 482 F.3d 33, 39 (1st Cir. 2007).

Third, even assuming that denying a kosher diet furthered a compelling governmental interest, DOC cannot demonstrate that the denial is the least restrictive means of furthering its interests. At least three less-restrictive alternatives are available: (1) DOC could provide prepackaged kosher meals; (2) DOC could utilize separate kitchens to pre-

pare kosher meals; or (3) DOC could adopt policies limiting the number of insincere inmates seeking a kosher diet. Any one of these alternatives would allow DOC to provide a kosher diet without harming its alleged interests. But DOC has not demonstrated that it adequately considered any of them.

Finally, even assuming DOC could satisfy strict scrutiny on the existing record, the district court erred by denying Rich's request for additional discovery under Rule 56(d).

STATEMENT OF FACTS

I. Rich's religious heritage, beliefs, and practice

Plaintiff Bruce Rich is an Orthodox Jew by birth, belief, and practice. RE 154. He was born to Orthodox Jewish parents in Brooklyn, circumcised on his eighth day at a *bris*, and raised in a kosher-observant household. *Id.* Growing up, Rich received an in-depth Jewish education, including study of the Torah. *Id.* As an adult, Rich personally maintained a kosher household. *Id.*

Rich believes that keeping kosher is fundamental to the Jewish faith and is necessary to conform to God's will as expressed in the Torah. RE 155. Like millions of observant Jews before him, Rich believes that

keeping kosher is "not a voluntary endeavor," and "not just for physical well-being" but "a law as handed down by G-d through the Torah" essential for "the holiness, purity and sanctity of my soul." *Id.*

Since his incarceration, Rich has served as a de facto "rabbi" to other Jewish inmates, teaching Torah study sessions and acting as *chazzan*, or cantor, during religious services. RE 154. He observes the Sabbath and other Jewish holy days. *Id.* And he has been recognized by outside Jewish authorities as an Orthodox Jew. *Id.* DOC has never contested the sincerity of Rich's beliefs, including his belief in keeping kosher.

II. The requirements of keeping kosher

Maintaining a kosher diet is a fundamental tenet of Judaism. The laws of kosher—known as *kashrut* in Hebrew—are based on the Torah and have been developed over thousands of years of rabbinic interpretation. They govern two main areas: (a) the ingredients that may be used and (b) the preparation of food.

A. Kosher ingredients

Kosher ingredients are divided into three categories: meat, dairy, and pareve. Sara E. Karesh & Mitchell M. Hurvitz, "kashrut," *Encyclopedia of Judaism* 267 (2006). Kosher meat comes from animals that

chew the cud and have a split hoof, *id.*, such as cows, sheep and goats. Kosher dairy products must come from a kosher animal and be processed in kosher equipment. Pareve foods contain neither meat nor dairy and are considered "neutral." *Id.* at 268. They include eggs, fruit, vegetables, grains, and most fish. *Id.*

B. Kosher preparation

The laws of *kashrut* also govern food preparation. For example, meat and dairy must be separated and may not be cooked or served together. *Id.* Non-kosher food may not come into contact with kosher food, and utensils used to prepare non-kosher food cannot be used to prepare kosher food. *See id.* Depending on what food is being prepared and where, supervision by a *mashgiach*—a Jew who observes the laws of *kashrut*—may be required. *See id.*

C. Widespread availability of kosher food

Today, thousands of commonly available food products are certified as kosher, making it much easier to maintain or provide a kosher diet. *See* Frank Bruni, *Foods Exert a Growing Appeal That Isn't Just for Jews*, N.Y. Times, Nov. 15, 1996. Nearly half of all supermarket products are kosher and there are approximately 125,000 kosher items in

the United States to choose from—up from just 16,000 in 1987. *New Study: Nearly Half of Supermarket Products are Kosher*, The Matzav Network, May 27, 2010, http://matzav.com/new-study-nearly-half-of-supermarket-products-are-kosher. These products are typically labeled with a *hechsher*, or kosher-certification symbol.

Prepackaged kosher meals are also widely available on airplanes, in hotels, from catering companies, and in hospitals. The U.S. military has also provided prepackaged kosher rations to Jewish troops for many years. Joe Gould, *Kosher, halal MREs feed religious diversity*, Army Times, Mar. 20, 2010, http://www. armytimes.com/news/2010/03/army_passover_032010w/.

III. The majority of prison systems across the country provide a kosher diet.

In 1975, the Second Circuit became the first Court of Appeals to hold that denying a kosher diet violated the First Amendment. *Kahane* v. *Carlson*, 527 F.2d 492, 496 (2d Cir. 1975). Since *Kahane*, over a dozen courts—including the Seventh, Eighth, Ninth, and Tenth Circuits—have held that denying a religious diet violates the First Amendment or RLUIPA. *See infra* n.17.

Today, a kosher diet is available in the prison systems of at least thirty-five states and the federal government.[1] These prison systems provide a kosher diet in one of three ways: (1) prepackaged kosher meals, (2) separate kosher kitchens, or (3) a "common fare" program.

---

[1] This figure is based on three sources of data:

(1) In 2005, the Michigan Department of Corrections conducted a National Kosher Meal Survey, concluding that thirty-two states and the federal government provide kosher meals. *See* Michigan Department of Corrections, *National Kosher Meal Survey* 1 (Sept. 14, 2005) ("Michigan Survey"), attached as Addendum B.

(2) Since 2005, at least three states—Indiana, Maryland, and Arizona—have begun providing kosher food. *See Willis* v. *Comm'r, Ind. Dep't of Corr.*, 753 F. Supp. 2d 768, 778 (S.D. Ind. 2010) (ordering Indiana to provide kosher food); Associated Press, *Md. Prisons to offer daily kosher meals beyond Passover*, TheTimesNews.com, Apr. 13, 2009, at http://www.thetimesnews.com/common/printer/view.php?db=burlington&id=24173; Arizona Department of Corrections, *Diet Reference Manual* 5 (Apr. 30, 2008), at http://www.azcorrections.gov/hlthsvc_rfp/diet_ref_manual_may2008.pdf ("Arizona Manual").

(3) In 2007, the Florida DOC commissioned a report, which found that 26 of 34 respondent states provided a kosher diet. Study Group on Religious Dietary Accommodation in Florida's State Prison System, *Final Report with Findings and Recommendations* Appendix D (July 26, 2007) ("JDA Report"), attached as Addendum A. This percentage (76%) is higher than that reported in the Michigan survey (64%), even with the recent additions of Indiana, Maryland, and Arizona (70%).

This Court "ha[s] not hesitated to take judicial notice of agency records and reports." *Terrebonne* v. *Blackburn*, 646 F.2d 997, 1000 (5th Cir. June 1, 1981) (*en banc*) (taking judicial notice of a Department of Corrections report).

A. Prepackaged kosher meals

Most prison systems provide a kosher diet via prepackaged kosher meals. Michigan Survey, *supra* note 1, at 1; JDA Report, *supra* note 1, at Appendix D. These meals are packaged by outside vendors, are shelf-stable, and can be warmed and served to inmates as needed. They can be heated in any clean microwave while still remaining kosher.

Prepackaged meals are available from a variety of vendors, such as Alle Processing Corp., Food Express, and My Own Meal, Inc. My Own Meal, which provides kosher meals to the military, offers meals ranging from $2.27 to $2.94. *See* My Own Meal Order Form, http://www.myownmeals.com/forms/t-MOM-22.pdf.

Because prepackaged meals do not supply all needed nutrients, prison systems typically supplement prepackaged meals with kosher items from the prison's regular food supplies—such as vegetables, fruit, eggs, cereal, bread, cheese, tuna, rice, or peanut butter. *See* Joshua Runyan, *Florida Partners With Aleph to Bring Kosher Food to Prisoners*, Chabad.org, July 7, 2010, http://www.chabad.org/news/article_cdo/aid/1246270/jewish/Kosher-Food-Coming-to-FL-Prisons.htm ("Runyan 2010 Article"). In Colorado, "[m]ore than half of the food items used to create

kosher meals are drawn from CDOC's regular supplies." *Caruso* v. *Zenon*, 2005 WL 5957978, at *12 (D. Colo. July 25, 2005); *see also* Arizona Dept. of Corr., *Diet Reference Manual* 13 (2008), http://www.azcorrections.gov/hlthsvc_rfp/diet_ref_manual_may2008.pdf ("pre-packaged foods" supplemented by other kosher items).

B. Kosher Kitchens

Several states—including Michigan, New York, Wyoming, and Texas—provide kosher diets by maintaining their own kosher kitchens. *See* Michigan Survey, *supra* note 1, at 1. In some prison systems, one kosher kitchen supplies kosher food to inmates throughout the state. Sandra Hansen, *Prison Ushers in New Era for Torrington*, Star Herald, Mar. 31, 2010 (describing how in Wyoming, kosher food is "prepared in a special Kosher kitchen, vacuum packed, and distributed to other facilities in the Wyoming corrections system").

Other prison systems dedicate a small portion of their existing facilities to the preparation of kosher meals. As Texas has explained, it "convert[ed] an unused pot room with existing hot and cold water and electricity into a kosher kitchen without an excessive amount of cost." Defs.' Second Mot. for Summ. J. (Dkt. Entry 198) at 34, *Moussazadeh* v.

TDCJ, 2011 WL 4376482 (S.D. Tex. Sept. 20, 2011) (No. 3:07-cv-00574). The initial cost to equip this kitchen was $8,066. *Id.* at 33.

C. Federal Certified Food Menu

The Federal Bureau of Prisons provides kosher meals through its "Certified Food Menu," formerly called the "common fare" program. *See* U.S. Department of Justice, Federal Bureau of Prisons, No. P5360.09, *Religious Beliefs and Practices* § 538.20 (2004), http://www.bop.gov/policy/progstat/5360_009.pdf ("BOP *Religious Beliefs*"); U.S. Department of Justice, Federal Bureau of Prisons, No. P4700.06, *Food Service Manual* 23 (2011), http://www.bop.gov/policy/progstat/4700_006.pdf ("BOP *Food Service Manual*"). All foods purchased for the Certified Food Menu are certified as kosher. *Id.*

Ten of the twenty-one meals per week consist of prepackaged meals, which are "double-wrapped and sealed in a package that may be heated in a conventional or microwave oven." *Id.*; Federal Bureau of Prisons, *FY 2012 Certified Food Menu* (2012), http://www.bop.gov/foia/certified_food_menu.pdf (prepackaged meals denoted as "tray contents" in ten meals per week). Prepackaged meals are supplemented with bread and fruit. *Id.* The other eleven meals consist of kosher-certified items that

can be purchased from any wholesaler and can be consumed by the general prison population—such as cereal, oatmeal, grits, tuna, sardines, bologna, potato chips, and peanut butter and jelly. *Id.* All meals are served with disposable utensils. BOP *Food Service Manual* at 23. The Certified Food Menu satisfies the religious requirements of multiple faiths under one menu. James A. Beckford & Sophie Gilliat, *Religion in Prison: Equal Rites In a Multi-Faith Society* 188 (1998).

IV. Prisons limit the kosher diet to sincere inmates.

Regardless of how they provide a kosher diet, all states have adopted safeguards to prevent abuse of the diet by insincere inmates. In general, these safeguards take one of four forms.

A. Pre-Screening

First, before an inmate can receive a kosher diet, he typically must be interviewed by a chaplain, a prison official, or both to determine whether his desire for a kosher diet is a sincere exercise of religious belief. In Texas, an inmate who wishes to receive a kosher diet must be interviewed by the lead contract rabbi; the contract rabbi must then consult with an outside Jewish organization to confirm that the inmate is Jewish and his religious beliefs are sincere. *See* Defs.' Second Mot. for

Summ. J., Ex. C (Dkt. Entry 198-3) at 12-15, *Moussazadeh*, 2011 WL 4376482 (No. 3:07-cv-00574) (Texas Department of Justice Chaplaincy Manual). Only then can the inmate receive a kosher diet.

Similarly, when Florida offered a Jewish Dietary Accommodation Program in the past, each inmate was interviewed twice and was required to "demonstrate, by a preponderance of the evidence, that the self-identified religious faith is sincerely held." JDA Report, *supra* note 1, at 7. Other prison systems employ similar sincerity testing.[2]

B. Equal Diets

Second, many states take care to ensure that the kosher diet is no more desirable than the regular diet. In many ways, this occurs naturally: A kosher diet typically has less meat, necessarily has less variety, and significantly restricts what an inmate can purchase from the commissary. For example, Wyoming's kosher dietary policy warns inmates

[2] *See, e.g.*, BOP *Religious Beliefs* § 548.20 (chaplains conduct oral interviews); Wyoming Department of Corrections, Policy and Procedure No. 5.601, *Religious Diet Program for Inmates* IV.B (2009), corrections.wy.gov/Media.aspx?mediaId=138 ("Wyoming *Religious Diet Program*") (inmate must complete a questionnaire, be interviewed by chaplain, and be verified by religious representative); New Mexico Corrections Department, CD-150901, *Food Service Procedures* Q (2011), http://corrections.state.nm.us/policies/current/CD-150900.pdf ("Only those inmates that have been approved by the facility Chaplain may participate in religious diets.").

that, "due to the strict preparation guidelines and limited kosher product availability, the variety of menus and items available for the Kosher Religious Diet Program may be more restricted than those available to others in the general inmate population." Wyoming *Religious Diet Program*, *supra* note 2, at IV.E.2.i.c. Many cases involve complaints about the inferiority of kosher food compared to the regular diet.[3]

C. Limited Transfers

Third, prisons often limit the ability of inmates to transfer into and out of the kosher diet program by changing their religious preference. In federal prison, an inmate who voluntarily withdraws from the religious diet may be required to wait up to thirty days before re-approval. BOP *Religious Beliefs* at 548.20(b). Repeated withdrawals "may result in inmates being subjected to a waiting period of up to one year." *Id.*; *see*

[3] *See, e.g.*, *Smith* v. *Mohr*, 2011 WL 6415532, at *1 (N.D. Ohio 2011) (Ohio prisoner refused to eat prison's "distasteful" kosher meals); *Moussazadeh*, 2011 WL 4376482 at *12 (Texas kosher meals "frequently consisted of highly distasteful tofu and other items that were far less appealing than the regular diet"); *Strope* v. *Cummings*, 2009 WL 3045463, at *3 (D. Kan. 2009) (Kansas inmate believed "he and other Kosher inmates do not receive food that is as varied or appetizing as that made available to prisoners receiving the regular line diet"); *Wolff* v. *N.H. Dep't of Corr.*, 2007 WL 2257213, at *1 (D.N.H. 2007) (prepackaged kosher meals caused inmate "to suffer from severe cramps and diarrhea").

also Nebraska Correctional Services, Administrative Regulation 108.01, *Food Service* at IV.B.5 (2011), http://www.corrections.nebraska.gov/pdf/ar/rights/AR%20108.01.pdf (up to one year); Vermont Dept. of Corr., Interim Procedure 354.05, *Inmate Alternative Diets* § 3.e.ii (2010), http://www.doc.state.vt.us/about/policies/rpd/correctional-services-301-550/351-360-programs-health-care-services/354-05-inmate-alternative-diets-medical-dental-and-religious-2 (same).

D. Behavioral Controls

Finally, prisons use behavioral controls to weed out insincere inmates. For example, an inmate can be removed from the kosher diet if he is caught eating food from the regular cafeteria line, purchasing non-kosher food from the commissary, or neglecting to pick up a certain number of kosher meals each week. In Indiana, the first time an inmate "abuses or misuses" the kosher diet "by voluntarily consuming the self-prohibited food," he is subject to removal from the diet for up to 90 days. Indiana Department of Corrections, Policy and Administrative Procedures No. 04-01-301, *The Development and Delivery of Food Services* XXVI (2009), http://www.in.gov/idoc/files/04-01-301_4-29-09.pdf ("Indiana Manual"). Subsequent violations result in removal for "up to 180

days per violation." *Id.* Similarly, in the Federal Bureau of Prisons, an inmate who violates the terms of the religious diet program on repeated occasions can be removed for a full year. *See* BOP *Religious Beliefs* § 548.20.

Other prisons remove inmates from the kosher diet if they do not consume a sufficient quantity of the meals. In Indiana, "[a]ny offender that does not participate in a minimum of 75% or more of the meals served in a week shall be removed from the program." Indiana Manual at XXVI. Similarly, in Florida, "[a]n inmate missing more than ten percent (10%) of her/his vegan meals for a month will be removed from the vegan roster." RE 106.

V. DOC's dietary policies

Currently, the Florida DOC offers three primary diets: (1) the "master menu," which is "designed to be served at all facilities to provide uniformity"; (2) the "alternate entree," which offers a non-meat substitute for the master menu; and (3) the "vegan meal pattern," which is a diet that excludes all animal products. Fla. Admin. Code 33-204.002; RE 169-70. It is undisputed that none of these options is kosher.

In addition to the three primary diets, DOC also provides "therapeutic diets." Fla. Admin. Code 33-204.002(2). These are special diets designed to accommodate an inmate's "medical or dental" needs, and are provided whenever a DOC-credentialed physician, clinical associate, or dentist determines it is necessary. Fla. Admin. Code 33-204.003(5).

All therapeutic diets are specially "planned, analyzed and certified as to nutritional adequacy by a licensed registered dietitian employed by the department." Fla. Admin. Code 33-204.002(2). Examples include "calorie regulated diets," with a calorie intake higher or lower than the master menu; "[t]exture modified diets," which may include "clear liquid, cold liquid, full liquid, puree, [or] mechanical dental diets"; and "finger foods" diets, which are provided to inmates for suicide precautions.[4] There are also "several other therapeutic diets," including "low residue" diets, "fat intolerance" diets, "dialysis" diets, and "pre-dialysis" diets. *Id*.

[4] Florida Department of Corrections, *Report on the Delivery of Food Services to Inmates* 2 (2010), http://www.myfloridahouse.gov/sections/Documents/loaddoc.aspx?PublicationType=Committees&CommitteeId=2457&Session=2010&DocumentType=Meeting%20Packets&FileName=CCJA-Meeting%20Packet%202-9-10Online.pdf ("Florida Report").

VI. DOC's former Jewish Dietary Accommodation Program

From April 2004 to August 2007, DOC also offered a Jewish Dietary Accommodation (JDA) Program. RE 27; JDA Report, *supra* note 1, at 7. Under the JDA Program, DOC established seven separate kitchens with separate utensils, separate cookware, and a separate cleaning area for preparation of JDA food. *Id.* at 11. Food for the JDA Program was drawn largely from the regular food supplies, and consisted almost exclusively of items that were pareve—neither meat nor dairy. *Id.* at 11-12. Only one meat meal was served per week, consisting of prepackaged chicken. *Id.* at 12. Only one dairy meal was served per week, consisting of stroganoff that was prepared in a designated pot stored separately from other cookware. *Id.* Meals from the seven JDA kitchens could be transported to inmates in six other institutions. *Id.* at 11.

Inmates were eligible to apply for the JDA Program only if participation in the program was required by the tenets of their faith. *Id.* at 7. Upon applying, the inmate was subject to two interviews, at which the inmate was required to demonstrate "by a preponderance of the evidence" that his self-identified religious beliefs were sincerely held. *Id.*

Once admitted to the JDA Program, inmates could be removed either voluntarily or involuntarily. *Id.* at 8-9. Voluntary removal could occur at any time upon the inmate's written request. Involuntary removal could occur for any violation of the JDA Participation Agreement—such as if the inmate purchased, possessed or consumed food that was not approved under the JDA Program; engaged in conduct that threatened security or discipline; or threw or misused food, beverage, food trays, or food utensils. *Id.* at 9. If an inmate was removed from the JDA Program for any reason, a minimum of six months had to pass before he could be reinstated. *Id.*

From 2004 to 2007, a total of 784 inmates participated in the JDA Program. *Id.* at 10. However, over 500 of those inmates (64%) withdrew from the program voluntarily. *Id.* An unspecified number were also "consistently being removed" involuntarily. *Id.* at 22, 9. As of April 2007, 259 inmates were enrolled in the program, but only 196 were regularly eating the JDA food. Although DOC made clear in July 2006 that the JDA Program was open to non-Jews, only 13 inmates in the JDA Program were non-Jews. *Id.* at 10. According to a DOC-commissioned

study, "the cost of maintaining the JDA Program for one year [wa]s approximately $146,000." *Id.* at 12-13.

On April 26, 2007, the Secretary of DOC formed a "Religious Dietary Study Group," which was tasked with submitting a report and recommendations on the JDA Program. Ultimately, the Study Group recommended that DOC "retain a kosher dietary program." *Id.* at 2. It also offered four suggestions for improvement. First, it recommended eliminating all pork products from DOC's food menus. *Id.* This would satisfy Muslim dietary law and ensure that no Muslims need receive a kosher diet. *Id.* at 15.

Second, the Study Group recommended limiting participation in the kosher diet "to those inmates who have been expertly appraised or vetted by a rabbi as eligible to participate." *Id.* at 2. One of the main complaints from prison officials about the JDA Program was the "irritation" due to the "multi-step application process," which consumed significant "administrative time and effort." *Id.* at 22. Relying on outside Jewish authorities, as Texas and other states have done, would reduce the burden on prison officials.

Third, the Study Group recommended "replacing the kosher meals prepared in the JDA kitchens with purchased pre-packaged meals." *Id.* at 2. This, according to the Report, "would simplify the cooking process." *Id.* at Appendix C. Moreover, "[m]any of the food items currently available in food services are certified or acceptable for use with kosher meals, and may be used to supplement the entrees at lunch and dinner, and to provide breakfast meals." *Id.*

Finally, the Report recommended removing inmates from the kosher dietary program if they "misse[d] ten percent or more of the kosher meals" each month. *Id.* at 2. On average, approximately 21% of JDA participants did not eat the JDA food on a regular basis. Thus, adopting this requirement would significantly reduce the number of participants in, and cost of, a kosher diet.

On August 16, 2007, DOC declined to follow the recommendations of the Study Group and rejected all kosher diets. RE 27.

VII. DOC institutes a new kosher dietary program

Three years later, following a directive from Governor Charlie Crist, DOC initiated a new kosher dietary program. Runyan 2010 Article. This program was developed in consultation with the Aleph Institute

and established at the South Florida Reception Center in Doral, Florida. *Id.* The diet consists of "at least one hot pre-packaged meal, along with cold fruits, vegetables, cereal and other shelf-stable items to round out the daily diet." *Id.* This program has continued to provide a kosher diet for at least fifteen months with no problems of cost or security. RE 157, 173-74. DOC, however, did not disclose the existence of this program to the District Court.

VIII. DOC denies a kosher diet to Rich

DOC has denied a kosher diet to Rich throughout his incarceration. Because of this, Rich has subsisted entirely on the handful of kosher certified items that he is able to purchase from the inmate canteen. RE 154-55. This has cost Rich both financially and physically. *Id.* On two occasions, Rich was placed in confinement where he was not permitted to purchase items from the canteen. *Id.* On both occasions, he went without regular meals for over a month. *Id.*

IX. Rich files suit

On August 9, 2010, Rich filed this lawsuit, proceeding *pro se*. RE 8-49. He alleged that the denial of a kosher diet violated the First and Eighth Amendments to the U.S. Constitution and RLUIPA.

About one year later, on July 18, 2011, DOC filed its answer. RE 52-55. Two weeks after filing its answer, on August 1, 2011, DOC filed a motion for summary judgment. RE 72-91. In it, DOC argued that the denial of kosher food was the least restrictive means of furthering a compelling governmental interest in controlling costs and maintaining security. RE 74-75. In support of its motion, DOC offered affidavits of two prison officials—Kathleen Fuhrman, who asserted that providing a kosher diet would be unduly expensive, and James Upchurch, who asserted that providing a kosher diet would cause security issues. RE 97-100.

On October 27, 2011, Rich filed a handwritten, seven-page "Motion to Extend the Discovery Cut-Off Date." RE 114-20. In it, he explained that he was proceeding *pro se*, had a mandatory work assignment for more than forty hours per week, and had limited access to the law library. RE 116-17. Citing DOC's pending motion for summary judgment, he requested additional time for discovery. RE 115, 117. The magistrate judge denied his motion the next day. RE 122-24.

On December 1, 2011, Rich filed his response to DOC's motion for summary judgment. RE 125-53. He argued that the conclusory affida-

vits of DOC officials were insufficient to carry DOC's burden of satisfying strict scrutiny—particularly in light of the facts that: (1) DOC provided specialized medical diets without any problems of cost or security; (2) DOC had provided the JDA Program without any problems of cost or security; and (3) the federal government and numerous states provided kosher diets without problems of cost or security. RE 131-33. He also pointed out that DOC currently provides a kosher diet to select inmates at the South Florida Reception Center, without problems of cost or security. RE 133.

On January 12, 2012, Magistrate Judge Gary R. Jones recommended that DOC's motion for summary judgment should be granted. RE 167-80. Although he recognized that DOC bore the burden of satisfying strict scrutiny, RE 175, he found that DOC had satisfied that burden based on the affidavits of two prison officials. Specifically, he concluded that providing a kosher diet "would, according to Fuhrman, cost DOC an additional $12,154,463.35 to $14,952,283.40 per year to provide kosher diets." RE 176. He also found that providing a kosher diet would, according to Upchurch, pose "serious security issues"—such as "a negative impact on inmate morale," opportunistic conversions to Judaism,

"discord and unrest," and "[l]ogistical issues." RE 176-77. The district court adopted the magistrate's recommendation without an opinion on March 5, 2012. RE 181.

On March 26, 2012, Rich timely filed a notice of appeal. RE 6.

STANDARD OF REVIEW

Summary judgment is appropriate only if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). This Court reviews a district court's grant of summary judgment *de novo*, viewing all facts in the light most favorable to the non-moving party. *Smith* v. *Allen*, 502 F.3d 1255, 1265 (11th Cir. 2007).

SUMMARY OF THE ARGUMENT

RLUIPA prohibits the government from imposing a "substantial burden" on religious exercise unless the government satisfies strict scrutiny. 42 U.S.C. § 2000cc-1.

I. DOC does not dispute that the denial of a kosher diet imposes a substantial burden on Rich. It forces him to choose between his religious beliefs and adequate nutrition.

II. DOC has failed to carry its heavy burden of demonstrating that the denial of a kosher diet furthers a compelling governmental interest. As for cost, DOC has offered no competent evidence. Its estimate of $12-$15 million per year is wildly out of step with the actual cost in states like Texas, Indiana, and Michigan ($28,324 to $272,000) and with DOC's costs under its own JDA Program ($146,000). The actual costs fall far short of a compelling interest.

As for security, DOC has offered only a conclusory affidavit stating that a kosher diet would create "serious security issues." RE 98. But DOC offers no examples of any security problems that arose during its JDA Program; no evidence of any security problems in the thirty-five state and federal prison systems that offer a kosher diet; and no evidence of any security problems that have arisen in its current program to provide a kosher diet at its South Florida Reception Center. It has therefore failed to demonstrate that a kosher diet threatens security.

III. DOC has also failed to show that the denial of a kosher diet is the least restrictive means of furthering its allegedly compelling interests. Like other states, DOC could utilize prepackaged meals; it could utilize separate kitchens to prepare kosher meals; or it could adopt more strin-

gent policies to limit insincere inmates. But DOC has failed to demonstrate that it adequately considered—much less had grounds for rejecting—these less restrictive alternatives.

IV. Finally, the district court erred by failing to grant Rich's request for additional discovery under Rule 56(d).

ARGUMENT

This case centers on the proper scope and application of RLUIPA. RLUIPA provides:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . unless the government demonstrates that imposition of the burden on that person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc-1(a).

This provision is designed to provide "heightened protection" for religious exercise in the prison context. *Smith*, 502 F.3d at 1265 (11th Cir. 2007) (quoting *Cutter* v. *Wilkinson*, 544 U.S. 709, 714 (2005)). To prevail under RLUIPA, the plaintiff bears the initial burden of proving that his sincere religious exercise was "substantially burdened." *Smith*, 502 F.3d at 1276. The burden then shifts to the government to "demonstrate that the challenged government action [1] 'is in furtherance of a compelling governmental interest' and [2] 'is the least restrictive means of furthering that compelling governmental interest.'" *Id.* (quoting 42 U.S.C. § 2000cc-1(a)). This burden-shifting framework "offers greater protection to religious exercise than the First Amendment offers." *Id.* at 1264 n.5.

Here, it is undisputed that the denial of a kosher diet substantially burdens Rich's religious exercise. DOC has also failed to carry its heavy burden of satisfying strict scrutiny. Thus, the magistrate erred by granting summary judgment to DOC.

I. DOC has imposed a substantial burden on Rich's religious exercise.

DOC does not dispute that the denial of a kosher diet "substantially burdens [Rich's] religious exercise." Op. 9. As this Court has explained, a substantial burden is a restriction that is "more than incidental" and imposes "more than an inconvenience on religious exercise." *Smith*, 502 F.3d at 1277. Specifically, it "must significantly hamper one's religious practice." *Id.*

Here, it is undisputed that keeping a kosher diet is "fundamental to [Rich's] practice of [Judaism]." *Id.* at 1278. By denying Rich a kosher diet, DOC forces him to choose between adhering to his faith and receiving adequate nutrition. By any measure, that is a substantial burden. *See Baranowski* v. *Hart*, 486 F.3d 112, 125 (5th Cir. 2007) ("Given the strong significance of keeping kosher in the Jewish faith, the TDCJ's policy of not providing kosher food may be deemed to work a substantial

burden."); *Beerheide*, 286 F.3d at 1187 (requiring inmates to pay 25% of the cost of kosher meals burdened religious exercise).

II. DOC cannot prove that the denial of a kosher diet furthers a compelling governmental interest.

Because Rich has suffered a substantial burden, the burden shifts to DOC to prove that the denial of a kosher diet "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1(a). This is "the most rigorous of scrutiny," *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1235 (11th Cir. 2004), and "the most demanding test known to constitutional law," *City of Boerne* v. *Flores*, 521 U.S. 507, 534 (1997).

Although this standard must be applied "with particular sensitivity to security concerns," *Cutter*, 544 U.S. at 722-23, "a court should not rubber stamp or mechanically accept the judgments of prison administrators." *Couch* v. *Jabe*, 679 F.3d 197 (4th Cir. 2012). In particular, prison officials "must do more than offer conclusory statements and post hoc rationalizations for their conduct." *Murphy* v. *Mo. Dep't of Corr.*, 372 F.3d 979, 988-89 (8th Cir. 2004). They must provide "specific factual information based on personal knowledge." *Spratt*, 482 F.3d at 39-40

(1st Cir. 2007). This is especially true when "other prison systems, including the Federal Bureau of Prisons, do not have such . . . policies or, if they do, [they] provide . . . exemptions." *Spratt*, 482 F.3d at 42 (quoting *Warsoldier* v. *Woodford*, 418 F.3d 989, 999 (9th Cir. 2005)).

Here, the magistrate concluded that DOC satisfied strict scrutiny by offering affidavits from two prison officials—one who said that providing kosher food would cost "an additional $12,154,463.35 to $14,952,283.40 per year," and another who said that providing kosher food would raise "serious security issues." Op. 10. But as explained below, DOC's evidence falls far short of satisfying strict scrutiny.

A. DOC has failed to prove that the denial of a kosher diet furthers a compelling interest in controlling cost.

DOC first relies on an allegedly compelling interest in controlling cost. But there are two problems with this argument: (1) Courts have repeatedly held that controlling cost, by itself, is not a compelling governmental interest; and (2) the costs at issue here are *de minimis*.

1. "Controlling cost," by itself, is not a compelling governmental interest.

The text of RLUIPA speaks directly to the question of cost. It provides: "[T]his chapter may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious ex-

ercise." 42 U.S.C.A. § 2000cc-3. As one court has explained, "[b]ecause the statute expressly anticipates increased costs, the fact that [religious] diets may be more costly than non-religious diets *is not alone a compelling governmental interest under the statute*." *Willis*, 753 F. Supp. 2d at 778 (emphasis added). Accordingly, courts have repeatedly rejected cost as a compelling interest in the prison context. *See, e.g.*, *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 use of the prison's limited resources for preserving institutional order."); *Koger* v. *Bryan*, 523 F.3d 789, 800 (7th Cir. 2008) (rejecting the "orderly administration of a prison dietary system" and the need for a "simplified and efficient food service" as compelling interests); *Agrawal* v. *Briley*, 2004 WL 1977581, at *8 (N.D. Ill. Aug. 25, 2004) ("[T]he possibility that Plaintiff's preferred [religious] diet cost a small amount more per year could not be considered compelling.").

Similarly, when applying strict scrutiny in analogous contexts, the Supreme Court has repeatedly rejected cost, standing alone, as a compelling governmental interest. *See*, *e.g.*, *Mem'l Hosp.* v. *Maricopa Cnty.*, 415 U.S. 250, 263 (1974) ("The conservation of the taxpayers' purse is

simply not a sufficient state interest"); *Graham* v. *Richardson*, 403 U.S. 365 (1971) ("a concern for fiscal integrity" is not a "compelling" interest); *Shapiro* v. *Thompson*, 394 U.S. 618, 633 (1969) ("The saving of welfare costs" is not a compelling interest).

Finally, as this Court has pointed out, RLUIPA is Spending Clause legislation, which applies only if Florida accepts federal funds. *Benning* v. *Georgia*, 391 F.3d 1299, 1312 (11th Cir. 2004). Thus, "[Florida] cannot complain about the costs of RLUIPA, because [Florida] consented to the costs when it accepted federal funds." *Id.* In short, DOC cannot rely on increased costs as an allegedly compelling interest.

2. DOC inflates the estimated cost of providing a kosher diet.

Even assuming cost could be a compelling interest, DOC has failed to establish that the cost of a kosher diet is prohibitive. DOC relies entirely on the affidavit of Kathleen Fuhrman, who estimates that the cost of providing a kosher diet "would be an additional **$12,154,463.35** to **$14,952,283.40** per year." RE 95, 176. The text of this affidavit is cut and pasted from a nearly identical affidavit of Fuhrman submitted in *Linehan* v. *Crosby*, 2008 WL 3889604 (N.D. Fla. Aug. 20, 2008), with only a few names, words, and numbers changed. There, Fuhrman esti-

mated that the cost of providing a kosher diet would be "**$38,982,000**" per year. Defendants' Special Report, Ex. C (Dkt. Entry 53-2) at 4, *Linehan*, 2008 WL 3889604 (No. 4:06-cv-225) ("Fuhrman Aff. 2007"). Either way, these estimates are wildly out of step with the actual costs reported by prison systems around the country, and with DOC's own experience under the JDA Program.

Texas, for example, has a larger inmate population than Florida and began providing a kosher diet in 2007. For Fiscal Year 2008, Texas reported that the total increased cost of its kosher dietary program was **$28,324**. Defs.' Second Mot. for Summ. J. (Dkt. Entry 198) at 36, *Moussazadeh*, 2011 WL 4376482 (No. 3:07-cv-00574). For Fiscal Year 2009, the total increased cost was **$42,475**. *Id.* at 37. Similarly, in Michigan, the estimated increased cost of providing a kosher diet in 2007 was **$272,000**.[5]

When Indiana began providing a kosher diet, the cost "was initially a few thousand dollars per month." *Willis*, 753 F. Supp. 2d at 771. In the six-month period from January 24, 2008, to July 23, 2008, Indiana re-

[5] Michigan Office of the Auditor General, *Performance Audit of Prisoner Food Services* 15 (2008), at http://audgen.michigan.gov/finalpdfs/07_08/r471062107L.pdf ("Michigan Audit").

ported that the *total cost* (not just the increased cost) of providing a kosher diet was $110,626.66, Defs.' Mot. for Summ. J., Ex. 5 (Dkt. Entry 83-5) at 2-7, *Willis*, 753 F. Supp. 2d 768 (No. 1:09-cv-815) (showing monthly invoices), which works out to an annual cost of **$221,253.32**.[6] Later in 2008, a number of Muslim inmates began requesting kosher food, leading to increased costs. *Willis*, 753 F. Supp. 2d at 772. But after Indiana began providing cheaper halal meals for Muslims and introduced additional checks on the kosher diet, the costs went back down. *See id.* In May 2009, the last month before Indiana began phasing out its kosher diet and litigation ensued, the total monthly cost of the kosher diet was $21,407.89, Defs.' Mot. for Summ. J., Ex. 5 (Dkt. Entry 83-5) at 17, *Willis*, 753 F. Supp. 2d 768 (No. 1:09-cv-815), which works out to an annual cost of **$256,894.68**.[7]

Finally, DOC itself provided kosher-style meals in its JDA Program from 2004 to 2007. Although this data would be readily available to DOC, it did not disclose it to the district court. And it is not hard to see why: According to the JDA Report (at 13), "the cost of maintaining the

[6] $110,626.66 x 2 = $221,253.32.

[7] $21,407.89 x 12 = $256,894.68.

JDA Program for one year is approximately **$146,000**." In other words, Furhman's estimate for the cost of a kosher diet is **10,000%** greater than the reported cost of Florida's JDA Program.

The following chart summarizes the costs reported in other states compared with Fuhrman's estimate:

State	Low End Cost	High End Cost
Texas	$28,324	$42,475
Florida (JDA)	$146,000	$146,000
Indiana	$221,253	$256,895
Michigan	$272,000	$272,000
Fuhrman Affidavit	$12,154,463	$14,952,283

Obviously, Fuhrman's estimate is wildly off. There are three problems. The first is her estimate of the daily cost of kosher food. According to Fuhrman, "[t]he total estimated cost for providing Rich with 'Kosher' meals would approximate $5.30 to $6.52 per day." RE 95. This comes from the cost of prepackaged meals, which Fuhrman estimates at "$2.52 - $2.95" per meal; the cost of "additional food items," which Fuhrman never itemizes, but which apparently bring the total raw food cost up to

"$4.49 to $5.71 per day"; and the cost of "disposable containers and utensils," which Fuhrman estimates at "$.81 per day." RE 93.

All three of these components are problematic. First, as noted above, My Own Meal offers prepackaged meals starting at $2.27. It is not clear how Fuhrman derives her estimate of "$2.52 - $2.95." Second, Fuhrman offers no basis for her estimate of "additional food items," and does not even attempt to itemize that cost. Third, Fuhrman offers no basis for her estimate of "$.81 per day" for "disposable containers and utensils." The JDA Report, by contrast, estimated the cost of "disposable containers and carriers" at only $.55 per day.[8] In short, all three components of Fuhrman's kosher food estimate are questionable.

The second major problem with Fuhrman's calculations is her estimate of the cost of the regular, non-kosher diets provided to all other inmates. In her 2007 affidavit, she said that this cost was $2.61 to $2.67. Fuhrman Aff. 2007, *supra*, at 2. Now she says that "[t]he new food service per diem for raw food cost is **$1.60**." RE 93. But the relevant number is not what DOC *hopes* to spend (the appropriated "per diem"); it is what DOC *actually* spends. According to DOC reports, the

[8] JDA Report at 13 (reporting $50,000 per year for 250 inmates). $50,000 / 365 days / 250 inmates = $.55.

actual expenditures on regular food in 2009 ranged from $2.33 to $2.90 per day, with an average cost of **$2.64** per day. Florida Report, *supra* note 4, at 17. The raw food cost ranged from $1.72 to $2.24, with an average cost of **$1.98**. *Id.* at Appendix C. Thus, Fuhrman *underestimates* the cost of regular food.

More importantly, to determine the true cost of a kosher diet, it is necessary to *subtract* the cost of the regular diet from the cost of the kosher diet, since an inmate eating a kosher diet will not eat the regular diet. But Fuhrman failed to do so. Instead, her calculations assume that all 6,283 inmates receiving a kosher diet would also receive a regular diet, further inflating her estimate by $3,669,272.[9]

Finally, Fuhrman grossly overestimates the number of inmates that will receive a kosher diet. According to her calculations, every Jew (2,136), Muslim (3,745), and Seventh-day Adventist (402) in the Florida prison system will need to receive a kosher diet—a total of "**6,283** additional inmates." RE 95. This is refuted by the experience of Florida and every other prison system.

[9] (6,283 inmates) x ($584.00 regular food cost per year) = $3,669,272.

In Florida, for example, there were over 95,000 inmates total in 2007, Florida Department of Corrections, *Average Daily Population Fiscal Year 2007-2008*, http://www.dc.state.fl.us/pub/pop/facility/avg0708.html, but only **250** participated in the JDA Program (0.26%). JDA Report at 10, 13. Although DOC "ma[d]e it clear that the department w[ould] not refuse to admit a person into the JDA Program, whether or not they are Jewish," only thirteen non-Jewish inmates ever participated. *Id.* at 10. Indeed, the JDA Report specifically found that Muslims and Seventh-day Adventists would *not* need a kosher diet, because the current pork-free and alternate entrée meal patterns "would satisfy Seventh-day Adventist" and "Muslim dietary law." *Id.* at 15-16. Similarly, in Texas, there are approximately 155,000 inmates, but only **20** to **26** inmates receive a kosher diet (0.01%). TDCJ MSJ at 32 n.46, 33 n.48. And in Michigan, there are approximately 51,165 prisoners, but only **131** receive a kosher diet (0.26%). Michigan Audit, *supra* note 5, at 7. In short, by assuming that **6,283** inmates would require kosher food, Fuhrman inflated the participation rate by over **2,500%**.[10] The following chart summarizes the discrepancy:

[10] (6,283 estimated participants) / (250 actual participants in the JDA

State	Total Inmates	Kosher Participants	Participation Rate
Florida (JDA)	95,000	250	0.26%
Texas	155,000	26	0.01%
Michigan	51,165	131	0.26%
Fuhrman Aff.	[95,000]	6,283	6.61%

3. The cost of providing a kosher diet is minimal.

The actual cost of providing a kosher diet is much less. A useful starting point is the JDA Report (at 13), which estimated the total cost of the JDA Program at $146,000 per year. Alternatively, one can employ Fuhrman's methods, but use more realistic assumptions. At the high end, for example, assume Fuhrman correctly estimated the cost of kosher meals at $5.30 per day, and correctly reported the cost of regular meals at $1.60 per day. That means kosher meals cost $3.70 per day more than regular meals, or $1,350.50 per year. Next, assume a participation rate identical to that of the JDA Program: 250 inmates. JDA Report at 13. Using these assumptions, the total cost of a kosher dietary program is $337,625 per year.

Program) = 25.132 or 2,513%.

More realistically, assume Fuhrman slightly inflated the cost of kosher meals—for example, as noted above, we know she inflated the low-end cost of prepackaged meals by $0.25 (using $2.52 instead of $2.27 from My Own Meal) and inflated the cost of disposable goods by $0.26. (We don't know how much she inflated the "supplemental food.") That brings the cost of a kosher diet down to $4.79 per day.[11] Next, use the *actual* raw food cost of regular meals in 2009, which averaged $1.98. *See supra*. That means kosher meals cost $2.81 per day more than regular meals, or $1,025.65 per year. Finally, assume DOC is able to remove some insincere inmates from the kosher food program, reducing the participation rate from 250 to 200 inmates. In that case, the total cost of a kosher dietary program is $205,130 per year—slightly higher than what the JDA Study Group estimated it to be.

The following chart summarizes these calculations:

[11] $5.30 - $.25 - $.26 = $4.79.

	Fuhrman Estimate	High-End Estimate	Moderate Estimate	JDA Study Estimate
Cost of pre-packaged meals	$2.52	$2.52	$2.27	N/A
Cost of disposables	$.81	$.81	$.55	$.55
Daily cost of kosher food	$5.30	$5.30	$4.79	N/A
Daily cost of regular food	$1.60	$1.60	$1.98	N/A
Increased daily cost of kosher food	$3.70	$3.70	$2.81	N/A
Inmate participation	6,283	250	200	250
Total annual cost of kosher food	**$12,154,463**	**$337,625**	**$205,130**	**$146,000**

To put these numbers into perspective, in 2009, DOC reported total food costs of $88,528,709. Florida Report, *supra* note 4, at Appendix C ("Total Costs" of "$46,093,077" and "$42,435,632"). Thus, at the high end, the total cost of a kosher diet is less than *four-tenths of one percent* (0.38%) of DOC's food budget.[12] More realistically, the cost is less than *three-tenths of one percent* (0.23%) of the annual food budget.[13] And us-

[12] $337,625 / $88,528,709 = 0.0038.

[13] $205,130 / $88,528,709 = 0.0023.

ing the JDA Report, the cost is less than *two-tenths of one percent* (0.16%) of the annual food budget.[14]

These *de minimis* costs cannot, as a matter of law, constitute a compelling governmental interest. In *Beerheide*, the Colorado DOC argued that it could not provide Jewish inmates with a kosher diet because it would increase the prison system's annual food budget by ".158 percent." 286 F.3d at 1191. Because the inmates' claim pre-dated RLUIPA, the Tenth Circuit evaluated it under the highly deferential First Amendment standard of *Turner*, 482 U.S. 78, under which the prison system need only show that the denial of a kosher diet was "rationally related" to "legitimate penological concerns." *Beerheide*, 286 F.3d at 1192. Nevertheless, the Tenth Circuit held that a ".158 percent" increase in DOC's annual food budget was a "*de minimis* cost" that was not even "rationally related to the stated penological goals of [controlling] cost." *Id.* at 1191.

The same is true here. Providing a kosher diet will increase DOC's annual food budget by only 0.16% to 0.38%. Under *Beerheide*, such a *de minimis* cost is not even a "valid penological interest." *Id.* A fortiori, it is

[14] $146,000 / $88,528,709 = 0.0016.

not a "compelling governmental interest" under RLUIPA. *See also Shakur* v. *Schriro*, 514 F.3d 878, 890-91 (9th Cir. 2008) (rejecting summary judgment for the prison where a halal diet in another state was only "minimally more expensive than the standard diet"); *Agrawal*, 2004 WL 1977581, at *8 ("[T]he possibility that Plaintiff's preferred diet cost a small amount more per year could not be considered compelling."); *Willis*, 753 F. Supp. 2d at 778 (rejecting cost objections to a kosher diet).

B. DOC has failed to prove that the denial of a kosher diet furthers a compelling interest in maintaining security.

Next, DOC claims that the denial of a kosher diet furthers a compelling interest in maintaining security. In support, it relies on the affidavit of James Upchurch, who says that a kosher diet would create "serious security issues." RE 98. Like the Fuhrman affidavit, the Upchurch affidavit is recycled from a nearly identical affidavit submitted by Upchurch in *Linehan*, with only a few names and sentences changed. Defendants' Special Report, Ex. D (Dkt. Entry 53-2), *Linehan*, 2008 WL 3889604 (No. 4:06-cv-225). And like the Fuhrman affidavit, the Upchurch affidavit does not satisfy strict scrutiny.

Of course, maintaining security is a compelling governmental interest in the abstract. *Spratt*, 482 F.3d at 39. But under RLUIPA, "the mere assertion of security or health reasons is not, by itself, enough for the Government to satisfy the compelling governmental interest requirement." *Washington* v. *Klem*, 497 F.3d 272, 283 (3d Cir. 2007). Rather, the government must "establish that prison security is furthered" by its policy, must prove that its policy is "the least restrictive means available to achieve its interest," and must do so with "*specific factual information* based on personal knowledge." *Spratt*, 482 F.3d at 39, 40-41 (emphasis added). "[A]n affidavit that contains only conclusory statements about the need to protect inmate security" is not enough. *Id.* at 40 n.10.

The First Circuit's decision in *Spratt* is illustrative. There, the Rhode Island DOC prohibited an inmate from preaching to other inmates on the ground that it posed a security threat. *Id.* at 35. In support, DOC offered the affidavit of a prison official, who maintained that "placing an inmate in a position of actual or perceived leadership before an inmate group threatens security, as it provides the perceived inmate leader with influence within the administration." *Id.* at 36. As an example, the

prison official cited a "trustee" program in Texas, in which inmates were placed in leadership positions and it caused security problems. *Id.* at 36-37. On the basis of the affidavit, the district court granted summary judgment to the DOC. (For the sake of comparison, the affidavit is attached to this brief as Addendum C.)

The First Circuit reversed. As the Court explained: "This affidavit, which cites no studies and discusses no research in support of its position, simply describes the equation thus: if Spratt is a preacher, he is a leader; having leaders in prison . . . is detrimental to prison security; thus, Spratt's preaching activity is detrimental to prison security." *Id.* at 39. But "[s]elf-serving affidavits that do not contain adequate specific factual information based on personal knowledge are insufficient to defeat a motion for summary judgment, let alone to sustain one." *Id.* (internal quotation omitted). Following *Spratt*, several courts have held that self-serving affidavits of prison officials are insufficient to satisfy strict scrutiny. *See, e.g.*, *Smith* v. *Ozmint*, 578 F.3d 246, 253 (4th Cir. 2009) (conclusory affidavit drafted for use in another case did not satisfy strict scrutiny); *Couch*, 679 F.3d 197 (prison official's affidavit did not

satisfy strict scrutiny); *Shakur*, 514 F.3d at 890 ("conclusory affidavits" from prison official were "insufficient" to satisfy strict scrutiny).

The same is true here. Like the affidavit in *Spratt*, the Upchurch affidavit "cites no studies and discusses no research in support of its position." 482 F.3d at 39. Indeed, at least the affidavit in *Spratt* cited *actual* security problems that had arisen in another state. *Id.* But the Upchurch affidavit does not even do that—despite the fact that thirty-five states and the federal government have been providing kosher diets for many years.

For example, Upchurch says that "the primary security issue" with a kosher diet is that "a special diet would be seen by the rest of the inmates as preferential treatment resulting in a negative impact on inmate morale." RE 98. In the "worst case scenario," this could even lead to "retaliation against the kosher inmates." RE 100. But Upchurch cites not *one* example of *any* security problem *ever* arising from a "special diet." In fact, DOC has been providing "special diets" for many years. It currently provides vegan and alternate entrée diets to some inmates but not others. Fla. Admin. Code 33-204.002. It provides a wide variety of therapeutic diets to some inmates but not others. Fla. Admin. Code 33-

204.002(2). And it provided the JDA diet to some inmates but not others. All of these are "special diets" that "[c]ould be seen by the rest of the inmates as preferential treatment"—but not one has ever created a security incident cited by Upchurch. As in *Spratt*, an affidavit that "cites no past instances" of security problems arising from similar accommodations cannot satisfy strict scrutiny. 482 F.3d at 39.

Next, Upchurch says that providing a kosher diet "would likely result in other inmates attempting to obtain a similar special religious diet." RE 98. This is the only issue that Upchurch specifically says was reported "during the Department's operation of the JDAP." RE 99. But the risk of "copycat" dietary requests is not a security issue; it is an administrative issue. And courts have repeatedly held that avoiding copycat requests is not even a legitimate penological interest, let alone a compelling one.

In *Love* v. *Reed*, 216 F.3d 682, 690 (8th Cir. 2000), the Arkansas DOC opposed a religious dietary request on the ground that "if they extend this 'privilege' to [one inmate], other inmates will demand the same privilege, and the resulting discontent will compromise the penological interests of security and order." But the Eighth Circuit held that this

argument "is not persuasive," because "[t]he same argument could be made" against almost any religious accommodation. *Id.* at 691. Instead, the DOC was required to determine whether a dietary request was "based upon sincerely held religious beliefs" or "merely upon personal preference." *Id.* at 691. Avoiding the administrative burden of this inquiry was "not reasonably related to a legitimate penological interest." *Id.*

Other courts have reached the same result. *See, e.g.*, *Toler* v. *Leopold*, 2008 WL 926533, at *3 (E.D. Mo. 2008) ("[D]enying [an inmate] a Kosher diet" due to "the risk of increased religious requests . . . is not rationally related to any legitimate economic or administrative concern."); *cf. Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006) ("The Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions.").

Next, Upchurch claims that merely attempting to "monitor and enforce any criteria" relating to an inmate's sincerity would cause "discord and unrest" and would divert "staff attention and focus" from more important matters. RE 99. Again, Upchurch cites no concrete examples of

this problem, and again, this is primarily an administrative concern, not a security issue. It has also been rejected by other courts. In *Koger*, 523 F.3d at 800, for example, the Illinois DOC argued that conducting an independent inquiry into an inmate's sincerity would inhibit "orderly administration of a prison dietary system." The Seventh Circuit, however, said that "no appellate court has ever found th[is] to be [a] compelling interest[]." *Id.*

Next, Upchurch claims that "creating specialized kitchens at only a few designated locations" could prompt inmates "to manipulate the system to gain assignment to the special institutions for gang and other associational purposes." RE 99. Again, he cites no specific examples of this phenomenon. More importantly, most prison systems do not limit their kosher diet to "a few designated locations," but instead provide a kosher diet regardless of where an inmate is transferred.[15] And if a particular inmate abuses the system or poses a security threat, other prison systems remove the problem inmate; they do not cancel the whole

[15] *E.g.*, Cal. Code Regs. tit. 15, § 3054(c) (2010) (Religious meals shall continue for "[i]nmates who are transferred."); Colorado Dept. of Corr., Administrative Regulation 1550-06 § IV.C.1 (2012) ("Upon an offender's transfer to another facility, the religious diet will be continued."); BOP *Food Service Manual* at 22 ("The Certified Food Menu . . . will be used for food procurement and meal service at all institutions.").

program. *See* Part IV.D, *supra*. Thus, if manipulative transfers are a problem at all, they are a problem of DOC's own making and are easily remedied.

In sum, the Upchurch affidavit is insufficient to establish that the denial of a kosher diet furthers a compelling governmental interest in maintaining security. Like the affidavit in *Spratt*, it is "conclusory"; it "cites no studies and discusses no research in support of its position"; and it "cites no past instances" of security problems arising from a kosher diet in Florida or any other state. 482 F.3d at 39. "RLUIPA requires more." *Greene* v. *Solano County Jail*, 513 F.3d 982, 990 (9th Cir. 2008).[16]

[16] Had Rich been permitted adequate discovery, *see* Part IV, *infra*, he could have easily submitted detailed affidavits from experts in prison security explaining why providing a kosher diet does not threaten security. For an example of such an affidavit, *see* Plaintiff Max Moussazadeh's Opp. to Defs.' Second Mot. for Summ. J., Ex. 36 (Dkt. Entry 201-2) at 20-32, *Moussazadeh*, 2011 WL 4376482 (No. 3:07-cv-00574) (Decl. of George Sullivan ¶ 33) ("Offering kosher foods to inmates has not presented security concerns in States with which I am familiar or in the U.S. Bureau of Prisons.").

C. DOC cannot satisfy strict scrutiny when the vast majority of states and the federal government provide a kosher diet without cost or security problems.

Even assuming the Fuhrman and Upchurch affidavits were based on accurate, specific factual information, they still would not be enough to establish as a matter of law that the denial of a kosher diet furthers a compelling interest in controlling cost or maintaining security. That is because DOC has failed to address the fact that the vast majority of states and the federal government all provide a kosher diet—without problems of cost or security.

In *Procunier* v. *Martinez*, 416 U.S. 396, 414 n.14 (1974), *overruled on other grounds by Thornburgh* v. *Abbott*, 490 U.S. 401 (1989), the Supreme Court held that "the policies followed at other well-run institutions" are "relevant to a determination of the need for a particular type of restriction" in the prison context. Following *Procunier*, numerous courts have compared one state's prison policies to others'.

In *Warsoldier*, 418 F.3d at 997 (9th Cir. 2005), for example, a Native American inmate challenged a prison grooming policy that required him to cut his hair. The California DOC argued that short hair furthered security by facilitating "quick and accurate identification of inmates,"

preventing inmates from "hid[ing] contraband or weapons in their hair," eliminating "a method by which inmates may signal a gang affiliation," and enhancing "identification of inmates . . . who have escaped." *Id.*

The Ninth Circuit held that the DOC had failed to satisfy strict scrutiny, in large part because "[p]risons run by the federal government, Oregon, Colorado, and Nevada all meet the same penological goals without such a policy." *Id.* at 999. As the Ninth Circuit explained: "Surely these other state and federal prison systems have the same compelling interest in maintaining prison security, ensuring public safety, and protecting inmate health as [DOC]. Nevertheless, [DOC] offers no explanation why these prison systems are able to meet their indistinguishable interests without infringing on their inmates' right to freely exercise their religious beliefs." *Id.* at 1000.

The same is true here. Indeed, it is not just three states and the federal government that provide a kosher diet, but ***thirty-five*** states and the federal government. *Every* other large prison system in the country provides a kosher diet—including California, Texas, and New York. And *every* federal prison in Florida provides a kosher diet. Florida has not even attempted to explain why it is uniquely incapable of accommoda-

tion. This means DOC cannot satisfy strict scrutiny. *Id.* at 1000; *see also Spratt*, 482 F.3d at 42 (DOC failed to satisfy strict scrutiny "in the absence of any explanation by [DOC] of significant differences between [its prison] and a federal prison that would render the federal policy unworkable"); *Washington*, 497 F.3d at 285 (3d Cir. 2007) (DOC failed strict scrutiny where "prison authorities at [DOC's] other institutions" did not impose the same restriction); *Shakur*, 514 F.3d at 890-91 (denial of religious diet failed strict scrutiny where the prisoner "points to a prison in Washington State that apparently serves a Halal meat diet to Muslim inmates").

D. DOC cannot satisfy strict scrutiny when it provides special therapeutic diets to a wide variety of inmates.

DOC also cannot demonstrate that the denial of a kosher diet satisfies strict scrutiny when it already provides "therapeutic diets" without compromising its alleged interests. As noted above, DOC provides a wide variety of therapeutic diets: high-calorie diets, low-calorie diets, clear liquid diets, cold liquid diets, full liquid diets, pureed diets, mechanical dental diets, finger-food diets, low residue diets, fat intolerance diets, dialysis diets, pre-dialysis diets, and others. Each diet must be

specially planned by a dietitian, Fla. Admin. Code 33-204.002(2), and most must be prepared and served separately from the regular diet.

This represents a significant logistical challenge, consuming a large amount of DOC administrative and financial resources. Indeed, inmates receiving therapeutic diets typically far outnumber inmates receiving religious diets. In 2010, for example, the Connecticut DOC served 92,024 therapeutic diets compared with only 2,500 religious diets. Connecticut Office of Legislative Research, Research Report 2010-R-0502, *Food Service in Prisons* (2010), http://www.cga.ct.gov/2010/rpt/2010-R-0502.htm.

Therapeutic diets also present the same supposed "security" risks as a kosher diet. Because they are specially designed and often provide more or better food than the regular diet, there is a risk that "a special diet would be seen by the rest of the inmates as preferential treatment." RE 98. Yet DOC does not even try to explain why these risks are acceptable for therapeutic diets but not kosher diets.

This is fatal to its strict scrutiny defense, since prison systems cannot treat religious needs as inferior to analogous secular needs. In *Couch*, 679 F.3d at 204, for example, the Virginia DOC permitted in-

mates to grow a beard for medical reasons, but not for religious reasons. The Fourth Circuit ruled in favor of the inmate, emphasizing that DOC's affidavits "fail[ed] to explain how the prison is able to deal with the beards of medically exempt inmates but could not similarly accommodate religious exemptions." *Id.* Similarly, in *Sossamon* v. *Lone Star State of Texas*, 560 F.3d 316, 334 (5th Cir. 2009), Texas permitted groups of inmates to use a chapel for marriage training sessions, sex education, and graduation parties, but not for group worship. The Fifth Circuit ruled in favor of the inmate, noting that Texas failed to explain why "a worship service presents significantly more danger than a sex-ed class." *Id.*; *see also Washington*, 497 F.3d at 283-84 (DOC failed strict scrutiny where it permitted inmates to possess additional educational books, but not additional religious books).

This Court has applied the same analysis to RLUIPA claims in the land-use context. In *Covenant Christian Ministries, Inc.* v. *City of Marietta, Ga.*, 654 F.3d 1231, 1246 (11th Cir. 2011), a city permitted "recreation centers, parks, and playgrounds" in a residential zone, but not churches. It claimed that the ban on churches was necessary to further its compelling interest in "preserving the residential character of the

neighborhoods." *Id.* But this Court disagreed, holding that the city could not satisfy strict scrutiny when it permitted "analogous nonreligious conduct" in the same zone. *Id.*; *see also Konikov* v. *Orange County*, 410 F.3d 1317, 1329 (11th Cir. 2005) (county failed strict scrutiny because it "appl[ied] different standards for religious gatherings and nonreligious gatherings"). The same is true here. By failing to explain why it provides therapeutic diets but not religious diets, DOC fails strict scrutiny.

E. DOC cannot satisfy strict scrutiny when it already provides a kosher diet to select inmates.

Finally, DOC cannot satisfy strict scrutiny when it is *already* providing a kosher diet to inmates within its own prison system. As Rich noted below, DOC established a new kosher dietary program in 2010 for select inmates at one of its units outside Miami. RE 157; Runyan 2010 Article. Although that program continues today, DOC failed to disclose its existence to the district court, and failed to offer any evidence that the program has harmed its alleged interests in cost or security.

This, too, is fatal to DOC's strict scrutiny defense. In *Spratt*, the Rhode Island DOC prohibited an inmate from preaching, even though he had been doing so for several years without incident. 482 F.3d at 40. The First Circuit rejected the DOC's alleged security concerns: "Spratt's

seven-year track record as a preacher . . . casts doubt on the strength of the link between his activities and institutional security." *Id.* Similarly, in *Warsoldier*, the California DOC prohibited a Native American inmate from having long hair, even though it permitted long hair in its women's prisons. 418 F.3d at 1000. The Ninth Circuit held that DOC's "fail[ure] to explain why its women's prisons do not adhere to an equally strict grooming policy . . . suggests that there is no particular health or security concern justifying the policy." *Id.*; *see also Koger*, 523 F.3d at 800 (DOC could not deny a religious diet where it "already served two diets that would have satisfied his request").

The same is true here. DOC has made no attempt to explain why it can provide a kosher diet to inmates at the South Florida Reception Center, but not to Rich.

F. DOC cannot satisfy strict scrutiny when the vast majority of courts require prisons to provide religious diets.

DOC may attempt to argue that the denial of a kosher diet is permitted under this Court's unpublished, *per curiam* opinions in *Muhammad* v. *Sapp*, 388 Fed. App'x. 892 (11th Cir. 2010) and *Linehan* v. *Crosby*, 346 Fed. App'x. 471 (11th Cir. 2009), or the Fifth Circuit's decision in *Baranowski*, 486 F.3d 112. In each case, the Court affirmed summary

judgment against a *pro se* inmate's religious dietary claim on grounds of cost or security.

But these cases are distinguishable. All involved *pro se* inmates who offered no evidence at the summary judgment stage. *E.g.*, *Baranowski*, 486 F.3d at 125 (evidence was "uncontroverted"). All were limited, as *Baranowski* said, to "the record before us." *Id.* None included evidence that thirty-five states and the federal government were already providing a kosher diet; none included evidence on cost or security in other states; none included evidence that the state was already providing special medical diets to other inmates; and none included evidence that the state was already providing a kosher diet to select inmates within the state.

Moreover, the factual basis for *Baranowski*, which was followed by *Muhammad* and *Linehan*, has been fatally undermined. Although *Baranowski* said that cost and security concerns prevented Texas from providing a kosher diet, Texas actually established a kosher kitchen in May 2007—*the same month* that *Baranowski* was decided. *Moussazadeh*, 2009 WL 819497, at *10 (dismissing kosher dietary claim as moot because Texas "transferr[ed] [the inmate] to the Stringfellow

Unit, where a kosher kitchen has been established"). Since then, Texas has continued to provide a kosher diet without cost or security problems. Moussazadeh Dkt. 198, TDCJ Mot. for Summ. J. at 34 (kosher kitchen established "without an excessive amount of cost").

More importantly, *Baranowski* is an outlier. It contradicts more than a dozen decisions—including those from the Second, Seventh, Eighth, Ninth, and Tenth Circuits—that a denial of a religious diet violates the First Amendment or RLUIPA.[17] Each decision included a ruling *on the*

---

[17] *See, e.g.*:

(1) *Koger*, 523 F.3d at 801 (7th Cir. 2008) (non-meat);

(2) *Beerheide*, 286 F.3d at 1192 (10th Cir. 2002) (kosher);

(3) *Love* v. *McCown*, 38 Fed. App'x. 355, 356 (8th Cir. 2002) (kosher);

(4) *Love* v. *Reed*, 216 F.3d 682, 691 (8th Cir. 2000) (Sabbath meal);

(5) *Ashelman* v. *Wawrzaszek*, 111 F.3d 674, 678 (9th Cir. 1997) (kosher);

(6) *Kahane*, 527 F.2d at 496 (2d Cir. 1975) (kosher);

(7) *Willis*, 753 F. Supp. 2d at 778 (kosher);

(8) *Hudson* v. *Dennehy*, 538 F. Supp. 2d 400, 411 (D. Mass. 2008) (halal);

(9) *Toler*, 2008 WL 926533, at *5 (kosher);

(10) *Buchanan* v. *Burbury*, 2006 WL 2010773, at *8 (N.D. Ohio 2006) (kosher);

(11) *Caruso* v. *Zenon*, 2005 WL 5957978, at *14 (D. Colo. 2005) (halal);

(12) *Thompson* v. *Vilsack*, 328 F. Supp. 2d 974, 980 (S.D. Iowa 2004) (kosher);

merits that the prison had to provide a religious diet—not just a denial of a prison system's motion for summary judgment. Many more cases have rejected a prison system's motion for summary judgment. *See* Derek Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 Harv. J.L. & Pub. Pol'y 501, 558-59 (2005) (collecting cases). Indeed, even the JDA Report concluded that, if DOC denied a kosher diet, "it is improbable that the department can satisfy a court's inquiry into whether the department is furthering a compelling interest, let alone that denying inmates' religious accommodation is the least restrictive means available." JDA Report at 27. Thus, there is no question what the great weight of authority requires: It requires a kosher diet.

III. DOC cannot prove that the denial of a kosher diet is the least restrictive means of furthering its alleged interests.

Even assuming that the denial of a kosher diet furthered a compelling interest in controlling cost or maintaining security, DOC also can-

---

(13) *Agrawal*, 2004 WL 1977581, at *10 (no meat or eggs);

(14) *Madison* v. *Riter*, 240 F. Supp. 2d 566, 569 n.2 (W.D. Va. 2003) (kosher), *overruled on other grounds*, 355 F.3d 310 (4th Cir. 2003);

(15) *Prushinowski* v. *Hambrick*, 570 F. Supp. 863, 869 (E.D.N.C. 1983) (kosher).

not prove that the denial of a kosher diet is "the least restrictive means" of furthering those interests. 42 U.S.C. § 2000cc-1(a)(2). This is a separate and independent requirement of strict scrutiny. In fact, many cases have held that a regulation failed the least restrictive means test even when it furthered a compelling governmental interest. *See, e.g.*, *Couch*, 679 F.3d 197; *Warsoldier*, 418 F.3d at 998-99; *Sossamon*, 560 F.3d at 334.

Under the least restrictive means test, it is not enough to simply "assert" that there are no feasible alternatives. *O'Bryan* v. *Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003). The government must demonstrate "that it has *actually considered* and rejected the efficacy of less restrictive measures *before adopting the challenged practice*." *Couch*, 679 F.3d at 204 (quotation omitted) (emphasis added); *Washington*, 497 F.3d at 284 (same); *Spratt*, 482 F.3d at 41 (same).

Here, there are at least three less restrictive alternatives to the denial of kosher diet:

(1) DOC can offer prepackaged kosher meals supplemented by kosher items from the regular menu;

(2) DOC can utilize separate kitchens to prepare kosher meals; or

(3) DOC can limit the kosher diet to sincere inmates;

Any one of these alternatives would permit DOC to provide a kosher diet while satisfying its allegedly compelling interests. But DOC has failed to demonstrate that it adequately considered or had adequate grounds for rejecting them.

A. DOC can offer prepackaged kosher meals supplemented by naturally kosher items from the regular menu.

The vast majority of states and the federal government provide a kosher diet via prepackaged meals—typically supplementing those meals with naturally kosher foods from the regular prison menu. *See* Statement of Facts III.A, *supra*. In fact, this is precisely what the JDA Study Group recommended: "replacing the kosher meals prepared in the JDA kitchens with purchased pre-packaged meals." JDA Report at 2. This is also how DOC currently provides a kosher diet to select inmates at the South Florida Reception Center—where the diet consists of "at least one hot pre-packaged meal, along with cold fruits, vegetables, cereal and other shelf-stable items to round out the daily diet." Runyan 2010 Article.

This alternative has several obvious benefits. First, it "would simplify the cooking process," JDA Report at Appendix C, greatly reducing the risk that kosher food will be contaminated by non-kosher food. Second,

it reduces the need for rabbinic supervision. Third, it ensures that a kosher diet is available at all prison units, thus reducing the alleged security risks associated with inmates transferring to new units. The only potential drawback, mentioned by Fuhrman, is that prepackaged meals might be more costly. RE 93-95. But as explained above, cost, by itself, is not a compelling governmental interest. And dozens of states have utilized prepackaged kosher meals while remaining within their budgets. Thus, DOC has no legitimate basis for dismissing this alternative.

B. DOC can utilize separate kitchens to prepare kosher meals.

Second, DOC has not explained why it cannot provide a kosher diet via separate kosher kitchens. As explained in the JDA Report (at 11), DOC has established kosher-ready kitchens in seven different institutions. These kitchens are "separated from the general kitchen by a physical barrier," have a separate area for food preparation and cleaning, and could easily be operated as a kosher kitchen with appropriate rabbinic supervision. *Id.* at 11-12.

Several other states have adopted this approach, including Texas, New York, Michigan, and Wyoming. It reduces costs; it is feasible; and

DOC has done it before. But DOC has offered no valid basis for rejecting this option.

C. DOC can limit participation in the kosher diet to sincere inmates.

Third, DOC can do a better job of limiting participation in the kosher diet to sincere inmates. According to prison staff who contributed to the JDA Report, the main problem with the JDA Program was that "insincere inmates" were allegedly abusing the program. JDA Report at 22. But insincere inmates are a potential problem with almost every religious accommodation—including the kosher diets provided by thirty-five states and the federal government. The solution is not to punish sincere inmates because some inmates are cheaters, but to use other states' best practices to distinguish the two.

As explained above, there are a variety of ways to limit cheating:

- screening inmates before they start a kosher diet;
- making the kosher diet no more desirable than other diets;
- restricting switching; and
- removing inmates from the diet for abusing it.

Other states have successfully used these methods for many years. In fact, the JDA Study Group specifically recommended partnering with

outside Jewish authorities to help determine which inmates are eligible to participate. *Id.* at 2. But DOC rejected this recommendation without explanation. Indeed, DOC has not even attempted to explain why thirty-five states and the federal government can control cheating, but Florida cannot.

IV. The district court erred by denying Rich's request for additional discovery.

The district court also erred by denying Rich's request for additional discovery by means of a handwritten 8-page motion entitled "Plaintiff's Motion to Extend the Discovery Cut-Off Date." [Dkt. 46]. Instead of denying Rich's motion the very next day, [Dkt. 47], the magistrate judge should have given him more time to engage in discovery. Under Rule 56(d), this failure to provide Rich additional discovery constituted an abuse of discretion.

A. Rich's motion to extend the discovery cut-off was a Rule 56(d) motion.

It is well-established that "*[p]ro se* pleadings are held to a less stringent standard than pleadings drafted by attorneys and will, therefore, be liberally construed." *Tannenbaum* v. *United States*, 148 F.3d 1262, 1263 (11th Cir. 1998). Under this standard, Rich's motion to extend the

discovery cut-off date should have been construed as a Rule 56(d) motion.

Rule 56(d) provides that:

> If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
>
> (1) defer considering the motion or deny it;
>
> (2) allow time to obtain affidavits or declarations or to take discovery; or
>
> (3) issue any other appropriate order.

Fed. R. Civ. P. 56(d). Prior to the 2010 Rule amendments, Rule 56(d) was Rule 56(f). However, the purpose of the Rule remains the same: It allows a party who needs additional discovery to "seek an order deferring the time to respond to the summary-judgment motion." Fed. R. Civ. P. 56, cmts. to 2010 Amendments.

The timing of Rich's motion shows that it was an attempt to obtain more discovery. Rich's motion was mailed from the prison on October 25, 2011, a day before the original discovery cut-off date of October 26, 2011. RE 114. As stated in the motion, Rich believed that he had until November 19, 2011 to file his response to Defendants' summary judgment motion. RE 116. He also stated in his motion that it had become

"onerous" to conduct discovery and respond to the summary judgment motion at the same time. RE 118. Thus the timing of the motion indicates that it was an attempt to extend the discovery cut-off from the original date and therefore a Rule 56(d) motion.

The timing of the motion is buttressed by two other facts. First, Rich stated that he was "preparing discovery filing," *id.*, and was treating that as different "procedural considerations" than the opposition to Defendants' summary judgment motion. RE 117. Second, Rich in fact conducted such discovery as he could over the course of the following month, as indicated in the exhibits he attached to his opposition to Defendants' summary judgment motion. RE 157-65. Although the month deadline that the magistrate imposed did not give Rich enough time both to draft the opposition and gather evidence, especially under the constraints he operated under, he still made an effort to obtain outside discovery.

It would be no response to argue that the motion was not a Rule 56(d) motion because Rich did not support his handwritten motion with an affidavit. As this Court has explained, "the opposing party need not file an affidavit . . . in order to invoke the protection of that rule," in

part because "the interests of justice sometimes require postponement in ruling on a summary judgment motion, although the technical requirements of Rule 56(f) have not been met." *Fernandez* v. *Bankers Nat. Life Ins. Co.*, 906 F.2d 559, 570 (11th Cir. 1990). This is particularly true in the case of a *pro se* prisoner like Rich.

B. The district court abused its discretion in denying the Rule 56(d) motion.

This Court reviews denial of a Rule 56(d) motion for abuse of discretion. *Fla. Power & Light Co.* v. *Allis Chalmers Corp.*, 893 F.2d 1313, 1315 (11th Cir. 1990). Under that standard, a district court abuses its discretion by making a clear error of judgment or applying an incorrect legal standard. *Josendis* v. *Wall to Wall Residence Repairs, Inc.*, 662 F.3d 1292, 1307 (11th Cir. 2011). Here, the district court did both.

First, the magistrate judge simply failed to recognize that Rich had made a Rule 56(d) motion, stating that Rich's motion "appears to be a request for an extension of time to respond to Defendants' motions for summary judgment." RE 122. Yet Rich's motion was styled as a request for an extension of the "discovery cut-off date," RE 114, not an extension of time to respond to the summary judgment motion. Its timing indicated that it was meant to obtain an extension of the discovery cut-off, not

the time to respond to Defendants' summary judgment motion. And Rich stated in his motion that he needed time to obtain additional discovery. RE 118. The magistrate judge therefore applied the wrong legal standard because he failed to recognize the relief that Rich sought.

The ruling was also a clear error of judgment. The magistrate rejected Rich's motion out of hand, denying it only one day later, without weighing the impact that denying a *pro se* plaintiff additional discovery would have on his ability to pursue his case. Instead the magistrate judge seemed to be "processing" the case without giving the plaintiff his due; this was an error in judgment. *See, e.g.*, *Hammer* v. *Ashcroft*, 512 F.3d 961, 971 (7th Cir. 2008) (vacated on other grounds) ("nothing in the court's order denying the continuance suggests that it considered the impact that the defendants' premature summary judgment motion had on [the *pro se* plaintiff's] ability to obtain the discovery necessary to defend against the motion").

The failure to provide additional discovery was prejudicial to Rich. Had the district court permitted discovery, Rich would have been able to advance much relevant evidence, such as data on the cost and security effects of kosher diets in other states, of Florida's JDA Program, of

DOC's therapeutic diets, and of DOC's current kosher diet. He also would have produced a detailed affidavit from an expert in prison security explaining why providing a kosher diet does not threaten security. For an example of such an affidavit, *see* Decl. of George Sullivan, *supra* note 16.

Due to this prejudice and the magistrate's abuse of discretion, this Court should reverse the district court's denial of the 56(d) motion.[18]

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's decision.

[18] Alternatively, this Court also has "inherent equitable power to allow supplementation of the appellate record if it is in the interests of justice." *CSX Transp., Inc.* v. *City of Garden City*, 235 F.3d 1325, 1330 (11th Cir. 2000). In exercising this power, "[a] primary factor which [the Court] consider[s] . . . is whether acceptance of the proffered material into the record would establish beyond any doubt the proper resolution of the pending issues." *Id.* Here, allowing Rich to supplement the record would help establish beyond any doubt that DOC cannot satisfy strict scrutiny. Accordingly, if the Court does not remand for additional discovery, Rich hereby moves the Court in the alternative to supplement the record.

Respectfully submitted,

s/ Luke Goodrich

Luke W. Goodrich
Eric C. Rassbach
THE BECKET FUND FOR RELIGIOUS LIBERTY
3000 K St., NW, Suite 220
Washington, DC 20007
T (202) 955-0095
F (202) 955-0090

Counsel for Bruce Rich

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because it contains 13,971 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 11th Cir. R. 32-4, as counted using the word-count function on Microsoft Word 2007 software. I further certify that the brief complies with the typeface and typestyle requirements of Fed. R. App. P. 32(a)(5), (a)(6), because it has been prepared using 14-point Century Schoolbook.

CERTIFICATE OF SERVICE

I hereby certify that, on August 1, 2012, I filed the foregoing Plaintiff-Appellant's Opening Brief with this Court, by causing a copy to be electronically uploaded and by dispatching the original and six paper copies to be delivered via Federal Express within three days. I further certify that I caused the brief to be served on August 1, 2012, upon the following counsel by electronic mail and by hard-copy via Federal Express:

Joy A. Stubbs
Assistant Attorney General
PL-01 The Capitol
Tallahassee, Florida 32399-1050
(850) 414-3300
joy.stubbs@myfloridalegal.com

August 1, 2012

s/ Luke Goodrich

Luke W. Goodrich
Eric C. Rassbach
THE BECKET FUND FOR RELIGIOUS LIBERTY
3000 K St., NW, Suite 220
Washington, DC 20007
T (202) 955-0095
F (202) 955-0090

Counsel for Bruce Rich

Addendum A

STUDY GROUP ON RELIGIOUS DIETARY ACCOMMODATION IN FLORIDA'S STATE PRISON SYSTEM

Professor Marc Gertz
Pastor Don Greulich
Imam Rashad Mujahid
Rabbi Jack Romberg
Franchetta Barber
Kathleen Fuhrman
Celeste Kemp

Sharon Nicholson
Alex Taylor
Gary Templeton
Charlie Terrell
Albert Thigpen
James Upchurch
C.J. Weinman

Final Report
With
Findings and Recommendations

Presented to James R. McDonough
Secretary of the Florida Department of Corrections
July 26, 2007

TABLE OF CONTENTS

STUDY GROUP ON RELIGIOUS DIETARY ACCOMMODATION IN FLORIDA'S STATE PRISON SYSTEM

Professor Marc Gertz
Pastor Don Greulich
Imam Rashad Mujahid
Rabbi Jack Romberg
Fran Barber
Kathy Fuhrman
Celeste Kemp

Sharon Nicholson
Alex Taylor
Gary Templeton
Charlie Terrell
Albert Thigpen
James Upchurch
C.J. Weinman

July 26, 2007

INTRODUCTION

Secretary McDonough announced the formation of the Religious Dietary Study Group (Study Group) on April 26, 2007.[1] In conjunction with the formation of the Study Group, Secretary McDonough placed a hold on inmate participation in the Jewish Dietary Accommodation Program (JDA Program) at participation levels as of that date, permitting no new enrollment until the Study Group completed its work. The Study Group was charged with conducting a review of religious dietary meal requirements:

- To conduct an analysis of the requirements of the religious dietary laws of the major faith groups represented in the Department of Corrections' inmate population which have dietary requirements as part of the tenets of the faith.

- To review and analyze the impact of an additional influx of participants to the religious dietary accommodation program and how the department may be able in the future to accommodate the religious dietary requirements of various faiths.

- To conduct an analysis of religious meal accommodations within the parameters of an institutional prison setting in federal, state, and private prison systems.

- To review the religious meal programs currently provided by the Department of Corrections pursuant to Florida Administrative Rules and pursuant to the Jewish Dietary Accommodations Procedure Number 503.005, reviewing, among other things, data in regard to food purchase and preparation, physical plant requirements, security and classification issues, administrative matters, utilization and participation, and cost.

[1] See Appendix A: Public Announcement and Purpose Statement

RECOMMENDATIONS

Based on the findings presented and discussed by the Religious Dietary Study Group during the course of its meetings, as set forth in this report, the following are the Study Group's recommendations to Secretary McDonough.

- Eliminate all pork and pork products from the Department of Corrections' food service menus.

- Retain a kosher dietary program, but limit the participants to those inmates who have been expertly appraised or vetted by a rabbi as eligible to participate.

- Eliminate the JDA Program kitchens currently used if vetting of inmates who claim to be Jewish, as recommended above, significantly reduces the officially recognized Jewish inmate population, replacing the kosher meals prepared in the JDA kitchens with purchased pre-packaged meals.

- If an inmate misses ten percent or more of the kosher meals purchased or prepared for him/her in the course of one month, that inmate be removed from the kosher dietary program.

Respectfully Submitted,

The Religious Dietary Study Group

MEETINGS

The Study Group first convened on April 26, 2007, and met subsequently on May 17, 2007, and June 27, 2007. During these meetings, information was presented and reports were heard and discussed.

April 26, 2007

The Study Group members heard information relating to the JDA Program presented by department staff and information presented by members of the Study Group representing various religious groups, specifically, Jewish, Muslim, and Seventh-day Adventist in response to JDA Program information.

The Study Group members discussed the information presented by department staff, specific institutional and program areas, and information presented by members of the Study Group representing various religious groups in regard to the basic dietary requirements of each religion.

May 17, 2007

Members of the Study Group representing various religions each addressed the following questions.

1. What are the basic dietary requirements of the faith they represent?
2. What are the requirements for a person to convert to that faith?
3. How do others recognize who is a member of that faith?

The Study Group members discussed existing meal plans, accommodations that can and cannot be made, and how possible new accommodations might be managed in an institutional setting.

The Study Group members heard a report and discussed a department-conducted survey of states, in regard to the manner in which religious dietary accommodations are addressed in federal and other state prison systems.

June 27, 2007

The Study Group heard and discussed a report presented by department as an update on a department-conducted survey of states in regard to how religious dietary accommodations are addressed in other state prison systems.

The Study Group heard and discussed the report of Rabbi Jack Romberg on his tour of the JDA kitchen and storage facilities and interview of inmates in charge of JDA food preparation at Washington Correctional Institute.

The Study Group discussed the procedures of a private prison contractor, The GEO Group, Inc., with regard to its implementation of religious dietary accommodations.

The Study Group generally discussed what adjustments, if any, should be made in religious dietary accommodations in view of all information gathered and presented how such accommodations may be managed in an institutional setting, and the financial impact of such accommodations.

The Study Group discussed various options and came to agreement regarding the recommendations which should be made to Secretary McDonough in this Final Report.

RELIGIOUS ACCOMMODATION MEAL PROGRAMS CURRENTLY PROVIDED BY THE DEPARTMENT

Food Service in the Department of Corrections is governed by Florida Administrative Code chapter 33-204,[2] which provides that the department shall supply inmates with three meals a day, at least two of which are hot meals,[3] and includes stipulations on the manner in which food must be served. Rule 33-503.001 requires the department to ensure that inmates who wish to observe religious dietary laws receive a diet sufficient to sustain them in good health without violating those dietary laws.

Rule 33-204.003(5) of the Florida Administrative Code establishes the standards and restrictions imposed on providing inmates with religious diets. In an effort to provide for inmates concerned with obeying the dietary laws of their respective religions,[4] the department permits such inmates to join one of two regular meal programs: either the alternate entrée program, or the vegan meal pattern.[5] Both of these meal options are available to all inmates. The JDA Program is a third option for inmates seeking to conform to religious dietary laws.

The alternate entrée program provides "meal options for inmates whose religions require a pork-free, lacto-ovo or lacto-vegetarian diet."[6] The alternate entrée is a non-meat entrée that consists of a protein such as peanut butter, soy, or beans.[7] In accordance with the alternative entrée program, the entrée served to the general population with a particular meal is substituted with the alternative non-meat entrée. The alternate entrée option is always available to all inmates upon request.

Another option, the vegan meal pattern, "provides meal options for the religious requirements of inmates who choose to avoid all animal products."[8] Chapter 33-204 requires that all vegetables be prepared without animal fat, meat, margarine, or butter in order to be better suited for religious and strict vegetarian diets.[9] The department is also required to prepare and identify food in such a way that those inmates who wish to abstain from eating pork products may do so.[10] This meal option is available to inmates on special request.

The JDA Program is a meal pattern specifically designed to meet the needs of inmates desiring to conform to religious dietary standards. The JDA Program, established in 2004 and set

---

[2] The authority of the department's establishment of a food service program was granted by the Florida Legislature through § 20.315 and § 944.09 Florida Statutes.
[3] Fla. Admin. Code R. 33-204.003(1).
[4] In accordance with Florida Administrative Code section 33-503, Chaplaincy Services, the department extends to all inmates the greatest amount of freedom and opportunity for pursuing individual religious beliefs that the constraints of safety and security will allow at the institutional level. Fla. Admin. Code R. 33-503.001(2)(a).
[5] Fla. Admin. Code R. 33-204.003(5).
[6] *Id.*
[7] Fla. Admin Code R. 33-204.001(3).
[8] *Id.*
[9] Fla. Admin. Code R. 33-204.003(3)(e).
[10] Fla. Admin. Code R. 33-503.001(11)(d).

forth in department procedure number 503.005, holds very specific standards for the preparation of food in accordance with Jewish dietary laws. The exacting standards for food preparation mandated by Jewish law meet or exceed the requirements established by many other faiths, including Al-Islam and Seventh-day Adventist. This meal option is available to inmates through a process of application and enrollment.

FINDINGS

The Jewish Dietary Accommodation (JDA) Program

The JDA Program is an additional provision for religious dietary accommodation. Established in April 2004, the procedures for the JDA Program are set forth in the department's Procedure Number 503.005. The procedure enumerates the specific steps an inmate must take to join the program as well as the requisite department action.

Eligibility

Currently inmates claiming to be Jewish, as indicated in the department's Offender Based Information System (OBIS) or as recorded in the inmate's religion file, are eligible to apply to the JDA Program.[11] Also eligible for the JDA Program are inmates espousing belief in a religion other than Judaism, such as Islam or Seventh-Day Adventist, where the tenets of the faith require them to conform to certain dietary restrictions and no department meal plan other than the one provided by the JDA Program will satisfy those restrictions. All applications to the JDA Program are reviewed on a case by case basis.

An inmate is *not* eligible to participate in the JDA Program if he or she has recently been transferred to a reception center or medical facility, has voluntarily withdrawn from the program in the previous six months, is a reception and orientation status inmate at a reception center,[12] has been denied enrollment privileges upon review within the last six months, or has been denied enrollment privileges upon return of an application due to the inmate's failure to provide enough information to determine sincere religious belief within the last sixty days.

Enrollment Process

Upon determination that an inmate is eligible to apply, the classification supervisor must arrange for two eligibility interviews; one interview is to be conducted jointly by the classification supervisor[13] and chaplain and the other is to be conducted by the security threat group coordinator.

During the interview conducted by the classification supervisor and the chaplain, the inmate must demonstrate, by a preponderance of the evidence, that the self-identified religious faith is sincerely held. In other words, the greater weight of evidence must weigh in favor of

---

[11] This is where an inmate has changed his/her faith preference to "Jewish" from another faith preference or a non-faith preference. Inmates who have recently changed their faith preference must wait sixty days before being considered eligible.

[12] Inmates at such reception centers are not eligible to participate in the JDA Program, but they may apply for the program. On transfer to an institution which participates in the JDA Program, inmates that are approved to participate in the JDA Program pursuant to an application filed from a reception and orientation center will be enrolled in the JDA Program.

[13] The classification supervisor may assign a designee that holds the status of a senior classification officer. The interview must occur within two working days of the inmate's application and must consist of the questions listed on the Jewish Dietary Accommodations Participation Agreement, form DC5-307. In addition, some limited fact-finding and clarification questions may be asked.

affirming the inmate's belief. An example of the preponderance of the evidence weighing *against* an inmate's profession of Jewish faith and need for dietary accommodation would be canteen records that demonstrate the inmate had purchased pork rinds on the day of the interview.

Personal, political, ideological, secular, moral, social, health, or other similar beliefs are not taken into account and will not satisfy the sincerely held belief standard. During the course of the interview, the chaplain is obliged to explain the requirements and conditions of the JDA Program to the inmate. Any failure to abide by the requirements and conditions of participation in the JDA program may result in the inmate's involuntary removal from the JDA Program and formal disciplinary action.

The security threat group coordinator interview is conducted in order to determine if an inmate applicant is a suspected member, confirmed member, or former member of a security threat group and whether the inmate's participation would be a threat to the program or program participants.

The chaplain and the security threat group coordinator each issue a recommendation concerning the inmate's participation in the JDA program to the classification supervisor. The classification supervisor gathers information regarding the applying inmate's eligibility, including the recommendations of the chaplain and the security threat group coordinator and an additional report created by the classification supervisor. The three recommendations the classification supervisor (or designee) and the chaplain are permitted to make under department procedure number 503.005 are that the inmate *is* recommended for the JDA Program, that the inmate is *not* recommended for participation, or that no recommendation either for or against the inmate's participation is possible for whatever reason.

The classification supervisor will provide the collected documentation to the warden of the institution for review. The warden of the institution housing the inmate will then review the application and all submitted documents in order to make a final recommendation on the inmate's enrollment status to the JDA review team.

The JDA review team is composed of the deputy assistant secretary for institutions for programs, the general counsel or designee, the chaplaincy services administrator or designee, and the JDA liaison and may also include officers and representatives from other department sections. The JDA review team has the authority to make the final determination regarding the inmate's status.

Once the JDA review team has made a final determination, the institution housing the inmate is notified. If the inmate is accepted into the JDA Program, preparations for his or her accommodation are made, including transferring the inmate if necessary.

Removal from the JDA Program

Inmates may voluntarily withdraw from the JDA Program or may be involuntarily terminated.

An inmate may voluntarily remove himself or herself from the JDA Program at any time after enrollment; to withdraw an inmate must simply submit an inmate request to the chaplain. The chaplain must verify by interview that the inmate wishes to withdraw from the JDA Program. Upon confirmation of the inmate's desire to withdraw and approval of the request by the warden, the removal will be documented.

Involuntary termination from the JDA Program may result from the inmate's breach of the stipulations set forth in the Jewish Dietary Accommodations Participation Agreement which is signed by the inmate upon enrollment. An inmate may be terminated from the JDA Program following review if the inmate purchases, possesses, or consumes food from the dining hall or canteen that is not approved under the JDA Program; if a JDA inmate engages in conduct that threatens security or discipline; or if an inmate creates a security problem by willfully committing certain acts; for example, throwing or misusing food, beverage, food utensils, human waste products or spitting at staff; the destruction of food trays or utensils; or any other violent acts that would place staff in jeopardy.

A minimum of six months must pass before an inmate may request to be reinstated into the JDA Program following removal for any reason. The inmate must make the request in writing and the request must be subsequently approved according to the application procedure in order for the individual to be reinstated into the JDA Program.

Inmate Grievances

In an effort to seek review of official determinations of eligibility, inmates denied enrollment privileges or terminated after enrollment may file a direct appeal to the Office of the Secretary through the inmate grievance process outlined in Florida Administrative Code rules 33-103.007 and 33-103.011. Inmates are also permitted to file grievances relating to the operation of the JDA Program at the institution level.

In the year 2006 there were 126 grievances filed in regard to the JDA Program and religious accommodation in general. Department records show that there were three major issues grieved: denial of an inmate's request for admission into the JDA Program; removal of an inmate from the JDA Program for violations of the JDA Agreement; and food preparation, handling, or service. These three topics encompass 60 per cent of the total number of grievances filed regarding the JDA Program and religious accommodation generally.

Other topics over which grievances have been filed include complaints that the proper condiments have not been served with meals, that the food was not served at the proper temperature, that there are no special holiday meals or programs for Jewish inmates, that there was delay in the completion of an inmate's transfer to a JDA facility, that specific food items are not included on the program menus, and that inmates are being discriminated against.

Inmate Participation Statistics

The Office of Classifications obtains JDA Program participation figures in the normal course of business. The JDA participation report for April 9, 2007, shows that there were 259 inmates participating in the program, but only 196 actually ate the JDA food prepared on that day, showing that 24 percent did not eat the JDA food even though they were enrolled in the program; the July 23, 2007, JDA participation report shows that 232 inmates were participating, but only 177 actually ate the food prepared, showing that 24 percent of JDA participants were not eating the JDA food. The number of inmates in the JDA program who are not eating the specially prepared JDA food has averaged about 21 percent during the months of April, May, June, and July 2007. [14]

As of April 26, 2007, approximately 95 inmates had applications pending review for approval or denial for participation in the program. In total, 784 inmates have participated in the JDA Program since its inception in 2004. There have been nearly 1,170 enrollment events since the program was launched. Enrollment events include admission into the program, involuntary removal, voluntary withdrawal, reassignment, death, or release from department custody.

Of all inmates enrolled, over 500 inmates have voluntarily withdrawn from the JDA Program since May 2004. Of that number, 489 remained in prison after withdrawal. Ninety of those individuals changed their religious preference to something other than Jewish following withdrawal. Currently, the majority of inmates participating in the program have registered their religious preference as Jewish; 13 of the total number of inmates participating in the JDA Program officially claim a religious preference for a religion other than Judaism.

Currently, department numbers show that nearly six percent of the inmates enrolled in the JDA Program have become gang members after entering the program.

Many of the inmates currently participating in the JDA Program are in close management. Currently there are 129 participants in close management, which is almost half of the total number of inmates enrolled in the JDA Program.

The department currently has the capacity to feed approximately 900 inmates through the JDA Program.

In July 2006, JDA Program procedures were modified to make it clear that the department will not refuse to admit a person into the JDA Program, whether or not they are Jewish, if they otherwise qualify. Under the new criteria, it is estimated that the total number of inmates who may qualify for the JDA Program is nearly 6,500, including Jewish, Muslim, and Seventh-day Adventist inmates. Five Muslim inmates have applied for and been admitted to the JDA Program prior to April 26, 2007.

[14] Appendix B: JDA Participation reports for April, May, June, and July 2007.

Implementation

Implementation of the JDA program requires a residential-type JDA kitchen and space for storage of foodstuffs that is separate from the food supply for the general inmate population. The JDA kitchen is a designated food preparation area, including a utensil cleaning area, established exclusively for the preparation of JDA Program meals. The JDA kitchen, operated by authorized and trained inmates only, is separated from the general kitchen by a physical barrier. All cookware used to prepare JDA meals is kept within the confines of the JDA kitchen to avoid contamination from non-kosher foodstuffs in the general kitchen.

The JDA kitchens are employed in order to provide inmates with kosher meals. Jewish dietary law is both strict and complicated and therefore special facilities are necessary to ensure compliance. Currently, thirteen institutions are equipped to accommodate the JDA Program; seven institutions maintain a JDA kitchen and six institutions provide JDA meals via satellite kitchens. Stringent requirements for food preparation, maintenance of the preparation areas and utensils, sanitation of food preparation areas, and service and transfer of prepared food are observed as dictated by department Procedure 503.005.

Report on the Tour of the Kosher Kitchen at Washington Correctional Institution

At the Study Group's June 27, 2007 meeting, Rabbi Romberg presented a report on the JDA kitchen at Washington Correctional institute. Rabbi Romberg drafted the report following a May 30, 2007, visit to the JDA kitchen at Washington CI. During the course of the inspection, an inmate who supervises the JDA kitchen explained the program and answered Rabbi Romberg's questions.

Rabbi Romberg reported that the kitchen is in a separate section of the institutional kitchen, cordoned off by a chain link fence style barrier. All of the cooking and cleaning facilities of the kitchen are completely separate from the general prison kitchen. The kitchen has a separate stove, oven, sink, and storage arrangements for pots and pans. There is also significant distance between the kosher kitchen and the general food preparation areas of the prison. Entrance to and exit from the kosher kitchen by individuals is severely restricted. There is a gate that is almost always locked and only those prisoners in charge of the kitchen and certain prison officials have a key. There are numerous pots and pans hanging from bars around the top of the kitchen, but all are inside the fenced-in area. The facility looked spotlessly clean.

The food is stored in either a master pantry, that is the same pantry where food for the general population is stored, or in the master refrigerator/freezer. Specific shelves and storage space in these areas are dedicated exclusively for the storage of food for the kosher kitchen. The food stored there is all wrapped in the original containers or packaging and the wrappings are not broken down until the food is inside the kosher kitchen area for preparation. The prisoner who conducted the members of the Study Group around the kosher kitchen was very aware of the need for separation of the kosher food, and demonstrated his ability to maintain the separation between the food for the kosher kitchen and the general population. Only those prisoners participating in the preparation of the kosher meals take food from the storage areas into the kosher kitchen.

Jewish dietary law forbids mixing dairy and meat. Most of the food prepared in the kosher kitchen is parve. Parve food is considered to be neutral – neither dairy nor meat. Parve foods may refer to any food that does not contain any meat or dairy products and, therefore, can be consumed freely with either meat or dairy. This includes all fruits and vegetables and foods derived exclusively from such sources, salt, and other non-organic foodstuffs. Fish is also considered parve and may be eaten directly before or after both meat and milk.

The only meat meal prepared in the kosher kitchen is chicken and is served only once a week. The only dairy meal prepared there is stroganoff. So the possibilities of mixing milk and meat are very limited. The stroganoff is prepared in one designated pot that is stored in a clearly separated manner from the rest of the pots and pans. The chicken arrives in prepackaged containers which are placed in the oven and heated. As a result, the chicken does not come into contact with the general utensils. The chicken is self-contained on serving plates that are disposed of after the meal is eaten.

Generally, there are several concerns which may arise in this context. The first concern in a facility of this nature is the possibility that food or utensils from outside the kosher kitchen area would be brought into the kosher kitchen, thus rendering the kitchen ceremonially unclean. Because of the distance from the general kitchen, the locked gate, and the relatively small number of prisoners working in the kitchen, each of whom demonstrated adequate caring and knowledge, it is highly unlikely that such mixing would occur unintentionally. Further, there is little possibility of mixing milk and meat, as most of what is served is parve and only one meat and one dairy meal are cooked per week. If the stroganoff pot were to be contaminated accidentally, it could be used instead in the general kitchen and be replaced in the kosher kitchen.

If the JDA kitchen were considered commercial or institutional, then the kashrut, or compliance with the Jewish dietary laws, would be in doubt as there is no rabbi on hand to certify and supervise in the JDA kitchen. The JDA kitchen, however, is treated as if it is part of the inmates' home and is, therefore, not subject to constant rabbinic supervision. Rabbi Romberg suggested that it would be helpful if rabbinic volunteers could make periodic visits to JDA Program kitchens to help answer inmates' questions and maintain kashrut.

Concern was expressed to Rabbi Romberg by the inmates in charge of the JDA Program kitchen that many of the meals they prepare go unclaimed. There are many more inmates enrolled in the JDA Program than actually claim the meals.

Cost of Implementation

There is additional expense involved with maintaining the JDA Program when compared to providing meals for the general population. The extra cost incurred per inmate participating in the JDA Program is estimated to average $16.80 per month for disposable containers and insulated carriers; for 250 JDA inmates, this is $50,000 a year. The estimated cost for transportation and staffing required to transport food from satellite kitchens to the six institutions that currently provide the JDA Program but are not equipped with JDA kitchens is approximately $8,000 per

month, for an estimated total of $96,000 per year. At a participation rate of approximately 250 inmates, the cost of maintaining the JDA Program for one year is approximately $146,000. The approximate cost of the JDA Program to serve 250 participants is summarized as follows:

- Cost for disposable containers and carriers @ $16.80 per month……. $50,000 per year
- Cost for transporting food from satellite kitchens @ $8,000 per month…$96,000 per year

Annual cost of JDA program for an average of 250 participants $146,000 per year

In an effort to compare the cost of maintaining the JDA Program with alternative methods of satisfying inmates' religious dietary needs, the Study Group examined the prices charged by private corporations providing pre-packaged kosher meals for institutional use. The Study Group found that, generally, private corporations provide two types of meal plans that consist of either two or three frozen meals a day. The specific cost and number of calories provided in each meal varies by company, but all require supplementation in that the meals would not fulfill the number of calories that must be provided per inmate per day.

The prices and products offered by vendors vary greatly. [15]

- One vendor provides10 types of 10-ounce shelf-stable meals which contain 400 calories each at a cost of $2.75 per meal.
- A second vendor offers a selection of more than 25 frozen meals that weigh between 12 and 16 ounces and contain 500 calories each for $4.00 a meal.
- A third vendor will supply a variety of 16-ounce frozen meals at a cost of $4.79 for each meal which contain 400 to 500 calories each.
- A fourth vendor proposes a meal plan that consists of 8 types of frozen entrees that contain between 300 and 400 calories each. The meals of the fourth vendor weigh between 12 and 13 ounces and cost between $4.50 and $6.00 each.

Pre-packaged meals provide an average of between four hundred and four hundred fifty calories per meal. Two pre-packaged meals provide less than one half of the number of calories served daily to the general inmate population. It is necessary, therefore, to heavily supplement the meals with additional kosher food items. Kosher meals may be supplemented by the department with items such as eggs, fruits and vegetables, cereal, juice, peanut butter and similar items. These food items would still need to be prepared and stored separately from food items for the general population according to kosher standards. Not including the cost of necessary supplemental food items, special equipment, or disposable serving items, the average cost per meal under these plans ranges from approximately $4.00 to $4.50.

[15] See Appendix C: Cost Estimates from Vendors for Prepackaged Kosher Food Products.

Reports from Study Group Members Representing Judaism, Al-Islam, and Seventh-Day Adventists in Regard to Basic Dietary Requirements Under Various Religious Laws, Recognition of Converts, and Elements of Conversion.

Judaism

Individuals who intend to comply with Jewish dietary restrictions must only eat food that is kosher. Kosher foods are those that meet certain criteria of Jewish law. Invalidating characteristics may range from the presence of a mixture of meat and milk, or even the use of cooking utensils which had previously been used for non-kosher food.[16]

A Jew is someone born of a Jewish mother, or is someone who has converted to Judaism in a manner according to Jewish law. In 1983 the Union for Reform Judaism of North America adopted a measure that allows for limited patrilineal descent as well. The Child of a Jewish father and a no-Jewish mother can be considered Jewish if, and only if, that child is raised in a Jewish home and receives a Jewish education leading to Confirmation. Someone claiming a Jewish father but who has not received a Jewish education is not considered Jewish even by the Reform Movement.

According to Jewish law, there are three ritual components that must be observed in order for a conversion to Judaism to be valid. The first is appearance before a *beit din*. A *beit din* is a Jewish religious court consisting of three learned Jews, usually rabbis. Second, circumcision must be carried out. If a man has already been circumcised, he is to undergo a symbolic circumcision called a *hatafat dam brit*. Third, immersion in a *mikveh* is required in order for the conversion candidate to be purified. A *mikveh* is a specially constructed pool of water used for total immersion in a purification ceremony. In the case of a woman, only appearance before a *biet din* and emersion in a *mikveh* are required.

Under traditional Jewish law, failure to do any of these invalidates the conversion. There is absolutely no authority from any of the three main forms of modern Judaism (Orthodox, Conservative and Reform) that would allow an individual who simply declared himself or herself to be Jewish to be recognized as truly Jewish.

In addition to the ritual component of conversion, there is usually an educational component as well. The conversion candidate, under the tutelage of a rabbi, is required to study a full range of Jewish subjects including theology, rituals, holidays, history, life cycles, Hebrew, and prayer. The conversion candidate must demonstrate enough facility in these areas to satisfy the supervising rabbi.

Al-Islam

[16] Extensive dietary restrictions are found in Jewish religious texts, and many are included in the book of Leviticus.

Muslims are instructed to eat only that which is Halal or things which are lawful according to the Quran and the Sunnah of the Prophet Muhammad. The most basic dietary tenet of Muslims is not to eat pork or pork bi-products. [17]

The Quran also states that Muslims are permitted to eat the food of the People of the Book, both Jews and Christians.[18] The primary choice of a Muslim should be to eat Halal, but if Halal is not available to him or her, the rule is to eat what is *Tayyabatu*. Food which is *Tayyabatu* is food which is good and pure, or which is not offensive to good taste and has not been universally regarded as repugnant by cultured people. Imam Rashad Mujahid, a member of the Study Group, agreed that if there were no pork or pork products used in the department's food service, the Muslim dietary law would be satisfied.

A Muslim is someone whose behavior reflects certain fundamental beliefs and feels that certain actions must be taken during the course of the individual's life. Important among these beliefs and actions are that the individual accepts Allah as G_d and Muhammad as his last Prophet, that he or she fast the month of Ramadan, and that he or she pay the Zakat. The Zakat is an obligation on Muslims to pay 2.5% of their wealth to specified categories in society when their annual wealth exceeds a minimum level (nisab).

It is also important that the individual make the Hajj, a pilgrimage which occurs during the Islamic month of Dhu al-Hijjah in the city of Mecca, at least once during his or her lifetime if the individual is able to do so. A Muslim must express belief in the last revelation (the Quran), in the Books before the Quran (the Torah and the Bible), in all the Prophets of the Books, and in the angels, the hell fire, Satan, the judgment day, and paradise.

In order to convert to Al-Islam, an individual must make an open declaration of faith. This declaration, called the Shahadahtan, must be made without coercion and must be the informed decision of the individual. One translation of the Shahadahtan is, "I bear witness that there is no god, besides Allah, and that there Muhammad is the seal of Allah's messengers."

Seventh - day Adventist

The basic dietary requirements of Seventh-day Adventists stem from the belief that the bodies of believers are the dwelling place of the Holy Spirit. It is therefore considered imperative that the Biblical counsel for a healthy diet be followed. That diet includes fruits, vegetables, grains, and nuts. Kosher meats are a secondary diet choice; however, abstention from foods enumerated in the Old Testament of the Bible as unclean, such as pork, is essential. Pastor Don Greulich of the Seventh-day Adventist church and a member of Study Group agreed that the

[17] Department food services staff stated that during the four-week meal cycle pork currently appears twice, one is pork sausage and the other is pork roast. The smoked pork sausage could be replaced with a smoked turkey sausage, and the pork roast, which is expensive, could be replaced with any muscle meat, such as meat loaf which is much more popular. Meat loaf has a high participation rate and is preferred by the inmate population; whereas, pork roast has a low participation rate.
[18] The Quran 5:6.

alternate entrée meal pattern provided by the department would satisfy Seventh-day Adventist dietary law.

The foods considered unclean by Seventh-day Adventists are enumerated in the instruction of the Old Testament. As the first five books of the Old Testament of the Seventh - day Adventist Bible are the same books contained within the Torah of the Jews, and many of the dietary restrictions of the Jewish faith are found in the Torah, the dietary laws regarding what is unclean are very similar in the two religions.

A Seventh-day Adventist is someone who accepts as true the official teachings of the denomination which are expressed in the Twenty-Eight Fundamental Beliefs. Important among these beliefs are that salvation is found only in Jesus Christ, that the believer is saved by grace, through faith and will receive immortality on Resurrection Day, that the Ten Commandments of God must be kept, and that the "Seventh-day Sabbath" (Saturday) is the day set aside for the worship of God.

As a denomination, Seventh-day Adventists proclaim *Sola Scriptura* as the rule of faith. In other words, the entire Bible, consisting of the Old and New Testaments together, contains the imperative elements of the faith.

Conversion is effectuated through baptism by immersion and a declaration of faith which includes the proclamation that the individual loves God with all their heart, soul, and mind, and that the convert promises to keep all of God's commandments.

Problems with Administration of the Jewish Dietary Accommodation Program

Administration of the JDA Program has proven difficult for several reasons and many more dilemmas may present themselves as the program continues. Much of the strife that has arisen with the implementation of the JDA Program is a direct result of the limited number of locations in which the JDA Program is now put into practice. One technical problem reoccurs often because inmates entering the JDA Program are likely to require transfer to another institution. Only seven institutions out of a total of sixty-seven are outfitted with properly equipped separate kitchen facilities for preparation of kosher meals. Six additional facilities provide the JDA program for inmates, but use satellite kitchens to prepare the food. An inmate who wants to participate in the JDA Program who is housed in an institution not equipped to maintain the JDA Program must be transferred to one of the 13 institutions capable of providing the accommodation at the time of the inmate's admittance into the JDA Program.

There is a great deal of movement into and out of the JDA Program often necessitating transfers of inmates to institutions offering the JDA Program initially and then transfers back to the original institution when the inmate is removed from the program, either voluntarily or because of a program infraction. Because such transfers are necessary, inmates are able to exploit the JDA Program to achieve transfers to institutions which may not otherwise be authorized. Inmates appear to be manipulating the program, possibly to be transferred closer to family, to avoid supervision by particular correctional officers, or to create additional work for corrections personnel.

More importantly, the security interests that accompany inmate transfers are of great concern. There is some indication that gang members may be manipulating the transfer process to their advantage so that members of a particular gang may be housed in the same institution.

Close management inmates pose a special threat during transfer. Statistically, nearly half of all participants in the JDA Program are close management inmates and many must be transferred to facilities equipped with JDA kitchens after receiving permission to participate in the JDA Program. Unfortunately, the department is only equipped with a limited number of close management housing locations. In order to transfer a close management inmate into a new facility, it is highly likely that a close management inmate already housed at the receiving facility must be transferred away from that facility, thereby virtually doubling the number of necessary transfers.

There is also cause for concern regarding security of the administration of the JDA Program, in that program trays have been used to conceal contraband.

Additionally, there are many inmates who apply to the JDA Program; each application requires chaplains and classification staff to engage in the time-consuming process of reviewing applications and interviewing inmates to determine eligibility. Even the removal or withdrawal of an inmate from the JDA Program requires authorization and review. The amount of effort involved in maintenance of the JDA Program increases with each enrollment event. As such, maintenance of the JDA Program requires a heavy investment of resources from a purely administrative perspective.

Increasing the already substantial burden of administration of the JDA Program is the distinct possibility that the program, once opened again for enrollment, will be overwhelmed by increased participation. Currently, it is estimated that 6,500 inmates are eligible to participate in the JDA Program.

The JDA Program cannot support the number of eligible inmates because the JDA kitchens simply cannot accommodate such a large number of inmates at this time. Currently, the department's JDA kitchens are able to accommodate food preparation for an absolute maximum of 900 inmates.

The department's Institutional Support Service Office estimates that only 21 institutional kitchens could be renovated to serve additional number of JDA inmates. However, even after extensive renovation of institutional kitchens at a total estimated cost of nearly $900,000, the department would be able to accommodate only approximately 2,100 inmates, which is less than one third of the total number of eligible inmates. Extreme reconstruction of virtually all other institution kitchens at astronomical cost would be required in order to serve all eligible inmates.

Federal, State, and Private Religious Dietary Accommodation Programs

Federal Religious Dietary Accommodation

The Study Group contacted the United States Department of Justice, Federal Bureau of Prisons (Bureau) in order to determine the nature, if any, of religious dietary accommodation provided to inmates in the custody of the federal penal system. The Food Service Manual of the Bureau establishes meal preparation and service techniques to ensure uniformity throughout federal institutions.

The Bureau's Food Service Manual provides for the Religious Diet Program which gives inmates two dietary accommodation alternatives. The "no-flesh option" dictates that no meat from animals, fish, or birds will be served in any form. Any vegetables supplied to the general population through the main line which are normally prepared with meat or meat by products also have an alternate no-flesh option. The no-flesh option is available at all times to any inmate through the main line. This option is equivalent to the alternate entrée program provided by the department.

The second option, the "certified food component," is also called "common fare" in reference to the availability of this program to all religious groups. Essentially a kosher food program, the Bureau offers enrolled inmates a pre-packaged entrée which is heavily supplemented to furnish inmates with enough calories. The nationally approved menu, which may not be altered except on unavailability of specific fresh produce, is available to approved inmate participants at all institutions. The certified food component program asserts precise instructions for the use, maintenance, and storage of utensils in addition to those for food preparation and service. Federal institutions designate separate areas within the institutional kitchen for common fare food preparation and utensil storage.

Participation in the certified food component is restricted to approved inmates only. To determine eligibility, the institution chaplain verifies that an applying inmate holds a sincere religious conviction through an application and interview process. Inmates may voluntarily leave the program or be involuntarily removed from the program. The institution chaplain also determines if a violation of program rules should result in an inmate's removal from the program.

The Bureau provides annual ceremonial meals, accommodates inmates who are fasting in accordance with days of public fasting, allows inmates to observe Ramadan and Passover, and gives the chaplain of an institution the capacity to request special religious meal accommodation on behalf of inmates involved in particular religious ceremonies.

State Religious Dietary Accommodation

The Study Group conducted a survey of other state prison systems in order to gain perspective on the way in which Florida's religious dietary accommodation programs compare to

those of other states. A total of 41 states provided information upon which the following statistics are based.[19]

Thirty-eight out of forty-one states surveyed say that they provide some form of religious dietary accommodation. Only 22 out of 35 states offer an alternate entrée program. The alternate entrée programs in those states usually consist of a meatless choice with a substitution of peanut butter, boiled egg, or cheese as a protein. Fifteen out of thirty-three states offer a vegan meal and most offer a vegetarian diet. Twenty-five percent of the states offer a lacto-ovo alternative.

Eighteen out of thirty-three states serve no pork. The states that are pork free have been pork free for an average of 10 years.

Twenty-six out of thirty-two states offer a kosher menu while only five out of thirty-three states offer a Muslim or Halal meal, the majority of the responses were that vegetarian or kosher menus are considered an acceptable alternative. Eighteen out of forty-one states have been court mandated to provide religious meals.

Four out of thirty-five states have privatized their food service programs. The remaining 31 states are self operated.

Just two out of thirty-three states prepare religious meals in a separate kitchen. Eight states have separate areas within their kitchens to prepare religious meals. Seventeen out of thirty-one states supply pre-packaged meals for religious use, some once a day and others only on special holidays. A few states with small inmate populations utilize pre-packaged for every meal.

Eight out of thirty-four states allow individuals from the religious community to provide special food items on special holidays. The majority do not allow volunteers to provide food for inmates because of security and food borne disease concerns.

Private Prison Contractor Religious Dietary Accommodation

Information presented to the Study Group indicates that at least one private prison contractor attempts to implement the policies and practices of their clients. The states' programs dictate the nature of the contractor's programs from location to location. The contractor follows four general rules to facilitate implementation.

First, all menus are restricted to exclude the use of pork in order to accommodate most religious diets. Second, the contractor provides a vegetarian diet for members of those faiths that do not consume any meat products.

Third, kosher meals are provided for Jewish inmates because the mixing of meats and dairy products is strictly forbidden by the Jewish faith. The contractor provides breakfast and lunch using kosher food products and serves the frozen kosher entrée for the evening meal. Frozen

[19] See Appendix D: Matrix Showing Responses of States' Survey of Religious Dietary Accommodation.

meals are supplemented as necessary to provide sufficient calories. All kosher meals are served on Styrofoam trays.

Finally, the private contractor verifies that those inmates who request a kosher diet are truly in need of such accommodation. In order to do so, the contractor has partnered with the Aleph Institute. The Aleph Institute has employed its strict assessment criteria in vetting inmates who claim to be Jewish.

Opinions Submitted by Institutional Staff Regarding the JDA Program

The Study Group contacted classification supervisors and chaplains in an effort to gain information regarding their observations, opinions, and concerns arising from implementation of the JDA Program. The general sentiment is, simply stated, that the JDA Program is being abused to such an extent that it complicates day to day operation of the institutions.

Chaplains and classification supervisors are overwhelmed by the number of applications to the JDA Program. Each inmate who applies must go through an extensive interview and assessment process. The multi-step application process consumes a great deal of administrative time and effort.

This process is often frustrating for officials because, as prison officials indicate, inmates are often attempting to deceive their interviewers. To this end, during interviews which are usually conducted cell front, inmates are communicating amongst themselves what they believe to be the correct answers to interview questions, lying about their religious history, and feigning sincerity of belief.

Inmates are consistently being removed from the JDA Program due to clear violations of restrictions. Examples of violations include purchasing non-kosher food from the canteen, eating food made for the general population, and the like. The violations indicate a lack of genuine belief. When inmates are subsequently removed from the program, the classification supervisor and chaplain receive the additional burden of altering inmate files to reflect the changes.

In turn, the rejection of inmates' applications to the JDA Program or removal from the program due to infractions leads to an increase in the number of grievances filed. The proliferation of paperwork sometimes interferes with the ability of the classification supervisor and chaplain to carry out their other duties.

Beyond the irritation prison officials experience due to the overwhelming multiplication of work, they are also clearly discouraged by the abuse of the JDA Program. In their experience, insincere inmates are often applying for the JDA Program in an effort to get what they believe is better food or transfer to a better institution. The high turnover rate within the JDA Program and high rate of change of religious preferences indicates to officials that a comparatively small number of inmates actually utilize the program in order to comply with their religious beliefs.

Officials also indicate concern that inmates are consolidating the locations of gang members by abusing the JDA Program. In the opinions of those prison officials most closely associated with the JDA Program, in its current state the program benefits few inmates and is manipulated by many.

LEGAL OVERVIEW OF ISSUES ARISING FROM THE JDA PROGRAM AND RELIGIOUS DIETARY ACCOMMODATION

In addition to the administrative, security, and monetary hindrances involved in implementing the JDA Program, there are also several legal issues implicated by the realities of religious dietary accommodation management.

The First Amendment

The First Amendment of the United States Constitution dictates that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…."[20] This single phrase forms the original basis of Americans' right to freedom of religion and protects citizens from the creation of laws that might be established in an effort to encumber an individual's ability to engage in religious conduct.

Free Exercise Clause

In any case brought before a court about an individual's rights under the Free Exercise Clause,[21] the individual claiming his or her rights have been infringed upon must prove that the regulation at issue affects conduct that is "rooted in religious beliefs."[22] If the court determines that the conduct is fundamentally religious in nature and is affected by the regulation, the court will move on to examine the regulation in question. Ordinarily, laws that are found to specifically restrict or enhance an individual's ability to practice religion under the Free Exercise Clause are considered unconstitutional unless justified by a compelling government interest.[23]

When dealing with questions of prisoners' constitutional rights, however, the United States Supreme Court has lowered the standard against which prison regulations are measured. The actions and regulations of prison officials do not violate prisoners' constitutional rights, their Free Exercise rights in particular, if the actions and regulations are reasonably related to legitimate penological interests.[24] The United States Supreme Court determined that creating an exception for prison regulations was appropriate because of several factors, including the complicated nature of prison regulations, the absolute need to protect society from dangerous situations, and the expertise of prison officials.[25]

The U.S. Supreme Court established a four-part test for determining the reasonableness of government action in the prison context through a case called Turner v. Safely.[26] First, under the four-part test, the court ascertains whether there is a "valid, rational connection" between the

---

[20] U.S. CONST. amend. I.
[21] "Congress shall make no law respecting the establishment of religion or *the free exercise thereof*…"
[22] Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).
[23] Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).
[24] O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987).
[25] Turner v. Safley, 482 U.S. 78 (1987) (establishing a four factor test to determine whether prison regulations so violate prisoners' rights as to make the regulation unconstitutional).
[26] Turner v. Safely, 482 U.S. 78 (1987). See also Hakim v. Hicks, 223 F. 3d 1244 (11th Cir. 2000) (applying Turner, supra to First Amendment rights).

regulation in question and a legitimate governmental interest. The second relevant question asked is "whether there are alternative means of exercising the right that remain open" to the inmate. The third important consideration is "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." The final factor examined by the court in the four-part reasonableness determination is "the absence of ready alternatives."

An incredibly wide variety of claims have been brought throughout the United States by inmates claiming their First Amendment rights have been violated. One example of the application of these principles can be demonstrated by a scenario in which a prison regularly serves pork products, generally regarded by many religions as an unclean food, and provides no alternate meal plan. An inmate in this institution might claim that his right to exercise religious freedoms by abstaining from eating pork is being violated. In order to proceed with such a claim, the inmate must demonstrate that the rule actually impacts his ability to conduct himself in a manner consistent with deeply rooted religious beliefs. This provision eliminates frivolous lawsuits because it roots out moot claims. Under these circumstances the inmate would be precluded from winning at trial if he is an agnostic who does not subscribe to the belief that pork is unclean and consistently eats pork voluntarily.

If the inmate is able to convince the court that his right to free exercise of religion is actually being impeded, the court would then employ the four-part test. In this setting, first, the court would determine there is little to no logical connection between serving pork and furthering the goals of the correctional system, and that second, inmates do not have the opportunity to obtain food from alternative sources. Third, the court would probably find that preparing food other than pork or providing some alternative has little impact on the allocation of prison resources. In fact, the provision of an alternative entrée by the prison would likely be considered a ready alternative under the final factor.

The Establishment Clause

This aspect of the First Amendment[27] ensures the separation of church and state and prevents the government from enacting laws that aid one religion over another or over secular principles.[28] In Lemon v. Kurtzman, the U.S. Supreme Court explained that there are "three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'"[29] Lemon lays out a three-part test to determine whether a neutral law, a law that does not explicitly contradict the mandates of the First Amendment, violates the establishment clause.

Typically, in order to be considered constitutional, the law must have a secular purpose. In addition, the primary or principal effect of the law must neither advance nor inhibit religion. Finally, the law must not foster an excessive government entanglement.[30] Just as in the framework

[27] "Congress shall *make no law respecting the establishment of religion* or the free exercise thereof…"
[28] School Dist. v. Schempp, 374 U.S. 203 (1963).
[29] Lemon v. Kurtzman, 403 U.S. 602 (1971) at 612
[30] Lemon, 403 U.S. at 612-613.

of free exercise, however, the actions and regulations of prison officials are not held to the more stringent Lemon standard. Instead, the analysis the court applies is the Turner test.

An extreme example of a situation in which this type of constitutional challenge might be brought to bear is where an institution with an evangelical protestant warden established a policy with the stated purpose of reducing recidivism. The hypothetical regulation establishes that only evangelical protestant chaplains and volunteers could enter the institution to volunteer and that they could only visit inmates who claim to be protestant and have made a profession of protestant faith while in the institution in order to convert inmates to Protestantism. This state of affairs clearly violates the rights of inmates under the establishment clause and fails all four factors of the Turner test.

Any connection between precluding the practice of beliefs other than Protestantism and the legitimate government interest of reducing recidivism is tenuous at best. Second, if all avenues of contact are restricted, there is virtually no way in which an individual of a faith other than Protestantism may participate in religious services. In addition, to allow representatives of other faiths to enter the institution can have little adverse impact on guards or inmates, or on the allocation of resources. There are certainly alternate methods of reducing recidivism that are less intrusive than prohibiting non-protestant inmates from seeking religious guidance from volunteers so the policy fails the fourth Turner factor as well.

The Fourteenth Amendment (Equal Protection Clause)

Essentially, section one of the Fourteenth Amendment requires that all individuals similarly situated be treated by the government in a similar manner. In pertinent part, the Equal Protection Clause of the Fourteenth Amendment[31] reads,

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The primary accusation faced by the department at this time with regard to equal protection claims is that the department unfairly discriminates against Muslims by providing Jewish inmates with a kosher diet through the JDA Program, but providing no similar halal program expressly designed for Muslim inmates.

In order to prevail on this claim, an inmate would be required to show three things. First, he or she would be required to demonstrate that the department is purposefully engaging in discrimination. Second, a court must be convinced that the inmate is part of an identifiable class of inmates which is "similarly situated" in comparison with another identifiable class of inmates. Third, the inmate would need to illustrate that the two classes of inmates are treated differently.

---

[31] [31] U.S. CONST. amend. XIV.

In practical terms, if a Muslim inmate claims that his Equal Protection rights were being violated as in the above example, he is obliged to prove that the department intentionally provides for Jewish inmates and not Muslim inmates by showing, for example, that the department intended that Muslim inmates not receive dietary accommodations. He must establish that Muslim and Jewish inmates are similarly situated in that both groups require accommodation that may be established with a similar amount of department effort. He must also provide evidence that Muslims receive no dietary accommodation where Jewish inmates do. It could be argued that a Muslim inmate's religious diet is accommodated by the department by providing the alternate entrée or vegetarian or vegan diets which are free from all animal fats and are readily available. Thus, the department may show that the Muslim inmate is not similarly situated to a Jewish inmate.

If an inmate is successful in proving that his constitutional right to equal protection has been violated, the department may still escape liability under the four-part Turner v. Safley[32] test by demonstrating that the department is protecting a legitimate penological interest through the application of the restrictive regulation.

The plaintiff inmate in this example would not likely prevail on an equal protection claim. It is true that the JDA Program was designed specifically to meet Jewish dietary specifications; nevertheless, the dietary accommodations needed by inmates to conform to the dietary requirements called for under Al-Islam, and many other religions for that matter, are consistent with Jewish dietary laws. The department ensures that every inmate of all faiths has access to the JDA Program as long as he or she can demonstrate a sincere belief. A Muslim inmate may, therefore, be accommodated as readily as a Jewish inmate through the JDA Program.

The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA)

Section 3(a) of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA)[33] provides that, "No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution … even if the burden results from a rule of general applicability."[34] Applied solely in the institutional context, this law prohibits prison officials from severely curbing an inmate's ability to observe his or her religion through any regulation or action, whether or not the regulation or action explicitly restricts religious practices.

The only exception to this rule is where the government can prove that the burden on religious exercise is both "in furtherance of a compelling governmental interest" and "the least restrictive means of furthering that compelling governmental interest."[35]

---

[32] Turner v. Safely, 482 U.S. 78 (1987).
[33] 42 U.S.C. § 2000cc-1.
[34] Id.
[35] Id.

In order to prevail on a RLUIPA claim, an inmate must first demonstrate that the challenged government action or policy substantially burdens his or her right to religious exercise.[36] Eleventh Circuit case law dictates that

> a 'substantial burden' must place more than an inconvenience on religious exercise; a 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. Thus, a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct.[37]

Basically, a "substantial burden" is one which virtually compels an inmate to comply with a restriction without regard for the inmate's religious beliefs and offers no real alternative to compliance which would allow the inmate to pursue his or her religious convictions. Where a government policy or action restricts one method of religious expression but an alternative method of expressing religion is available to the inmate, there is no substantial burden imposed.[38]

If an inmate brings a RLUIPA claim and shows that the restriction is a substantial burden, the government must demonstrate that the action or policy both furthers a compelling interest and is the least restrictive means by which it can reach its ends in order to avoid liability. The least restrictive means of accomplishing a governmental objective is the method that least interferes with the free practice of religion by an inmate while providing a method for accomplishing the institutional goal. Examples of a compelling government interest include maintaining the safety of inmates, correctional officers, and the public, and maintaining the security of institutions.

Numerous inmates in the Florida prison system alone have made claims under RLUIPA. One example of a claim that might arise under this statute could be where a Jewish inmate, who is not provided with a kosher diet or with any alternative that would allow him to fulfill his religious obligation, seeks religious accommodation. The inmate in this hypothetical position would presumably be able to demonstrate that his ability to practice Judaism is substantially burdened by the disputed regulations and actions of prison officials because the regulations and actions leave him with no meaningful choice. He may either eat the non-kosher food and fail to obey his religious laws or not eat the non-kosher food and starve.

In this situation, to overcome the inmate's substantiated claim that his rights have been violated, the department must show that not providing kosher food is the least restrictive means of furthering a compelling government interest. In other words, the department is required to prove that it has an imperative goal to meet and that denying the inmate access to kosher food is the least invasive option available to the department in the course of fulfilling its duty. In this context, it is improbable that the department can satisfy a court's inquiry into whether the department is furthering a compelling interest, let alone that denying inmates' religious accommodation is the least restrictive means available.

---

[36] 42 U.S.C. § 2000cc-1(b).
[37] Midrash Sephardi, Inc. v. Town of Surfside, 366 F. 3d 1214, 1227 (11th Cir. 2004).
[38] Midrash Sephardi, Inc. at 1227 citing Cheffer v. Reno, 55 F. 3d 1517 (11th Cir. 1995).

The Religious Freedom Restoration Act (RFRA) and the Florida Religious Freedom Restoration Act (FRFRA)

The Florida Religious Freedom Restoration Act (FRFRA)[39] was closely modeled after the federal Religious Freedom Restoration Act (RFRA).[40] While the federal RFRA does not apply to state and local government and is therefore not directly applicable to the department,[41] the Florida and federal interpretive decisions and tests for application are very similar and will be addressed together here.[42] Both the FRFRA and federal RFRA are very similar to the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). The major difference is that where RLUIPA applies to institutionalized persons only, FRFRA and federal RFRA apply to all individuals.

The Florida Legislature enacted the Florida Religious Freedom Restoration Act (FRFRA) in order to protect the rights of individuals to practice religion without government interference. In pertinent part the statute[43] states:

> (1) The government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, except that government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person:
> (a) Is in furtherance of a compelling governmental interest; and
> (b) Is the least restrictive means of furthering that compelling governmental interest.

In order for a plaintiff to prevail on a FRFRA claim, "the plaintiff bears the initial burden of showing that a regulation constitutes a substantial burden on his or her free exercise of religion."[44] In other words, "the plaintiff must demonstrate that the government has placed a substantial burden on a practice motivated by a sincere religious belief."[45]

A "substantial burden" under FRFRA is governed by the same definition given the term under the federal RFRA and RLUIPA. The Florida Supreme Court held "that a substantial burden on the free exercise of religion is one that either compels the religious adherent to engage in conduct that his religion forbids or forbids him to engage in conduct that his religion requires." This definition, adapted from rulings of the Fourth, Ninth and Eleventh Federal Circuit Courts, approximates the most restrictive, or least protective, of three federal RFRA tests. With regard to the federal RFRA substantial burden tests, the Florida Supreme Court notes:

---

[39] 42 U.S.C. 2000bb et seq.
[40] §§ 761.01, Fla. Stat. (2003) et seq.
[41] See City of Boerne v. Flores, 521 U.S. 507 (1997) (declaring as unconstitutional the application of the RFRA to state and local governments).
[42] Reference will generally be made to the Florida Religious Freedom Restoration Act as the FRFRA applies to the department and the federal RFRA does not. Where differences between RFRA and FRFRA arise, such differences will be indicated with explanation.
[43] § 761.03, Fla. Stat. (2003). The pertinent RFRA language, codified at 42 U.S.C. 2000bb-1, reads in generally the same way.
[44] Warner v. City of Boca Raton, 887 So. 2d 1023, 1034 (Fla. 2004).
[45] Id.

> The Eighth and Tenth Circuits use a broader definition – action that forces religious adherents 'to refrain from religiously motivated conduct,' or that 'significantly inhibit[s] or constrain[s] conduct, or expression that manifests some central tenet of a [person's] individual beliefs,' or imposes a substantial burden on the exercise of the individual's religion. The Sixth Circuit seems to straddle this divide, asking whether the burdened practice is 'essential' or 'fundamental.'[46]

The Florida Supreme Court wrote in justification of its determination to utilize the most restrictive test, "[i]f this Court were to make religious motivation the key for analysis of a claim, that would 'read out of [FRFRA] the condition that only substantial burdens on the exercise of religion trigger the compelling interest requirement."[47]

A FRFRA claimant, like a RLUIPA claimant, is required to establish that the interference is more than an inconvenience in order to prevent dismissal of his or her case.[48] The plaintiff is *not* required to substantiate a claim that the governmental regulation is targeted at religion in particular. Instead, the individual must only demonstrate that the regulation substantially interferes with his or her free exercise of religion.[49]

If the plaintiff proves that the government has improperly restricted his or her right to exercise religion, it is the government's responsibility to demonstrate that the regulation furthers a compelling governmental interest and that the restriction in question is, in fact, the least restrictive means of furthering the interest.

In order to convince a court that a regulation or action furthers a compelling interest, the state must first show that the regulation was created in order to facilitate the government's performance of an essential duty owed to the public.[50] The term "essential duties" may encompass any number of imperative governmental functions. In addition, the state must establish that the restriction is the least intrusive option available to the state in its quest to carry out an essential duty.

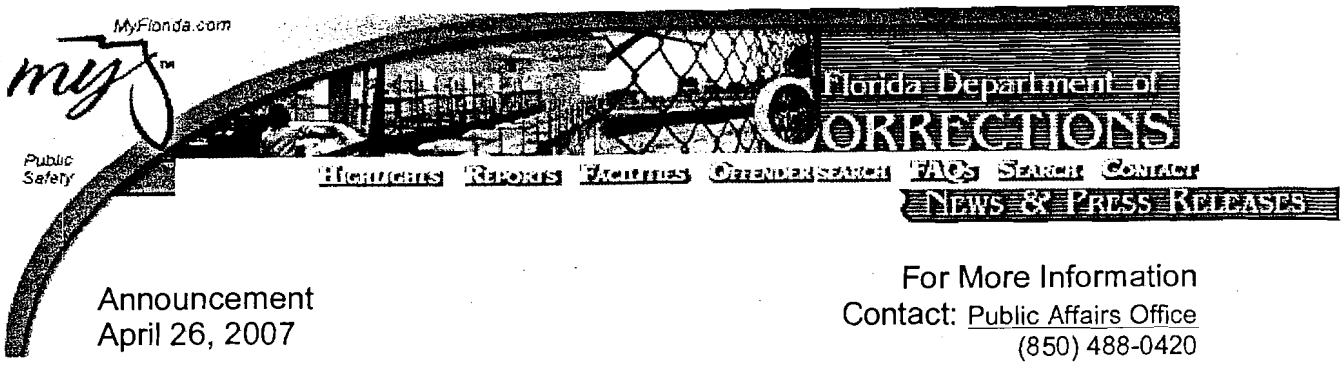
Simply stated, in order to protect itself from liability once a plaintiff has shown that his or her rights under FRFRA have been violated, the state must prove that the infringing regulation is absolutely vital because the government is using it to carry out a critical responsibility and there are no options available that would infringe less upon the rights of individuals than the disputed regulation.

---

[46] Warner, 887 So. 2d at 1033 (internal citations omitted).
[47] Warner, 887 So. 2d at 1033, citing Henderson v. Kennedy, 253 F. 3d 12, 17 (D.C. Cir. 2001).
[48] Id. at 1035.
[49] §761.03(1), Fla. Stat. (2003). See also Warner 887 So. 2d at 1035-1036 (stating "[w]e also hold that under the [FRFRA], any law, even a neutral law of general applicability, is subject to the strict scrutiny standard where the law substantially burdens the free exercise of religion.").
[50] See Wisconsin v. Yoder, 406 U.S. 205; Sherbert v. Verner, 374 U.S. 398.

APPENDIX A

Public Announcement and Purpose Statement



Announcement
April 26, 2007

For More Information
Contact: Public Affairs Office
(850) 488-0420

Jewish Dietary Accommodation Program

Effective immediately, the Florida Department of Corrections will hold participation in the Jewish Dietary Accommodation Program at current participation levels. The department will not be processing pending or future applications for the program until the findings and report of the Religious Dietary Study Group are complete.

The Religious Dietary Study Group is charged with conducting a review of religious dietary meal requirements for a period of not less than 90 days, with submission of monthly interim reports and a final report. The scope of the study will include the following tasks:

- To conduct an analysis of the requirements of the religious dietary laws of the major faith groups represented in the Department of Corrections' inmate population which have dietary requirements as part of the tenets of the faith.
- To review and analyze the impact of an additional influx of participants to the religious dietary accommodation program and how the department may be able in the future to accommodate the religious dietary requirements of various faiths.
- To conduct an analysis of religious meal accommodations within the parameters of an institutional prison setting in federal, state, and private prison systems.
- To review the religious meal programs currently provided by the Department of Corrections pursuant to Florida Administrative Rules and pursuant to the Jewish Dietary Accommodations Procedure Number 503.005, reviewing, among other things, data in regard to food purchase and preparation, physical plant requirements, security and classification issues, administrative matters, utilization and participation, and cost.

More 2007 Announcements and Press Releases . . .

Home | Highlights | Reports | Facilities | Offender Search | FAQs | Search | Contact
Privacy Policy

APPENDIX B

JDA Program Participation Reports April, May, June, and July 2007

04/09/07

Jewish Dietary Accommodations

- **Participating Inmates:**

Union: 69 participating 55 ate this morning
Removed (2)- Cox, J #Y24607; Norton, D #494397

FSP: 50 participating 49 ate this morning
Added (1)– Merriex, L #265627
Removed (1)- Rogers, B #983579

Washington: 40 participating 15 ate this morning
Added (1)– Norton, D #494397

Hendry: 16 participating 05 ate this morning
No Change

Lawtey: 3 participating 3 ate this morning
No Change

Lowell: 11 participating 2 ate this morning
1 less this week due to paperwork error

Columbia: 0 participating 0 ate this morning
No Change

Santa Rosa: 63 participating 55 ate this morning
Removed (1)- Raices, L #101767

TOTAL PARTICIPATING: 259 196 ate this morning.

24% did not eat

04/30/07

Jewish Dietary Accommodations

- **Participating Inmates:**

Union: 66 participating 59 ate this morning
Added (1)–Edwards, M #497324
Removed (3)- Cox, J #Y24607; Logan, J #Y00683; Gilbert, M #122943

FSP: 52 participating 49 ate this morning
No Change

Washington: 45 participating 17 ate this morning
Added (2)– Fonte, S #M43315; Francis, Dwayne #195619
Removed (1)- Wynn, B #908179

Hendry: 15 participating 8 ate this morning
No Change

Lawtey: 3 participating 3 ate this morning
No Change

Lowell: 10 participating 1 ate this morning
Removed (1)-Kennelly, D #152147

Columbia: 0 participating 0 ate this morning
No Change

Santa Rosa: 63 participating 48 ate this morning
Added (6)– Brooks, T #125055; Cox, J #474253; Partlow, J # H00386; Smith, I #122834; Taylor, L #692400; Ball, C # R40474
Removed (1)- Andrade, R # P22784; Williams, G #084074

TOTAL PARTICIPATING: 254 **185 ate this morning.**

27% did not eat

05/07/07

Jewish Dietary Accommodations

- **Participating Inmates:**

Union: 65 participating 58 ate this morning
Added (1)–Beaudry, B #622334
Removed (2)- Prevatt, D #065814; Washington, J #900987

FSP: 50 participating 49 ate this morning
Added (2)– Logan, J #Y00683; Gilbert, M #122943
Removed (4)- Edwards, M #497324; Ball, C #R40474; Francis, D #195619; Taylor, L #692400

Washington: 44 participating 27 ate this morning
Removed (1)- Courtright, J #075269

Hendry: 15 participating 6 ate this morning
No Change

Lawtey: 3 participating 3 ate this morning
No Change

Lowell: 11 participating 0 ate this morning
Added (2)– Kennelly, D #152147

Columbia: 0 participating 0 ate this morning
No Change

Santa Rosa: 59 participating 54 ate this morning
Removed (2)- Abrams, J #V15043; Brooks, A #L23224

TOTAL PARTICIPATING: 247 197 ate this morning.

20% did not eat

05/14/07

Jewish Dietary Accommodations

- **Participating Inmates:**

Union: 64 participating 59 ate this morning
Removed (1)- Edwards, M #497324

FSP: 50 participating 49 ate this morning
No Change

Washington: 42 participating 23 ate this morning
Added (1)–Andrade, R #P22784
Removed (3)- Francis, D #195619; Haram, L #080843; Funk, J #168693

Hendry: 15 participating 15 ate this morning
No Change

Lawtey: 3 participating 3 ate this morning
No Change

Lowell: 11 participating 1 ate this morning
Added (2)– Kennelly, D #152147

Columbia: 0 participating 0 ate this morning
No Change

Santa Rosa: 61 participating 55 ate this morning
Added (2)– Francis, D #195619; Fleishman, J #J20347

TOTAL PARTICIPATING: 246 205 ate this morning.

17% did not eat

06/04/07

Jewish Dietary Accommodations

- Participating Inmates:

Union: 65 participating 61 ate this morning
No Change

FSP: 46 participating 45 ate this morning
Removed (3)- Mayhar, J #X25262; McKinney, M #100414; Perron, J #Q15959; Tarpley, D #192281

Washington: 43 participating 16 ate this morning
No Change

Hendry: 13 participating 8 ate this morning
No Change

Lawtey: 2 participating 2 ate this morning
No Change

Lowell: 10 participating 0 ate this morning
Removed (1)- New, J #L31418

Columbia: 0 participating 0 ate this morning
No Change

Santa Rosa: 61 participating 61 ate this morning

TOTAL PARTICIPATING: 240 193 ate this morning.

20% did not eat

06/18/07

Jewish Dietary Accommodations

- **Participating Inmates:**

Union: 66 participating 63 ate this morning
Added (2)- Byrens, J #O53824; Chestnut, J #197339

FSP: 46 participating 45 ate this morning
Added (4)- Boatman, R #089151; Brown, J #K61261; Byrnes, D #053824; Chestnut, J #197339; Turner, T #L13947
Removed (2)- Hayes, J #718162; Perron, J #Q15959

Washington: 38 participating 14 ate this morning
Removed (2)- Odam, K #892850; Ovetrea, C #337922

Hendry: 14 participating 6 ate this morning
No Change

Lawtey: 2 participating 2 ate this morning
No Change

Lowell: 9 participating 2 ate this morning
Removed (1)- Manning, S #331940

Columbia: 0 participating 0 ate this morning
No Change

Santa Rosa: 61 participating 61 ate this morning

TOTAL PARTICIPATING: 236 193 ate this morning.

18% did not eat

07/09/07

Jewish Dietary Accommodations

- **Participating Inmates:**

Union: 61 participating 60 ate this morning
Removed (4)- Mayhar, J #X25262; Yearby, T #693658; Haimowitz, R #H07976; McKinney, M #100414

FSP: 46 participating 45 ate this morning
Added (3)- Belvin, P #D87069; Mayhar, J #X25262; Yearby, T #693658

Washington: 42 participating 17 ate this morning
Added (2)- Ball, C #R40474; Ovletrea, C #337922

Hendry: 14 participating 6 ate this morning
Added (1)-

Lawtey: 2 participating 2 ate this morning
No Change

Lowell: 9 participating 0 ate this morning
No Change

Columbia: 0 participating 0 ate this morning
No Change

Santa Rosa: 60 participating 58 ate this morning
Added (2)- Barrington, A #566013; Thomas, B #Q07174

TOTAL PARTICIPATING: 234 188 ate this morning.

20% did not eat

07/23/07

Jewish Dietary Accommodations

- **Participating Inmates:**

Union: 58 participating 50 ate this morning
Added (1)- Merriex, L #265627
Removed (2)- Alexander, S #L22808; Sookov, J #U10046

FSP: 49 participating 49 ate this morning
No Change

Washington: 38 participating 11 ate this morning
No Change

Hendry: 14 participating 5 ate this morning
No Change

Lawtey: 2 participating 2 ate this morning
No Change

Lowell: 10 participating 2 ate this morning
Added (1)- New, J #L31418

Columbia: 0 participating 0 ate this morning
No Change

Santa Rosa: 61 participating 58 ate this morning
Added (1)- Alexander, S #L22808

TOTAL PARTICIPATING: 232 177 ate this morning.

24% did not eat

APPENDIX C

Cost Estimates from Vendors for Prepackaged Kosher Food Products.

Kosher Entrees

General Information

Costs of kosher entrees are dependant on quantities ordered, shipping costs, and any handling fees which may be assessed by food vendors. The following information provides the basic estimated costs of kosher shelf stable and frozen entrees (excluding shipping and handling fees):

Vendor	Average Cost/ Entree	Average Calories (Ounces)/ Meal	Variety	Phone Contact Number
My Own Meal, Inc. Deerfield, IL	$2.75	400 (10 oz)	10 entrees/ shelf stable	Mary Ann Jackson (847) 948-1118
Mada'n Kosher Foods Dania Beach, FL (Used by GEO)	$4.00	500 (12-16 oz)	25+ entrees/ frozen	Mel Weiss (305) 944-6644
Gold Kosher Catering Miami, FL (Used by Trinity)	$4.79	400-500 (16 oz)	20 entrees/ frozen	(305) 249-2220
Milmar Foods (Used by Aramark)	$4.50 - $6.00	300-400 (12-13 oz)	8 entrees/ frozen	Information provided by Aramark
Overall Averages:	**$4.00 – $4.40**	****400 – 450 calories each**		

** 2 kosher entrees provide less than 1/3 of the calories provided to the general population. The remaining calories must be supplemented with other food items that are kosher.

Kosher Menus

We can provide three (3) frozen meals per day which would simplify the cooking process, but would be more costly. The other option is to provide two kosher entrees at lunch and dinner each day. Based on kosher diet information from the Department of Corrections in other states, and what ARAMARK is currently doing for other clients, we will probably only need to provide 2 kosher frozen pre-plates or entrees per day. (Sample meal plans attached for meal plans using two (2) frozen entrees per day, and using three (3) frozen entrees per day.) Kosher entrees generally contain one serving each of a meat (3-4 oz), starch (1/2 c) and vegetable (1/2 c). Additional food items must be provided in addition to these meals in order to meet a calorie level equivalent to that provided to the general inmate population and to meet the Dietary Reference Intakes. Many of the food items currently available in food services are certified or acceptable for use with kosher meals, and may be used to supplement the entrees at lunch and dinner, and to provide breakfast meals. Examples of food items already available in food services which may be included on kosher trays are eggs, milk, fresh fruits and vegetables, frozen vegetables,

Kosher Entrees

margarine, cereal, juice, and peanut butter. Bread that is certified kosher will need to be ordered. These food items must be handled separately from food items for the general population according to kosher standards.

Additional factors which will increase the costs of serving kosher meals will be any special equipment needed to prepare the meals as well as disposable items (such as Styrofoam on which to serve the meals).

APPENDIX D

Matrix Showing Responses of States' Survey of Religious Dietary Accommodations

MATRIX SHOWING RESPONSES OF STATES' SURVEY OF RELIGIOUS DIETARY ACCOMMODATIONS

	1.Are religious diets accommodated?	1A. Is a meatless alternate entrée available?	1B. Is a vegan meal plan available?	1C. Is your food service totally pork free?	1C-1. If your state is pork free, how many years?	1D. Is a Kosher menu available?	1E. Is a Halal menu available?	1F. Are other meal plans available? Specify	2. Is food services privatized or self operated?	3. Are religious meals prepared in the regular or separate kitchen?	3A. If prepared in regular kitchen is there a designated area just for religious meals?	4. Are prepackaged meals utilized?	5. Does the religious community provide any special food items for the religious diets?	6. Were any of your meals for religious accommodations court mandated?
Alabama (AL)	Y	Y		Y	UK	Y								Y
Alaska (AK)														
Arizona (AZ)														
Arkansas (AR)	Y	N	Y	N	NA	Y	N	O	S	R	N	N	N	Y
California (CA)	Y	Y	Y	Y	7	Y	N	N	S	R	Y	Y	N	Y
Colorado (CO)	Y	Y	Y	Y	UK	Y	Y	V	S	R	N	N	N	Y
Connecticut (CT)	Y													N
Delaware (DE)	Y			Y	UK									N
Florida (FL)														
Georgia (GA)	N													N
Hawaii (HI)	Y	Y	N	Y	12	Y	Y	O	S	R	N	Y	N	N
Idaho (ID)	Y	Y	Y	N	NA	N	N	O	S	NA	N	N	N	N
Illinois (IL)	Y	Y	Y	N	NA	Y	N	O	S	NA	NA	Y	N	Y
Indiana (IN)	Y								P					N
Iowa (IA)														
Kansas (KS)	Y	N	Y						P				N	Y
Kentucky (KY)	Y	Y	N	Y	UK	N	N	N	P	R	N	Y	N	Y
Louisiana (LA)	Y	N	N	Y	UK	Y	N	N	S	R	N	N	N	Y
Maine (ME)														
Maryland (MD)														
Massachusetts (MA)	Y	Y	N	Y	15	Y	N	N	S	NA	NA	Y	N	Y
Michigan (MI)	Y	N	N	N	NA	Y	N	V	S	S	NA	Y	N	Y
Minnesota (MN)														
Mississippi (MS)														
Missouri (MO)	Y	Y	N	N	NA	N	N	N	S	NA	NA	N	N	N
Montana (MT)	Y	Y	N	Y	NA	N	N	O	S	R	N	N	N	N
Nebraska (NE)	N	N	N	N	NA	N	N	N	S	NA	NA	N	N	NA
Nevada (NV)	Y	N	N	N	10	Y	N	N	S	NA	NA	Y	N	Y
New Hampshire (NH)	Y	Y	N	N	4	Y	N	N	S	R	Y	Y	N	N
New Jersey (NJ)	Y	N	N	Y	20	Y	N	O	S	R	N	Y	Y	Y
New Mexico (NM)	Y													N
New York (NY)	Y	Y	N	Y	UK	Y	N	V	S	S	NA	N	Y	N
North Carolina (NC)	Y	N	Y	N	NA	Y	N	O	S	R	N	N	Y	N
North Dakota (ND)	Y	Y	N	N	NA	Y	N	O	S	R	Y	Y	Y	N
Ohio (OH)	Y	Y	Y	N	NA	N	N	N	S	R	N	Y	N	N
Oklahoma (OK)	Y	N	N	N	NA	Y	N	O	S	R	N	Y	Y	Y
Oregon (OR)	Y	Y	Y	Y	UK	Y	N	N	S	R	Y	Y	Y	Y
Pennsylvania (PA)	Y	Y	N	N	NA	Y	N	N	S	R	N	N	N	Y
Rhode Island (RI)	Y	Y	N	Y	13	Y	Y	N	S	R	N	N	N	Y

MATRIX SHOWING RESPONSES OF STATES' SURVEY OF RELIGIOUS DIETARY ACCOMMODATIONS

	1.Are religious diets accommodated?	1A. Is a meatless alternate entrée available?	1B. Is a vegan meal plan available?	1C. Is your food service totally pork free?	1C-1. If your state is pork free, how many years?	1D. Is a Kosher menu available?	1E. Is a Halal menu available?	1F. Are other meal plans available? Specify	2. Is food services privatized or self operated?	3. Are religious meals prepared in the regular or separate kitchen?	3A. If prepared in regular kitchen is there a designated area just for religious meals?	4. Are prepackaged meals utilized?	5. Does the religious community provide any special food items for the religious diets?	6. Were any of your meals for religious accommodations court mandated?
South Carolina (SC)	Y	Y	Y	Y	3	N	N	N	S	NA	NA	NA	Y	N
South Dakota (SD)	Y	N	Y	Y	UK	Y	Y	N	P	R	Y	N	N	Y
Tennessee (TN)	N	Y	Y	N	NA	N	N	O	S	R	N	N	N	N
Texas (TX)	Y	Y	N	N	NA	Y	N	N	S	R	Y	N	N	Y
Utah (UT)	Y	Y	N	Y	16	Y	N	N	S	R	Y	Y	Y	N
Vermont (VT)														
Virginia (VA)	Y	Y	N	N	NA	Y	N	N	S	R	Y	N	N	N
Washington (WA)	Y	N	Y	Y	2	Y	N	O	S	R	N	Y	N	N
West Virginia (WV)														
Wisconsin (WI)	Y	N	Y	N	NA	Y	N	N	S	R	N	Y	N	N
Wyoming (WY)	Y	N	Y	Y	NA	Y	Y	N	S	R	N	Y	N	N

y shaded cells indicate No response

Q's 1-1C Y= Yes, N = No
Q1D-1E Y= Yes, N = No
Q1F. O= Lacto Ovo, V= Vegetarian N- No other offered
Q2. P= Privatized, S= Self Operated
Q3. R= Regular, S= Separate
Q4-Q6 Y= Yes, N = No

NA= Not applicable
UK = Unknown

Addendum B

MICHIGAN DEPARTMENT OF CORRECTIONS

"Expecting Excellence Every Day"

MEMORANDUM

DATE: **September 14, 2005, 2005**

TO: **Gatha McClellan**
Michigan Department of Corrections
Food Service Manager

FROM: **Don Savolainen**
Michigan Department of Corrections
Assistant Food Service Manager

SUBJECT: **National Kosher Meal Survey**

All forty-nine states, the District of Columbia, New York City, and Philadelphia were contacted on the survey.

The survey asked the responder: 1) Are kosher meals provided, and, if so, are they provided because of a court order or due to pending litigation?; 2) Does the responder operate a kosher kitchen?; 3) Are the prisoner workers in the kosher kitchen Jewish or are they a mixed crew, and do they work on the Sabbath or on Holy Days?; 4) The number of prisoners on a kosher diet? The number of prisoners on a kosher therapeutic diet; 5) What are the types of kosher entrees offered: frozen, shelf stable, cooked from "scratch"?; 6) What is the per capita cost of the kosher meal and the non-kosher meal?; 7) Is rabbinical supervision provided, and, if so, is the supervision contractual, volunteer, or employee?; 8) Are there policies and procedures that the responder would be willing to share with Michigan?.

The survey was conducted the week of March 28, 2005 and continued through the week of April 11, 2005.

Eighteen (18) states did not offer kosher meals to their prisoner populations. Thirty-two (32) states, including Michigan, did offer kosher meals. Three (3) states: Michigan, Arkansas, and New York operate specific kosher kitchens; forty-seven (47) states, the District of Columbia, and Philadelphia do not operate specific kosher kitchens. The majority of the states offer prepared kosher meals purchased from kosher food manufacturers. Several states accommodate religious diets on a generic common fare program.

Meal costs for kosher meals vary from state to state; however, costs appear to average $3.00 to $4.00 per meal for a prepackaged kosher item. This may be due to the use of a common vendor that provides packaged kosher meals nationwide.

Foodservice operations were privatized in fifteen states with two states considering privatization. Several contractual operations considered a line-entry single foodservice operational cost which did not translate to a per capita prisoner meal cost per day.

Information provided by states that revealed their per capita meal costs per day varied from a low of $1.13 per day to $4.38 per day. Some states included all costs associated with the meal: labor, food, paper, etc in their meal cost.

State-wide menus varied nationally. Therapeutic menus also varied, with some states not offering general therapeutic menus or employing dieticians other than in an administrative capacity to monitor the employment of the state-wide menu. Several states minimized baked dessert items, others minimized prepared salad items.

The responders included administrative officers, a chaplain, foodservice administrators, deputy wardens, a department of corrections commissioner, foodservice managers, and contractual managers. Depending on their closeness to the local foodservice statistics, the information some provided might have been skewed by the function that they performed in their institution. In most cases, however, the responder was a foodservice related person who understood the question and provided an appropriate response.

Fourteen (14) states, including Michigan, instituted a kosher meal program as a result of a court order. Of these states, four (4) have pending litigation. Of the eighteen (18) other states that offer kosher meal programs, that were not the result of a court order, two (2) of these have pending litigation.

Six states responded that they use staff to monitor their kosher meal programs. Three states use contractual personnel to monitor their programs. Four states use volunteer personnel to monitor and advise their kosher programs. These were the answers in response to whether rabbinical supervision was utilized to guide the kosher programs.

States varied on the utilization of non-Jewish workers to re-heat or otherwise provide kosher meals. Six (6) states responded that they do utilize Jewish prisoners to work on the Sabbath and/or Holy Days.

The number of kosher prisoners served varied greatly from state to state, irrespective of the state's perceived Jewish population. The number ranged from an average of two (2), to an average of one thousand-five hundred (1500). Several states had none on the kosher program, but would serve a kosher meal upon demand.

Please advise if further information is needed. Thank you.

Cc: National List of Kosher Program Responders
File National Kosher Survey

Addendum C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Wesley Spratt	:	
	:	
vs.	:	**C.A. No.: 04-112S**
	:	
Department of Corrections;	:	
A.T. Wall	:	

MEMORANDUM ADDRESSING HOW THE RESTRICTION ON PLAINTIFF'S SUPERVISED PREACHING IS THE "LEAST RESTRICTIVE MEANS" OF FURTHERING THE DEPARTMENT OF CORRECTIONS' SECURITY INTEREST

Now comes Defendant A.T. Wall and hereby responds to this Court's October 18, 2005 Order in which the Court ordered the Defendant to detail how the restriction on Plaintiff's unsupervised preaching is the "least restrictive means" of furthering the Department of Corrections' security interest.

I. The "least restrictive means" test

Plaintiff has sued the Department of Corrections' Director after he was prohibited from acting as an inmate preacher to an inmate congregation. Under the Religious Land Use of Institutionalized Persons Act, (RLUIPA), 42 U.S.C. § 2000cc, substantial burdens on religious exercise will only be sustained if they further a compelling state interest in the least restrictive manner. In cases that have discussed the "least restrictive manner" factor, it has been shown that if some level of compromise can be effectuated between the inmate's religious request, and the prisons' security concerns, then a "least restrictive manner" exists.

II. The prohibition on inmate preachers furthers a compelling state interest in the least restrictive manner; there is no method of accommodating Plaintiff's request to preach to an inmate congregation that would not impact the valid security concerns of the Department of Corrections

The Plaintiff at bar is seeking authorization to act as a leader of religious services within the Maximum- security facility of the ACI. Counsel has been unable to find any case from any jurisdiction that has sustained a prisoner's challenge to a prison's prohibition of this activity. To permit a prison inmate to hold such a leadership position would risk the safety and security of the institution itself. If the Plaintiff preached to the inmate congregation under the supervision of the Department, concerns about the content of Plaintiff's preaching as it relates to prison security could be somewhat alleviated (although not entirely, as it is possible that an inmate preacher could use a code or signal to communicate to the inmate population during his "sermons") however the Department would still be left in the position of Plaintiff being elevated to a position of leadership or perceived leadership within the inmate population. That position or the perception of that position presents a significant risk to inmate security that it unacceptable to the Defendants.

In *Morrison v. Cook*, 1999 WL 717218 (D.Or.) the U.S. District Court for the District of Oregon addressed a claim by a prison inmate who wished to lead religious services within the prison:

> Plaintiff appears to be challenging the constitutionality of a rule banning inmate-led religious activities in Oregon prisons. **This type of claim, however, has been rejected by virtually every court that has considered the question.** *See, e.g., Benjamin v. Coughlin*, 905 F.2d 571, 577-578 (2nd Cir.), *cert. denied*, 498 U.S. 951, 111 S.Ct. 372, 112 L.Ed.2d 335 (1990); *Cooper v. Tard*, 855 F.2d 125, 129 (3rd Cir. 1988); *Johnson-Bey v. Lane*, 863 F.2d 1308 (7th Cir.1988) (a prison "need not yield to their desire to invite convicted felons, frocked or unfrocked, to conduct religious services in the prison"). *Morrison* at 10. [Emphasis added].

The Seventh Circuit has held that "[a]llowing prisoners to lead religious services also gives them a greater position of authority over other inmates than do many other leadership positions." *Hadi v. Horn*, 830 F.2d 779, 785 (7th CIR. 1987). See also, *Anderson v. Angelone et al.*, 123 F.3d 1197, 1198 (9th CIR. 1997) ("[P]rohibition on inmate-led religious services does not violate the First Amendment. Requiring an outside minister to lead religious activity among inmates undoubtedly contributes to prison security.")

Because religious services are in fact being provided to the inmate population, including the Plaintiff, the Defendant is furthering a compelling state interest (i.e., prison security) in the least restrictive manner. There is simply no way to permit the Plaintiff, or any other inmate for that matter, to hold a position of authority before an inmate congregation. (See Affidavit of Jake Gadsden, attached).

The Defendant submits that for the reasons contained in his Motion for Summary Judgment and accompanying memorandum, that he is entitled to judgment as a matter of law.

Defendant, by his attorney

Patricia A. Coyne-Fague, #5198
RI Dept. of Corrections
40 Howard Avenue
Cranston, RI 02920
(401) 462-0145/(401) 462-2583 *fax*

Certification

I hereby certify that a true copy of the within document was mailed, postage-prepaid to Plaintiff Wesley Spratt, Maximum Security, P.O. Box 8273, Cranston, RI 02920 on this 31st day of October 2005.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Wesley Spratt	:	
	:	
vs.	:	**C.A. No.: 04-112S**
	:	
Department of Corrections;	:	
A.T. Wall	:	

AFFIDAVIT OF JAKE GADSDEN

1. My name is Jake Gadsden. I am the Assistant Director for Institutions and Operations for the Rhode Island Department of Corrections (RIDOC). I have served in this capacity since September, 2001. Prior to my appointment I served as the Warden of the Medium security facilities at the RIDOC. Prior to my appointment as Warden I served the Massachusetts Department of Corrections as the Warden of the Massachusetts Boot Camp. I have also served the Massachusetts Department of Corrections as Warden of the Northeast Correctional Center; Deputy Warden of Southeastern Correctional Center; Director of Treatment at MCI Norfolk; Supervisor of Social Services at MCI-Cedar Junction at Walpole; and a correctional counselor.

2. As the Assistant Director for Institutions and Operations, my job duties include the supervision of all correctional staff, from correctional officers to Deputy Wardens and Wardens; oversight of all of the facilities (to include security, maintenance, food services, classification, inmate discipline and all essential areas of inmate life). I also oversee the emergency response teams and the Department's Special Investigations Unit.

3. While inmates at the RIDOC may participate in religious services and may even be ordained by clergy, they may not lead religious services or hold a position of perceived leadership. The reason for this is that by placing an inmate in a position of actual or perceived leadership before an inmate group threatens security, as it provides the perceived inmate leader with influence within the administration If an inmate is a leader, he appears to be sanctioned by the administration and may be perceived to be in a position to garner special favors from the administration. Therefore, he may be in a position to use his position of perceived power to gain favors from other inmates, as well as becoming vulnerable to other inmates' pursuit of special favors. The position of leadership then becomes a desirable goal among other inmates, thus creating a competition that is threatening to inmate climate and security. The Department maintains control by treating all inmates fairly and equitably.

4. There is no less restrictive manner to accommodate inmate Spratt's desire to preach to an inmate congregation, other than an outright ban. An inmate preacher, even one preaching under RIDOC supervision, could convey subversive information to the inmates without staff knowledge (through a code, a signal, or other verbal or non-verbal means). Finally, even an inmate who is truly preaching without subversive motivation is nevertheless in a position of perceived power that is threatening to the security of the institution.

5. Through my contacts with peers nationwide, I am familiar with a situation in the Texas Correctional system that bears out my position on this issue. Texas utilized some inmates as "trustees." Trustees were inmates who had positive adjustment to institutional life, and the administration felt they could be trusted to lead other inmates in the right direction (to appropriately adjust to inmate life). The Texas Department of Corrections has abolished this process, as it was found that the trustees abused their position to garner favors from other inmates, and threatened inmates with reprisal if their favors were not granted. I am unwilling to sanction a process here at RIDOC that could create the same dynamic.

Further your affiant sayeth not.

Jake Gadsden, Jr.

Sworn and subscribed before me this 31st day of October, 2005.

NOTARY PUBLIC
My Commission Expires: 11-04-05