

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

WILLIAM ROUSER,

Plaintiff,

No. CIV S-93-0767 LKK GGH P

vs.

THEO WHITE, et al.,

Defendants.

ORDER; FINDINGS & RECOMMENDATIONS

Plaintiff is a state prisoner proceeding with this civil rights action pursuant to 42 U.S.C. § 1983. On December 5, 1997, the parties filed a notice of private settlement and stipulation for dismissal without prejudice. The stipulation provided that the court would retain jurisdiction to enforce the settlement through reinstatement of the original action.

In documents filed earlier this year, plaintiff contends that defendants breached the agreement. On June 19, 2003, the court ordered the parties to file declarations, with attached exhibits, addressing this issue. The court ordered plaintiff's declaration due within thirty days, and defendants' responsive declaration due thirty days thereafter. On July 7, 2003, plaintiff filed a response to the June 19, 2003, order, in which he requested that the court take judicial notice of his amended complaint filed April 9, 2003, in support of his claim that defendants had failed to comply with the settlement agreement. On August 14, 2003, defendants filed their response.

1 At the outset, the court observes that plaintiff's amended complaint identifies five
2 additional plaintiffs and includes allegations regarding some of these plaintiffs. The only matter
3 at issue at this time is whether defendants have violated the settlement agreement. The
4 settlement agreement applies to plaintiff only. Therefore, allegations regarding other inmates
5 will not be addressed in these findings and recommendations unless they are relevant to the
6 settlement agreement as it pertains to plaintiff. In addition, the court has not authorized an
7 amended complaint. The amended complaint is considered only as plaintiff's briefing in support
8 of his claim that defendants breached the plea agreement.

9 Esbats and Sabbats

10 The settlement agreement provides that plaintiff is to be permitted access to a
11 room for bi-weekly Esbats and for the eight annual Sabbats for Wiccan services, subject to the
12 same policies and procedures regulating other inmate individual or group religious worship.
13 Settlement Agreement, ¶ 7.

14 In the amended complaint, plaintiff alleges that he was allowed one Sabbat and no
15 Esbats in a one year period. Amended Complaint, p. 5. Plaintiff also alleges that on the
16 Tuesdays that the Esbats were scheduled, he was not ducated to attend. Id., p. 6. Attached as
17 exhibit F to the amended complaint is a declaration by inmate Milton dated March 26, 2002.
18 Inmate Milton states that in June or July 2001, he worked as the Chapel Clerk. At this time,
19 Chaplain Stewart and Volunteer Chaplain Dewsnap told him not to make out a ducat list for the
20 Wiccans. After inmate Milton told them that he would make out the list, he was fired from his
21 job. Plaintiff alleges that the Wiccans were not permitted to conduct the last Sabbat service
22 because defendant Carlson forgot to process the paperwork. Id.

23 In the August 14, 2003, response, defendants describe plaintiff's access to Esbats
24 and Sabbats as follows. At the time the settlement agreement was filed, plaintiff was housed in
25 Facility IV-B at the California Correctional Facility. Defendants' Response, Exhibit A, § 3. On
26 November 4, 1998, he was transferred to California State Prison-Corcoran. Id. On April 6,

1 1999, he was transferred to California State Prison-Sacramento (CSP-Sac). Id. In the instant
2 order, the court will focus on plaintiff's access to Esbats and Sabbats since his transfer to CSP-
3 Sac.

4 Plaintiff was housed in Facility C from April 6, 1999, to February 26, 2000, when
5 he was moved to administrative segregation (ad seg) in Facility A following disciplinary charges
6 for mutual combat with another inmate. Id., ¶ 4. He was moved to ad seg in Facility B on
7 February 26, 2000, and remained there until April 7, 2000, when he was transferred back to ad
8 seg on Facility A. Id. On May 30, 2000, plaintiff was moved to general population on Facility A
9 where he is currently housed. Id.

10 Defendants state that plaintiff may not have been able to attend Esbats and
11 Sabbats while in ad seg. Under ¶ 15 of the settlement agreement, prison officials have discretion
12 to suspend the terms of the agreement for attendance while plaintiff was in segregated housing.
13 Accordingly, this court will focus on plaintiff's ability to attend Esbats and Sabbats while he was
14 housed in the general population.

15 The exhibits attached to defendants' response contain plaintiff's communication
16 with prison officials regarding his access to Esbats and Sabbats. On August 24, 1999, plaintiff
17 sent a letter to Warden Plier complaining that he had been released late for Wiccan services on
18 August 21, 1999. Defendants' Response, attachment 2, p. 6. On September 14, 1999, Warden
19 Plier responded to plaintiff's letter. Id., p. 5. Warden Plier stated that the Wiccan sponsor was
20 responsible for compiling a list of inmate names wishing to attend services and giving the list to
21 prison officials responsible for preparing the ducat list. Id. Plaintiff's name was not on the ducat
22 list. Id.

23 On or around March 26, 2001, plaintiff sent a letter to L.L. Jackson, the
24 Community Resources Manager at CSP-Sac. Id., p. 18. In this letter, plaintiff stated that he
25 realized that he would miss the Sabbat, which was in two days. Id. The note does not state
26 why plaintiff missed the Sabbat.

1 On April 22, 2001, plaintiff filed an inmate appeal stating that for one year he had
2 been unable to have any services: "And I feel that I have no chance left but to ask the judge to
3 intervene since for 1 year I have not been able to observe no Sabbat, order what is needed for
4 services, have any services, within that year I had only been allowed one service. That was when
5 the Wiccan chaplain came in September." Defendants' Response, Attachment 1, p. 59-61. On
6 June 5, 2001, plaintiff withdrew this appeal. Id., p. 62.

7 On July 31, 2001, plaintiff filed another inmate appeal stating that on July 27 and
8 31 he was not released to the chapel for Wiccan services because no one was available to
9 supervise the Wiccans. Id., p. 71. On August 29, 2001, Lonnie Jackson responded to this appeal.
10 Id., p. 74. Mr. Jackson stated that the Muslim chaplain provides supervision for both Muslim
11 and Wiccan services. Id. On July 27, 2001, the Muslim chaplain was not available due to
12 illness. Id. Consequently, Wiccan and Muslim services were cancelled. Id.

13 On October 25, 2001, Lonnie Jackson sent a memorandum to Captain Walker in
14 Facility A in response to plaintiff's request that arrangements be made for the Sabbat on October
15 31. Id., pp. 26, 28. Lonnie Jackson has sent memos arranging for the following additional
16 Sabbats: Beltane (May 1, 2002); Autumn Equinox (September 23, 2002); Samhain (October 31,
17 2002); Imbolg (February 3, 2003); and Lamas (July 31, 2003). Id., pp. 32, 64-67.

18 Plaintiff filed an inmate appeal complaining that prison staff had failed to process
19 a request to conduct a Yule Sabbat on December 23, 2002. The first level appeal response
20 describes how this occurred:

21 It is true that the Wiccan/Pagan religious group was unable to
22 celebrate their Yule Sabbat because the appropriate paper work did
not get completed. A brief description of events is as follows:

23 Inmate Rouser made a verbal request to acting CRM J. Carlson on
24 Facility A yard for a Wiccan celebration. He was instructed to
25 submit a written request. He submitted a hand written request on a
26 torn piece of paper which provided insufficient information to
schedule the event. He was instructed to resubmit. The attached
documents were submitted. Please note that there is no date on the
request and the ducat request is for December 17, 2002 yet Mr.

1 Rouser says that the event was to be on December 23.

2 The event was missed due to a breakdown in communication. Mr.
3 Rouser has been given a formatted document to refer to for future
4 requests and has been instructed to allow a minimum of thirty days
for approval.

5 Defendants' Response, attachment 1, p. 119.

6 According to L.L. Jackson, the Wiccans have not, to date, routinely asked to
7 conduct all eight Sabbats to which plaintiff is entitled each year, and their volunteer spiritual
8 advisor has not regularly come to the prison to conduct those services. Defendants' Response,
9 Exhibit A, p. 9.

10 On July 17, 2002, plaintiff filed an administrative appeal stating that Wiccans had
11 been delayed into the chapel. Defendants' Exhibit A, attachment 1, p. 93-101. On September
12 16, 2002, L.L. Jackson responded to this appeal. Id., p. 100. In relevant part, Mr. Jackson stated
13 that:

14 Operational exigencies, institutional emergencies or security needs,
15 may be reason to cancel, delay or postpone scheduled religious
16 services. When operationally possible, all religious services shall
17 be conducted. By your own admission, this situation was remedied
by a memorandum authored and distributed by Sgt. Mayhew, A-
Facility Sergeant. You state that no further incidents of this nature
have occurred.

18 Id., p. 100.

19 L.L. Jackson states that he is aware of plaintiff's claim that inmate Milton was
20 fired because he objected when the chaplain told him not to make out a ducat list for Wiccans.
21 Defendants' Response, Exhibit A, p. 8. L.L. Jackson states that this allegation is untrue. Id.
22 Inmate Milton came up with this claim for the first time after Chaplain Stewart removed him
23 from his work assignment because he was not doing his job. Id.

24 In his August 29, 2003, response, plaintiff agrees that he withdrew his April 22,
25 2001, administrative appeal alleging that he had been allowed "but one Esbat or Sabbat service"
26 since his release to Facility A on May 30, 2000. Plaintiff states that he withdrew the appeal

1 because L.L. Jackson agreed to work to fix the difficulties plaintiff had faced in having Wiccan
2 services. As to the denial of Yule services on December 23, 2002, plaintiff states that inmate
3 Hysell filed an appeal regarding this matter. Attached to plaintiff's response are responses by
4 prison officials to inmate Hysell's appeals. The Second Level appeal stated, in relevant part:

5 You contend that on December 23, 2002, Community Resource
6 Manager (A) Jim Carlson denied your right to free exercise of your
7 religion. Your paperwork for Yule Sabbath was turned in to Mr.
8 Carlson in plenty of time to be approved, as has been done for
9 every Sabbath, but he refused to process it. You claim this was
10 done on purpose since Mr. Carlson has made statements that he
11 doesn't recognize your beliefs as a valid religion. . .

12 ****

13 Your appeal is partially granted in that your staff misconduct
14 allegations has been referred to the SAC Investigative Services
15 Unit (ISU) for a review. ISU staff will interview you during this
16 process.

17 Plaintiff's Response, Exhibit A.

18 The court is puzzled by plaintiff's April 2001 administrative appeal claiming that
19 he had been allowed only one Wiccan service for the past year. Plaintiff apparently filed
20 no administrative appeals before this time complaining about his inability to attend these
21 services. Plaintiff's March 26, 2001, letter makes no mention of this. Defendants have also
22 provided a ducat dated March 21, 2001, identifying the inmates who would attend the Wiccan
23 service. Defendants' response, attachment 2, p. 17. Plaintiff's name is on this list.

24 Despite the conflicting record regarding plaintiff's ability to attend Esbats and
25 Sabbats from April 2000 to April 2001, the record indicates that plaintiff's ability to attend these
26 services since that time has been consistent. While plaintiff was not released to services in July
2001, this was because the Muslim chaplain was unavailable to supervise the Wiccans due to
illness. According to the record, plaintiff's only complaint since April 2001 regarding access
to Sabbats concerned the December 23, 2002, Yule Sabbat. The reason for why this Sabbat was
not held is not entirely clear. However, prison officials responded to plaintiff's complaints

1 regarding this matter.

2 The record does not indicate that prison officials have, at least in the past 2 ½
3 years, routinely refused to permit plaintiff to conduct Sabbat and Esbat services in accordance
4 with the settlement agreement. The record reflects that prison officials have permitted
5 plaintiff to have these services. Accordingly, the court finds no need for an evidentiary hearing
6 regarding this matter.

7 In the amended complaint, plaintiff also alleges that he asked defendant Jackson if
8 the Wiccans could have their own area to worship, as they outnumbered the Native Americans
9 and most other groups. Amended Complaint, p. 6. The settlement agreement states that Wiccans
10 are to be given access to a room for their services. Plaintiff's request that Wiccans have their
11 own area to worship is outside the scope of the terms of the settlement agreement.

12 Religious Artifacts

13 The settlement agreement provides that plaintiff shall be permitted access to small
14 candles, incense, oil, small wands, ritual cups, small bells, cords, water, and salt for use at the
15 Esbats and the Sabbats subject to the policies and procedures consistent with inmate access to
16 religious artifacts. Settlement Agreement, ¶ 10. The religious artifacts are subject to approval by
17 prison officials and search to ensure safety and security. Id. When these items are not in use,
18 prison officials shall have custody of them. Id. at § 11. By agreeing to permit plaintiff access to
19 these religious artifacts, defendants agree that they are obligated to assist plaintiff in obtaining
20 these items via institutional mail in a manner that is consistent with policies and procedures
21 applicable to a general population inmate's receipt of religious artifacts from approved religious
22 vendors. Id. at ¶ 13.

23 In the amended complaint, plaintiff alleges that he ordered chalices, an altar bell,
24 tarots cards and other items from Azure Green, but was denied access to them for months.
25 Amended Complaint, p. 5. Plaintiff also alleges that his orders from Azure Green were often
26 sent back for no good reason or sat on prison shelves for months prior to being inspected and

1 issued. Id., p. 9. Plaintiff alleges that he is being denied access to the items required to cast his
2 circle at both the Sabbats and Esbats. Id., p. 10.

3 In their response, defendants state that on January 17, 2002, in response to
4 plaintiff's complaint that he had not received items ordered from a vendor or religious items,
5 Warden Pliler sent him a memo explaining the procedures for ordering such items and the
6 reasons he had difficulty in receiving his order. Defendants' Response, attachment 1, p. 88. This
7 memo states:

8 Most of the difficulty encountered in receiving packages is
9 centered on the improper shipment of the package. That is:
10 *Vendor stamp not being placed on the shipping label
*Shipping label not affixed to the exterior of the shipping
container.

11 Other difficulties causing package rejection or delays in
12 distribution include:
13 *Unauthorized (contraband) items received in the packages.
14 *Excessive amounts of authorized items being received (this
constitutes contraband)
15 *Packages being mailed into the institution from the home of
friends or relatives.
*Questionable materials, i.e., literature (content), artifacts, etc., that
raise security questions.

16 Id.

17 The memo also stated that a review of the activity on plaintiff's trust account
18 statement for the period of June 1, 2001, through January 4, 2002, did not indicate that any
19 checks were drafted to vendors of religious items. Id. In addition, there was no documentation
20 from CSP-SAC Receiving and Release that indicated items were being returned to any vendors.

21 Id.

22 On January 28, 2002, plaintiff filed an administrative appeal stating that he had
23 documentation indicating that he had ordered religious items from a vendor which were sent
24 back. Id., p. 85. Plaintiff referred to order #1171162B. Id. On February 6, 2002, prison
25 officials responded that the mail/package receipt issue was discussed with Sergeant Saunders and
26 L.L. Jackson. Id. It was agreed that packages would be allowed provided the contents met the

1 institutional parameters for safety and security. Id. A list of permitted items was placed in
2 receiving and release in order to prevent their improper rejection. Id. A copy of this list is
3 attached to defendants' response, attachment 2, pp. 29-30. On May 3, 2002, Acting Warden
4 Rosario issued an addendum to CSP-Sacramento's supplemental Departmental Operations
5 Manual (DOM) § 53050 regarding inmate spiritual packages which further clarified the
6 procedures and items for religions, including Wicca. Defendants' Response, attachment 1, pp.
7 34-63.

8 On January 14, 2003, plaintiff filed another administrative appeal complaining
9 that religious items ordered from an approved vendor had been returned. Id., attachment 1, pp.
10 122-136. On May 19, 2003, L.L. Jackson responded that the items had been mistakenly returned
11 to the vendor as unauthorized property. Id., pp. 135-136. L.L. Jackson told plaintiff that the
12 items could be ordered and that he was recommending reimbursement for the \$7.00 in shipment
13 fees for the returned items be made to plaintiff's wife who had paid for the shipment. Id.

14 Based on the record, the court finds that prison officials have encountered
15 difficulties in enforcing the portion of the settlement agreement authorizing plaintiff to possess
16 certain religious artifacts. This difficulty appears to stem from confusion by staff regarding what
17 artifacts are and are not permitted. However, prison staff have responded to plaintiff's
18 grievances regarding this matter. Acting Warden Rosario issued an addendum to CSP-
19 Sacramento's supplemental Departmental Operations Manual (DOM) § 53050 regarding inmate
20 spiritual packages and a memorandum was placed in receiving and release identifying the
21 authorized religious property.

22 Despite plaintiff's inability to receive some of his Azure Green orders, the record
23 does not suggest that prison officials have a policy of refusing to enforce this portion of the
24 settlement agreement. Rather, they have responded to plaintiff's grievances and are making a
25 good faith attempt to enforce this portion of the settlement agreement. Accordingly, the court
26 finds that no evidentiary hearing is warranted regarding this matter.

1 Plaintiff alleges that someone wrote “devil worshiper” and other things on the box
2 that he was given to store his religious artifacts. Id., p. 6. This box was stored in the chapel area.
3 Id. In his declaration attached to the amended complaint as Exhibit G, plaintiff states that he told
4 Lonnie Jackson what had happened, and the box was moved to the storage room of the chapel.
5 Plaintiff’s concerns regarding the vandalism of this box are not covered by the settlement
6 agreement.

7 Plaintiff also requested permission to grow his own herbs. Id., p. 7. These
8 requests were denied, and plaintiff was advised to order herbs from Azure Green, an approved
9 vendor. Id. Plaintiff alleges that another inmate ordered herbs from Azure Green. Id. Prison
10 officials refused to permit the inmate to possess these herbs. Id. The settlement agreement does
11 not provide that plaintiff is permitted to possess herbs.

12 In his August 29, 2003, plaintiff also alleges that prison officials gave him
13 permission to possess an altar, but then cut it open. The settlement agreement does not provide
14 that plaintiff is permitted to possess an altar.

15 Books and Tarot Cards

16 The settlement agreement provides that plaintiff shall be permitted access to A
17 Witches Bible Compleat, subject to policies and procedures applicable to inmate access to
18 religious literature. Settlement Agreement, ¶ 6. Plaintiff is also permitted to have the Thoth
19 edition of Tarot cards in his personal property and available for use in his cell or at the Esbats or
20 eight Sabbats subject to the policies and procedures applicable to other religious artifacts. Id. at ¶
21 12.

22 In the amended complaint, plaintiff alleges that he was not allowed to possess a
23 book called The Tree because of recipes it contained. Amended Complaint, p. 5. Plaintiff also
24 alleges that he was not allowed to possess a book called Santeria: African Magick. Id.

25 \\\

26 \\\

1 The settlement agreement does not cover either of the books plaintiff claims he
2 was not permitted to possess. Accordingly, the court does not find that defendants breached the
3 plea agreement by the alleged refusal to permit plaintiff to possess these books.

4 Chaplain

5 The settlement agreement provides that a volunteer Wiccan spiritual adviser may
6 attend Esbat or Sabbat services provided that the person has complied with the policies and
7 procedures for access by volunteer spiritual advisers. Settlement Agreement, ¶ 14. The amended
8 complaint alleges that while Facility A was on lockdown, Wiccan Chaplain McCollum and a
9 guest who was a high priestess, were denied access to plaintiff, while other chaplains were
10 allowed to walk the tiers and have direct access to inmates of their faiths. Amended Complaint,
11 p. 7. Plaintiff also alleges that his attempts to get a paid chaplain were denied. Id., p. 11.

12 In their response, defendants state that on July 17, 2002, plaintiff filed an
13 administrative appeal requesting appointment of a paid chaplain and that the Wiccans be
14 appointed their own inmate clerk. Defendants' Response, attachment 1, p. 93. In the appeal
15 response, L.L. Jackson stated, in relevant part:

16 As you are aware, a Wiccan volunteer is assigned to assist with
17 administering the Wiccan faith at SAC, and throughout the
18 department. As for the Wiccan clerk, each facility has a staff of
19 inmate clerks assigned to assist chaplains with various
20 administrative duties. A-Facility chapel currently has a filled
position for inmate clerk. That individual is well qualified and
capable of handling all assigned administrative duties for the
various faith groups in that facility. Your request to hire a Wiccan
chaplain and a Wiccan clerk are denied.

21 Id., p. 100.

22 The settlement agreement does not provide that prison officials must provide
23 Wiccans with a paid chaplain. Therefore, plaintiff's claim that his attempts to obtain a paid
24 chaplain, apparently in reference to the administrative appeal discussed above, is not covered by
25 the settlement agreement.

26 \\\

1 Plaintiff also claims that volunteer Chaplain McCollum was denied access to
2 plaintiff while Facility A was on lockdown, while other chaplains were allowed to walk the tiers
3 and have direct access to inmates of their faiths. The settlement agreement provides that the
4 volunteer Wiccan spiritual advisor may attend Esbat or Sabbat services. The settlement
5 agreement does not provide that the volunteer Wiccan spiritual advisor may visit plaintiff in his
6 cell. Therefore, plaintiff's claim that Chaplain McCollum could not visit him while Facility A
7 was on lockdown is not covered by the settlement agreement.

8 Conclusion

9 The court certainly recognizes the possibility that a series of seemingly isolated
10 acts in violation of the settlement agreement can represent, when viewed collectively, a passive-
11 aggressive approach towards compliance with the agreement in this case. It is possible that
12 prison officials desire this agreement to suffer the death of a thousand cuts. However, at this
13 time, after carefully considering the record, the court finds that defendants have not willfully
14 failed to enforce the settlement agreement. While on some occasions portions of it have not been
15 complied with, defendants have generally responded to plaintiff's grievances regarding these
16 matters in a constructive way. Nor does plaintiff's violation of prison rules assist his case. For
17 these reasons, the court finds that no evidentiary hearing is required. However, should the
18 settlement agreement be violated in the future in a manner suggesting that defendants are
19 willfully and consistently violating it, plaintiff may re-file his request for an evidentiary hearing.

20 Finally, following the conclusion of briefing, plaintiff filed several motions for
21 judicial notice. In large part, these motions allege difficulties by other inmate Wiccans in
22 practicing their religion. Only plaintiff is covered by the settlement agreement. Therefore, to the
23 extent these motions allege problems particular to these inmates, they are not relevant to the
24 instant matter. Also, on September 2, 2003, plaintiff filed an amended complaint. This amended
25 complaint is not authorized. Fed. R. Civ. P. 15.

26 ////

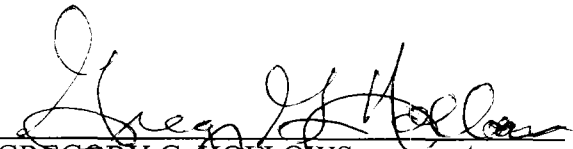
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Accordingly, IT IS ORDERED that:

1. The motions for judicial notice filed by plaintiff on August 27, 2003, September 8, 2003, and September 25, 2003, are disregarded;
2. Plaintiff's amended complaint filed September 2, 2003, is stricken; and
3. No evidentiary hearing is required because defendants are in compliance with the September 5, 1997, settlement agreement.

IT IS HEREBY RECOMMENDED that to the extent plaintiff has sought an enforcement of the settlement agreement, that request be denied without prejudice to its renewal.

DATED: December 16, 2003.


GREGORY G. HOLLOWS
UNITED STATES MAGISTRATE JUDGE

GGH:kj/lrr
rous0767.ord2

United States District Court
for the
Eastern District of California
December 17, 2003

* * CERTIFICATE OF SERVICE * *

2:93-cv-00767

Rouser

v.

White

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on December 17, 2003, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

William Rouser
C-10659
FSP-1
California State Prison Sacramento
PO Box 290066
Represa, CA 95671-0066

VC/GGH

AR/LKK

Constance L Picciano
Attorney General's Office for the State of California
PO Box 944255
1300 I Street
Suite 125
Sacramento, CA 94244-2550

James Edmund Flynn
Attorney General's Office for the State of California
PO Box 944255
1300 I Street
Suite 125
Sacramento, CA 94244-2550

Carlotta Wells
United States Department of Justice
Civil Division
PO Box 883
Washington, DC 20044

Jonathan T Foot
Federal Programs Branch
Civil Division
P O Box 883
Washington, DC 20044

Jack L. Wagner, Clerk

BY: 
Deputy Clerk