

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

06 Cr. 442 (LAP)

v.

SYED HASHMI,

Defendant.

**MEMORANDUM OF LAW IN SUPPORT OF MR. HASHMI'S MOTION FOR
MODIFICATION OF PRETRIAL CONDITIONS OF DETENTION**

I. The Conditions of Mr. Hashmi's Pretrial Detention

On June 6, 2006 Mr. Hashmi, an American citizen with no prior criminal history, was arrested in England pursuant to an arrest warrant issued in the Southern District of New York. The British government detained Mr. Hashmi in Belmarsh prison for almost a year while Mr. Hashmi challenged his extradition to the United States. While in Belmarsh prison, Mr. Hashmi was permitted to interact with other Muslim detainees. Mr. Hashmi could participate in group prayer and receive newspapers, periodicals, and reading materials. Mr. Hashmi was never placed in solitary confinement and was never accused of trying to communicate with any known or suspected "terrorists" outside of the prison.

On or about May 25, 2007 Mr. Hashmi was extradited to the United States from England. On May 29, 2007 Mr. Hashmi was formally arraigned on a four-count indictment and was immediately placed in the Special Housing Unit (SHU) at MCC

Manhattan by the Bureau of Prisons (BOP). The SHU is a segregated housing unit used as a disciplinary measure against detainees who have violated BOP rules. Since detaining Mr. Hashmi in the SHU, the BOP has kept Mr. Hashmi in solitary confinement. Mr. Hashmi has never had a roommate and has been barred from interacting with any other detainees. The interior of Mr. Hashmi's cell is under constant video surveillance.

On October 29, 2007 the Acting Attorney General placed Mr. Hashmi under special administrative measures (2007 SAMs). The conditions of Mr. Hashmi's detention deteriorated with the imposition of the 2007 SAMs, which placed even greater restrictions on Mr. Hashmi's ability to receive family visits, to have access to reading materials and the media, and to communicate with others.

On November 13, 2007 Mr. Hashmi filed a motion challenging the SAMs and the pretrial conditions of detention. (Docket document 18, 11/13/07). The Court denied relief. (See Memorandum Order, Docket document 34, 1/16/08).

After subjecting Mr. Hashmi to an entire year of SAMs and approximately 18 months of pretrial solitary confinement, the government renewed the SAMs on October 22, 2008 (2008 SAMs)(attached as Exhibit 1). The 2008 SAMs are effective for an additional "12 months."

The restrictions placed on Mr. Hashmi are severe. For instance, provisions 5 through 8 of the 2008 SAMs state as follows:

No Group Prayer:

- a. The inmate shall not be allowed to engage in group prayer with other inmates.
- b. If an FBI and/or USMS/BOP/DF-approved religious representative is to be present for prayer with the inmate, the prayer shall be

conducted as part of a contact or non-contact visit, at the discretion of USMS/BOP/DF.

No Communal Cells and No Communication Between Cells:

- a. The inmate shall not be allowed to share a cell with another inmate.
- b. The inmate shall be limited within USMS/BOP/DF's reasonable efforts and existing confinement conditions, from communicating with any other inmate by making statements audible to other inmates or by sending notes to other inmates.

Recording Conversations Between Cells:

- a. USMS/BOP/DF/FBI are hereby authorized to place microphones in the hallways and elsewhere outside the inmate's cell to record any statements made by the inmate to other inmates or staff. . . .

Cellblock Procedures:

- a. The inmate shall be kept separated from other inmates as much as possible while in the cellblock.
- b. The inmate shall be limited, within USMS/BOP/DF's reasonable efforts and existing confinement conditions, from communicating with any other inmate while in the cellblock area.

Under the 2008 SAMs, Mr. Hashmi's access to visitors, mail, and the media continue to be greatly curtailed.

Mr. Hashmi stands by his previously filed motion and in no waives previous objections made to the pretrial conditions of detention. While maintaining that the SAMs should be set aside in their entirety, Mr. Hashmi requests that the Court focus particular attention in remedying the following conditions:

- 1. the continued infliction of solitary confinement;
- 2. the bar on group prayer;
- 3. the bar on more than one family visit at a time; and

4. the bar on any interaction with any other detainee.

II. The Conditions of Detention Violate Mr. Hashmi's Fundamental Rights

To determine if a prison regulation burdens fundamental rights, the Court must ask whether the regulation is "reasonably related to legitimate penological objectives, or whether it represents an exaggerated response to those concerns." Turner v. Safley, 482 U.S. 78, 87 (1987). In making such an evaluation, the Court should examine four factors: (1) whether there is a "valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it;" (2) "whether there are alternative means of exercising the right that remain open to prison inmates;" (3) the "impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally;" and (4) the "absence of ready alternatives." Turner v. Safley, 482 U.S. 78, 89-90 (1987).

A. There is not a "valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it"

The Court has previously found that the 2007 SAMs were reasonably related to legitimate penological interests. Mr. Hashmi maintains that the government has not met its burden regarding the first Turner factor. The government has never alleged that Mr. Hashmi is or was a member of al Qaeda or that Mr. Hashmi has acted under al Qaeda's operational command. The 2008 SAMs memorandum provides the same purported factual basis as the 2007 SAMs memorandum to justify the imposition of SAMs upon Mr. Hashmi. The alleged factual basis is that (1) Mr. "Hashmi is a former member of the New York faction of an Islamic fundamentalist organization known as Al-Muhajiroun (ALM);" (2) Mr. Hashmi "allowed co-conspirators to store gear in his apartment which

was destined of al Qaeda's insurgency forces in Afghanistan . . ." and "permitted his co-conspirator to use his cellular phone to contact other al Qaeda supporters, including Omar Khyam; and (3) Mr. Hashmi made "threats and statements against U.S. and British soldiers" after his arrest. See 2008 SAMs Memorandum at 1.

Mr. Hashmi has been detained continuously for over two and a half years in England and in the United States, yet the government has never stated that Mr. Hashmi has ever attempted to send any messages outside of jail to any members of a terrorist organization. In addition, the government has never stated that Mr. Hashmi is a member of al Qaeda or communicates with members of al Qaeda. The government has asserted that Mr. Hashmi was a member of Al-Muhajiroun, however Al-Muhajiroun was a legal, non-criminal group in the United States that disbanded years ago. Thus, the government has not shown a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it.

B. There are reasonable alternative conditions of detention that can be fashioned that satisfy the remaining Turner factors

There is no rational, humane reason why BOP must continue to deprive Mr. Hashmi from virtually all human contact. Mr. Hashmi requests that the Court immediately order BOP to make the following modifications to Mr. Hashmi's detention conditions:

1. Permit Mr. Hashmi to have some type of interaction with fellow Muslims detained at MCC by either permitting him to have a Muslim roommate or to have a regular opportunity to congregate with fellow Muslims to study and discuss religious issues;
2. Permit Mr. Hashmi to participate in group prayer with fellow Muslims;

3. Permit Mr. Hashmi's father and mother to visit Mr. Hashmi at the same time; and
4. Permit Mr. Hashmi to have weekly family visitation hours.

These modest conditions are available to other prisoners and will not jeopardize the government's security interests. The BOP has the facilities, staff, and technology to implement these proposed modifications without creating any undue impact on the guards and other inmates or upon the allocation of prison resources generally.

The continued infliction of extreme social isolation creates numerous problems of constitutional magnitude. The detrimental physical and psychological effects of solitary confinement are well-documented. See, e.g., Davenport v. DeRobertis, 844 F.2d 1310, 1313 (7th Cir. 1988) (“[T]he record shows, what anyway seems pretty obvious, that isolating a human being from other human beings year after year or even month after month can cause substantial psychological damage, even if the isolation is not total.”); Madrid v. Gomez, 889 F. Supp. 1146, 1230 (N.D. Cal. 1995) (“Social science and clinical literature have consistently reported that when human beings are subjected to social isolation and reduced environmental stimulation, they may deteriorate mentally and in some cases develop psychiatric disturbances.”); Ruiz v. Johnson, 37 F. Supp. 2d 855, 913 (S.D. Tex. 1999) (finding “actual psychological harm” among prisoners deprived of human contact); Koch v. Lewis, 216 F. Supp. 2d 994, 1001 (D. Ariz. 2001) (noting that even the government’s expert “agreed that extended isolation . . . subjects the inmate to heightened psychological stressors and creates a risk for mental deterioration”). This conclusion finds support in the psychological literature. See also Craig Haney, *Mental Health Issues in Long-Term Solitary and ‘Supermax’ Confinement*, 49 (1) *Crime & Delinquency* 124, 132 (2003) (finding that “there is not a single published study of

solitary or supermax-like confinement . . . that failed to result in negative psychological effects”).

Mr. Hashmi's ability to have full cognitive and physical functioning during the preparation of his case and throughout trial is directly threatened by the inhuman treatment inflicted upon him by the government. If Mr. Hashmi has a nervous breakdown or loses his mental or emotional balance, it will be a direct result of the government's barbaric treatment of him. There will be no adequate remedy once the damage is done; Mr. Hashmi will be unable to assist counsel in the preparation of his defense, to testify in his own defense, or exercise other fundamental constitutional rights that an otherwise competent or psychologically undamaged defendant might exercise. Thus, prevention is the only remedy and that means permitting Mr. Hashmi to have greater social interaction so as to prevent any deterioration of his mental and physical well-being.

In light of the Turner factors that weigh in favor of Mr. Hashmi, the Court immediately should modify Mr. Hashmi's conditions of detention. Failure to do so will violate Mr. Hashmi's constitutional right to due process, as well as his rights to the free exercise of religion and speech under the First Amendment, to equal protection under the Fifth Amendment, to participate in his defense, to present a defense, and to receive meaningful assistance of counsel under the Sixth Amendment, and to be free from cruel and unusual punishment under the Eight Amendment.

III. The Length of Detention With Extreme Social Isolation Violates Mr. Hashmi's Constitutional Rights

Mr. Hashmi brings a separate challenge to the length of his pretrial detention. In particular, Mr. Hashmi asserts that the imposition of extreme social isolation for close to two years before trial amounts to unconstitutional punishment.

Pretrial detention is permissible until it amounts to "punishment of the detainee." Bell v. Wolfish, 441 U.S. 520, 535 (1979). "When detention becomes 'excessively prolonged,' it may no longer be reasonable in relation to the regulatory goals of detention, in which event a violation of due process occurs." U.S. v Millan, 4 F.3d 1038, 1043 (2d Cir. 1993).

To determine whether the length of pretrial detention has become unconstitutionally excessive, a court must weigh: (1) its length; (2) the extent of the prosecution's responsibility for delay of the trial; (3) the gravity of the charges; and (4) the strength of the evidence upon which detention was based. U.S. v. El-Hage, 213 F.3d 74, 79 (2d Cir. 2000)(citing U.S. v. El-Gabrownny, 35 F.3d 63, 65 (2d Cir.1994)); U.S. v. Orena, 986 F.2d 628, 630 (2d Cir. 1993).

A. Length of detention

Mr. Hashmi has been detained since June 6, 2006. For close to a year Mr. Hashmi was detained at Belmarsh prison in England until extradited to New York in May of 2007. Since being extradited, Mr. Hashmi has been detained continuously at MCC in the SHU under conditions of extreme social isolation. A trial date has been set for May 4, 2009. If trial commences on that date with the detention conditions unchanged, Mr. Hashmi will have been subjected to almost two years of extreme social isolation.

B. The extent of the prosecution's responsibility for delay of the trial

It is undisputed that this is a complex case and that the defense has consented to pretrial delay in order to prepare for trial. The defense, however, has never consented to the conditions of Mr. Hashmi's pretrial detention, particularly in light of the time needed to prepare the case for trial.

C. The gravity of the charges

Although sensational, the essence of the charges against Mr. Hashmi are not as grave as many cases that routinely come through the federal courts. Mr. Hashmi is not charged with committing any acts of violence, transporting any weapons or illegal drugs, or even directly providing anything to al Qaeda. Although the indictment is sparse, the government has averred in the SAMs memoranda that Mr. Hashmi permitted a co-conspirator to store "gear" in Mr. Hashmi's apartment and that Mr. Hashmi permitted the co-conspirator to borrow Mr. Hashmi's cell phone to make phone calls. There is no allegation that the co-conspirator himself was a member of al Qaeda. Thus, while serious, the charges are not as grave as many criminal cases or even other so-called material support cases.

D. The strength of the evidence upon which detention was based

The evidence upon which the detention is based appears weak. The government has asserted in public that the testimony of one co-conspirator is the centerpiece of the government's case. Mr. Hashmi, who has no prior criminal history, has steadfastly asserted his innocence. There are no custodial statements of Mr. Hashmi admitting commission of the charged offenses. The government has alleged that Mr. Hashmi made threatening remarks when arrested, but such remarks purportedly made more than two

years after the alleged substantive crime do not amount, in conjunction with the other evidence so far made available to the defense, to an overwhelming prosecution case.

It is well settled that the conditions of pretrial confinement may not violate express constitutional guarantees. Bell v. Wolfish, 441 U.S. 520, 536-537 (1975).

[W]e have held that convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison. There is no iron curtain drawn between the Constitution and the prisons of this country. So, for example, our cases have held that sentenced prisoners enjoy freedom of speech and religion under the First and Fourteenth Amendments, that they are protected against invidious discrimination on the basis of race under the Equal Protection Clause of the Fourteenth Amendment; and that they may claim the protection of the Due Process Clause to prevent additional deprivation of life, liberty, or property without due process of law. A fortiori, pretrial detainees, who have not been convicted of any crimes, retain *at least* those constitutional rights that we have held are enjoyed by convicted prisoners.

Bell, at 545. [emphasis added, citations omitted].

Looking at the totality of the pertinent factors under El-Hage as applied to the facts of Mr. Hashmi's case, the continued imposition of extreme social isolation amounts to unconstitutional punishment and should be modified accordingly.

CONCLUSION

For all the foregoing reasons, the Court should remove the special administrative measures against Mr. Hashmi. In the alternative, the Court should make the following modifications to Mr. Hashmi's conditions of detention:

1. Permit Mr. Hashmi to have some type of interaction with fellow Muslims detained at MCC by either permitting him to have a Muslim roommate or to have a regular opportunity to congregate with fellow Muslims to study and discuss religious issues;
2. Permit Mr. Hashmi to participate in group prayer with fellow Muslims;

3. Permit Mr. Hashmi's father and mother to visit Mr. Hashmi at the same time; and
4. Permit Mr. Hashmi to have weekly family visitation hours.

The Court should order any other relief it deems just and proper.

Dated this the 19th day of December, 2008.

Respectfully submitted,

/S/

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